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THE MICHIGAN DIGEST ANNOTATED

EMBODYING ALL REPORTED DECISIONS FROM THE EARLIEST PERIOD DOWN TO VOLUME 202 MICHIGAN, INCLUSIVE.

Being a
NEW EDITION OF JACOBS & CHANEY
By
GEORGE F. LONGSDORF
Editor New York Cyclopedic Digest, Illinois Cyclopedic Digest, Ohio Notes, etc.

VOLUME VI
MAXIMS TO RECEIPTS

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CALLAGHAN & COMPANY
1921

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OF

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VOLUME VI

MAXIMS.

A list of the principal maxims of law cited in Michigan Reports with citations to the cases where found and applied. In some cases reference is made to the topic where the maxim is treated as a rule of law.

[Note. The translations accompanying the Latin maxims are taken from Cyclopedic Law Dictionary.]

Maxims in equity, see Equity, I; and see also post ¶ 14 et seq.

¶ 1. A litigant is entitled to his day in court.—Ledyard v. Auditor General, 121 Mich. 56. Due process cases, see Constitutional Law, V.

¶ 2. A surety is a favorite in the law.—Roberts v. McGur, 82 Mich. 221.

¶ 3. Actio personalis moritur cum persona. [A personal action dies with the person.]—Hyatt v. Adams, 16 Mich. 180; James v. Emmet Min. Co., 55 Mich. 335. For applications of the maxim under the statutes and the common law, see Abatement §§ 2-17.

¶ 4. Actus non facit reum nisi mens sit rea. [The act does not make a person guilty unless the intention be guilty also.]—Pond v. People, 8 Mich. 150; Maher v. People, 10 Mich. 212. See also Crimes § 2.

¶ 5. Between equal equities the prior in time will prevail, see Equity § 2; and see also post "when equities are equal."

¶ 6. Caveat emptor. [Let the buyer beware.]—Picard v. McCormick, 11 Mich. 68; Crane v. Reeder, 25 Mich. 303; Bristol v. Braidwood, 28 Mich. 191; Tenney v. Hand, 32 Mich. 63; McGoren v. Avery, 37 Mich. 120; Tuttle v. White, 46 Mich. 485; Stevens, Auditor-General v. Lake George & M. R. R. Co., 82 Mich. 426; Maxted v. Fowler, 94 Mich. 106. For applications of the maxim in sales of personalty, see Sales, VI; in sales of land, see Vendors and Purchasers, II; fraudulent representations about land, see Fraud §§ 12, 16.

¶ 7. Cessante ratione, cessat etiam lex.—Smith v. Martin, 124 Mich. 34; Durfee v. Risch, 142 Mich. 504.

¶ 8. Communis error facit jus. [A common error makes law. The converse is "Communis error non facit jus."]—Malonny v. Mahar, 1 Mich. 26; Pease v. Peck, 18 How. (59 U. S.) 595, 15 L. ed. 518, affirming 5 McLean 486, Fed. Cas. No. 10894.

¶ 9. Conventus privatorum non potest publico jure derogare.—Jaquith v. Hudson, 5 Mich. 123; Mandlebaum v. McDonell, 29 Mich. 78. [See "Privatorum conventio juri publico non derogat"—Private agreements cannot derogate from public law.]

¶ 10. Day in court, see ante "A litigant is entitled," etc.

¶ 11. Delegata potestas non potest delegari. [Delegated authority cannot be again delegated.]—People v. Collins, 3 Mich. 343,

351. Applications of the principle of this maxim, see Agency § 29; Constitutional Law, II, D.

¶ 12. De minimis non curat lex. [The law does not notice (or care for) trifling matters.]—Case v. Dean, 16 Mich. 12. For the doctrine that trivial errors will not be regarded, see Harmless Error; Indictment, XV. The maxim "de minimis non curat lex" held applicable to a claim that the amount stated in the notice of foreclosure sale under a building and loan association mortgage was excessive.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 13. Divinatio, non interpretatio est, quæ omnino recedit a litera. [It is a guess, not interpretation, which altogether departs from the letter.]—Jaquith v. Hudson, 5 Mich. 123.

¶ 14. Equality is equity, see Equity § 2.

¶ 15. "Equity aids the vigilant and not the slothful," see Equity, IV, and see post "Vigilantibus," etc.

¶ 16. Equity follows the law.—Grand Lodge A. O. U. W. v. Child, 70 Mich. 163, and see Equity § 3.

¶ 17. Equity regards that as done which ought to be done.—Grand Lodge A. O. U. W. v. Child, 70 Mich. 163, and see Equity § 8.

¶ 18. Equity regards substance rather than form, see Equity § 7.

¶ 19. Equity will not aid a forfeiture.—Wallace v. Kelly, 148 Mich. 336. See also Penalties and Forfeitures. Equity abhors forfeitures, applied in a case where a city sought to revoke the franchise of an electric light company upon a mere technicality.—Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43.

¶ 20. Equity will not aid a wrongdoer.—Peek v. Peek, 101 Mich. 304.

¶ 21. Every one is presumed to know the law.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; Ledyard v. Auditor General, 121 Mich. 56; Toney v. Knapp, 142 Mich. 652. See also Evidence §§ 47, 48; Indictment § 133. The rule that "every man is presumed to know the law" applied as against a complainant in a proceeding to set aside tax sales.—Cook v. Hall, 123 Mich. 378.

¶ 22. Every man's house is his castle.—Ware v. Branch Circuit Judge, 75 Mich. 488.

¶ 23. Ex nudo pacto non oritur actio, see post, "No action arises on a contract without a consideration."

¶ 24. Expressio unius est exclusio alterius. [The expression of one thing is the exclusion of another.]—Williams v. City of Detroit, 2 Mich. 560; Galpin v. Abbott, 6 Mich. 17; Niles v. Rhodes, 7 Mich. 374; Perry v. Cheboygan, 55 Mich. 250. Applied to the constitution, see Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. Applied in construing corporate charter powers, see Corporations § 70. Rules of implication in construction of writings, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.

¶ 25. Expressum facit cessare tacitum. [That which is expressed puts an end to that which is implied.]—Williams v. City of Detroit, 2 Mich. 560; Michigan Cent. R. Co. v. Hale, 6 Mich. 243. See also preceding maxim.

¶ 26. Ex turpi causa non oritur actio. [No action arises out of an immoral consideration.]—Quirk v. Thomas, 6 Mich. 76.

¶ 27. Ex turpi contractu not oritur actio.—Bank of Michigan v. Niles, 1 D. 401; Brooks v. Hill, 1 Mich. 118; Comstock v. Draper, 1 Mich. 481; State of Michigan v. How, 1 Mich. 512.

¶ 28. Falsa demonstratio non nocet. [A false description does not vitiate.]—Anderson v. Baughman, 7 Mich. 69; Johnstone v. Scott, 11 Mich. 232; Cooper v. Bigly, 13 Mich. 463. See also Contracts, VI; Deeds, III.

¶ 29. Falsus in uno, falsus in omnibus. [False in one thing, false in everything.]—Van Voorhis v. Van Voorhis, 94 Mich. 60. Application of maxim to credibility of witnesses, see Witnesses, VI.

¶ 30. De non apparentibus et non existentibus eadem est ratio et judicium. [See De non apparentibus et non existentibus eadem est lex—The law is the same respecting things which do not appear and those which do not exist.]—People v. Wells, 8 Mich. 104; Van Auken v. Monroe, 38 Mich. 725.

¶ 31. Fortior et potentior est dispositio legis quam hominis. [The disposition of the law is stronger and more powerful than that of man.]—Mandlebaum v. McDonell, 29 Mich. 78.

¶ 32. Generalia specialibus non derogant. [Things general do not derogate from things special.]—Regents of University v. Auditor-General, 109 Mich. 134.

¶ 33. He who acts by or through another acts himself, see post, "Qui facit per alium, facit per se."

¶ 34. He who comes into equity must come with clean hands.—Applied in Lowes v. Lowes, 127 Mich. 307. See also Equity

§ 6. He who comes into equity must come with clean hands, and keep them clean.—Van Voorhis v. Van Voorhis, 94 Mich. 60. One who asks for a discretionary writ must come with clean hands.—Board of Supervisors of Cheboygan County v. Supervisor of Township of Mentor, 94 Mich. 386. Application of clean hands maxim in mandamus cases, see Mandamus § 10.

¶ 35. He that committeth iniquity shall not have equity.—Morley Bros. v. Stringer, 133 Mich. 690. See also Equity § 5.

¶ 36. He who seeks equity must do equity.—Wallace v. McBride, 70 Mich. 596; Malone v. Danforth, 137 Mich. 227; Grand Rapids & I. Ry. Co. v. City of Grand Rapids, 137 Mich. 587. See also Equity § 4. "He who seeks equity must do equity" applied to a suit to set aside a deed to a son upon condition of support for the father for life after the death of the son leaving a widow.—Coe v. Dickerson, 129 Mich. 61. He who seeks equity must do equity does not apply on the law side so as to dispense with legal grounds for denying an asserted right.—Wheeler v. Dime Savings Bank, 116 Mich. 271.

¶ 37. He who keeps silent when he should speak will not be permitted to speak when he should be silent.—Michigan Shingle Co. v. State Investment & Ins. Co., 94 Mich. 389. Application of rule to raise estoppel, see Estoppel § 32.

¶ 38. He who sows shall reap.—McDaniels v. Walker, 44 Mich. 83, and see Lucas v. Parks, 84 Mich. 202.

¶ 39. Id certum est quod certum reddi potest. [That is certain which may be rendered certain.]—Paddack v. Pardee, 1 Mich. 421; Clement v. Comstock, 2 Mich. 359; Martin v. McReynolds, 6 Mich. 70; Cooper v. Bigly, 13 Mich. 463; Lungerhausen v. Crittenden, 103 Mich. 173, 174; Auditor-General v. Ayer, 109 Mich. 694, 697.

¶ 40. Id certum est quod potest certum fieri. [See translation of preceding maxim.]—Lockwood v. Drake, 1 Mich. 14.

¶ 41. Ignorantia legis neminem excusat. The general rule that ignorance of the law excuses no one and that a mistake in a matter of law is no protection is without exception as applied to the general laws of the country and one's rights or duties as defined by them.—Parks v. Brooks, 188 Mich. 645. For applications of this maxim, see Crimes § 15; Evidence §§ 47, 48; Mistake.

¶ 42. In fictione juris semper æquitas existit. [A legal fiction is always consistent with equity.] In the following cases the doctrine of relation back to attach rights was held not applicable where it would be inequitable.—Blackwood v. Brown, 29 Mich. 483; Heffron v. Flanigan, 37 Mich. 274; Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 43. In pari delicto melior est conditio possidentis. [When the parties are equally in the wrong, the condition of the possessor is better.]—Bank of Michigan v. Niles, 1 D. 401.

¶ 44. In pari delicto potior est conditio defendentis et possidentis. [Where both parties are equally in fault, the condition of the defendant is preferable.] Thurston v. Prentiss, 1 Mich. 193; Edwards v. Michigan Tontine Inv. Co., 132 Mich. 1. In pari delicto potior est conditio defendentis, applied see Contracts § 89 et seq.; Fraud § 85. In pari delicto, rule of equity as to persons in equal wrong, see Equity § 5.

¶ 45. In traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur. [See "In traditionibus scriptorum chartarum, non quod dictum est, sed quod gestum factum est, inspicitur"—In the delivery of writings (deeds), not what is said, but what is done, is to be considered.]—Dawson v. Hall, 2 Mich. 390.

¶ 46. It is equitable that one should reap what he has sown, see Equity ¶ 39, and see ante "He who sows shall reap."

¶ 47. "Laches should be used as a shield and not as a sword," see Equity ¶ 206.

¶ 48. The law never requires impossibilities. [See "Lex non cogit ad impossibilia"—The law requires nothing impossible.]—Grand Lodge A. O. U. W. v. Child, 70 Mich. 163; Giddings v. Secretary of State, 93 Mich. 1, and see also Gristock v. Royal Ins. Co., 87 Mich. 428.

¶ 49. Modus et conventio vincunt legem. [The form of agreement and the convention of the parties overrule the law.]—Mandelbaum v. McDonell, 29 Mich. 78.

¶ 50. Nemo allegans suam turpitudinem. est audiendus. [No one alleging his own turpitude is to be heard as a witness.]—Orr v. Lacey, 2 D. 230.

¶ 51. Nemo debet bis vexari pro eadem causa, see post, "No one shall be twice vexed for the same cause."

¶ 52. Nemo debet esse judex in propria causa, see "No one should be judge in his own cause."

¶ 53. No action arises on a contract without a consideration. [Ex nudo pacto non oritur actio.]—Colman v. Post, 10 Mich. 422. Doctrine of necessity of consideration, see Contracts, V, A.

¶ 54. Nemo est hæres viventis. [No one is an heir to the living.]—Lewis v. Nelson, 4 Mich. 630; Ready v. Kearsley, 14 Mich. 215; Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 55. No man can profit by his own wrong. —Kiplinger v. Green, 61 Mich. 340; Perrin v. Lepper, 72 Mich. 454; Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466; People v. Bussey, 82 Mich. 49; Moore's Appeal, 84 Mich. 474; Michigan Shingle Co. v. State Invest., etc., Co., 94 Mich. 398.

¶ 56. No one shall be twice vexed with the same cause. [Nemo debet bis vexari pro eadem causa.]—Sheahan v. Barry, 27 Mich. 217; Elliott v. Van Buren, 33 Mich. 49; Dutton v. Shaw, 35 Mich. 431.

¶ 57. No one should be judge in his own cause. [Nemo debet esse judex in propria causa.]—Parsons v. Russell, 11 Mich. 113; People ex rel. Plugger v. Overyssel Township Board, 11 Mich. 222; Peninsular Ry. Co. v. Howard, 20 Mich. 18; Stockwell v. White Lake Township Board, 22 Mich. 341; Sheldon v. Village of Kalamazoo, 24 Mich. 383; People ex rel. Kennedy v. Gies, 25 Mich. 83; Whipple v. Saginaw Circuit Judge, 26 Mich. 342; Clement v. Everest, 29 Mich. 19; King v. Merritt, 67 Mich. 194; Horton v. Howard, 79 Mich. 644. [Note. The principle of the foregoing maxim is expressed in varying phrasings, which may be found in any book of maxims. That which is given above is perhaps the most usual form and phrasing, and is adopted, although not all of the cases above cite it literally.]

¶ 58. Noscitur a sociis. [It is known from its associates.]—Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 59. Omnia præsumuntur contra spoliatorem. [All things are presumed against a wrongdoer.]—Bethel v. Linn, 63 Mich. 464; Hance v. Tittabawassee Boom Co., 70 Mich. 227. See also maxim following this.

¶ 60. Omnia præsumuntur in odium spoliatoris.—In re Estate of Lambie, 97 Mich. 54; Walterhouse v. Walterhouse, 130 Mich. 89. Omnia præsumuntur contra spoliatorum, applied, see Evidence § 64. See also maxim preceding.

¶ 61. Omnia præsumuntur rite et solemniter esse acta; omnia rite esse acta præsumuntur. [All things are presumed to have been rightly and regularly done.] See Evidence § 34 et seq.; Indictment § 136.

¶ 62. Omnis definitio in jure periculosa est; parum est enim ut non subverti posset. [Every definition in law is perilous, for it is within an ace of being subverted.]—Hall v. City of Ionia, 38 Mich. 493.

¶ 63. Once a mortgage always a mortgage, see Mortgages § 1.

¶ 64. Privatorum conventio juri publico non derogat, see ante "Conventus privatorum," etc.

¶ 65. Quando res non valet ut ago, valeat quantum valere potest. [When a thing is of no force as I do it, it shall have as much as it can have.]—Thayer v. McGee, 20 Mich. 195.

¶ 66. **Qui facit per alium, facit per se. [He who acts by or through another acts** himself; i. e., the acts of an agent are the acts of the principal.]—Green v. Graves, 1 D. 351; Ætna Live Stock Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246. Qui facit alium facit per se, applied. See Agency, II.

¶ 67. Qui hæret in litera, hæret in cortice. [He who adheres to the letter adheres to the bark.]—Smith v. Barstow, 2 D. 155.

¶ 68. Qui per alium facit, seipsum facere videtur. [He who does anything through another is considered as doing it himself.]—Shaw v. Bradley, 59 Mich. 199. See ante "Qui facit," etc.

¶ 69. Quilibet potest renunciare juri pro se introducto. [Anyone may renounce a law introduced for his own benefit.]—People v. Johr, 22 Mich. 461.

¶ 70. Quod initio non valet tractu temporis non convalescit.—Gorham v. Wing, 10 Mich. 486. [See "Quod initio vitiosum est, non potest tractu temporis convalescere"—Time cannot render valid an act void in its origin.]

¶ 71. Respondeat superior. [Let the principal answer.]—De Forrest v. Wright, 2 Mich. 368; Moore v. Sanborne, 2 Mich. 519; City of Detroit v. Corey, 9 Mich. 165; Bath v. Caton, 37 Mich. 199; Boyd v. Rice, 38 Mich. 599. For applications, see generally Master and Servant, IV; Agency, II; Corporations, XVII.

¶ 72. Salus populi suprema lex. [The safety of the people is the supreme law.]—People v. Phippin, 70 Mich. 6; Davock v. Moore, 105 Mich. 120.

¶ 73. Sic utere tuo ut alienum non lædas. [So use your own as not to injure another's property.]—James v. Brown, 11 Mich. 25; Caldwell v. Gale, 11 Mich. 77; Gilbert v. Showerman, 23 Mich. 448; Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182; Robinson v. Baugh, 31 Mich. 290; Underwood v. Waldron, 33 Mich. 232; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; People's Ice Co. v. The Excelsior, 44 Mich. 229; Patterson v. Wabash, St. L. & P. R. Co., 54 Mich. 91; Boyd v. Conklin, 54 Mich. 583; Detroit Base Ball Club v. Deppert, 61 Mich. 63; Burke v. Smith, 69 Mich. 380; Knowles v. Mulder, 74 Mich. 202; Kern v. Myll, 80 Mich. 525; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

¶ 74. Stare decisis et non quieta movere. [To adhere to precedents and not to unsettle things which are established.]—Morgan v. Butterfield, 3 Mich. 615; Newberry v. Trowbridge, 4 Mich. 391. Stare decisis applied, see Courts §§ 33-36.

¶ 75. Taxation and representation go together.—People v. Mahaney, 13 Mich. 481.

¶ 76. The law does not require unnecessary things to be done.—Gristock v. Royal

Ins. Co., 87 Mich. 428. See also ante, "The law never requires impossibilities."

¶ 77. The law will leave equal wrongdoers where it finds them.—Edwards v. Michigan Tontine Inv. Co., 132 Mich. 1. See ante, "In pari delicto."

¶ 78. Ubi jus ibi remedium. [Where there is a right, there is a remedy.]—Stout v. Keyes, 2 D. 184; City of Pontiac v. Carter, 32 Mich. 164; De May v. Roberts, 46 Mich. 160; Warren v. Warren, 89 Mich. 123.

¶ 79. Ut res magis valeat quam pereat. [That the thing may rather have effect than be destroyed.]—People v. Lambert, 5 Mich. 349; Anderson v. Baughman, 7 Mich. 69; Thayer v. McGee, 20 Mich. 195.

¶ 80. Vigilantibus et non dormientibus leges subveniunt.—Hollister v. Loud, 2 Mich. 309; Campau v. Van Dyke, 15 Mich. 371, and see ante, "Equity aids the vigilant and not the slothful."

¶ 81. Volenti non fit injuria. [He who consents cannot receive injury.]—Shinglemeyer v. Wright, 124 Mich. 230. Volenti non fit injuria, applied in case of civil assault, see Assault § 14. Volenti non fit injuria, applied in trover, see Conversion § 16.

¶ 82. When equities are equal, the prior equity will prevail.—Johnson v. Bratton, 112 Mich. 319; Wing v. McDowell, Walk. Ch. 175; Norris v. Showerman, Walk. Ch. 206.

¶ 83. Where one of two innocent parties must suffer by the fraud of another, he shall bear the loss who by his conduct has enabled such third party to perpetrate the fraud.—Bates v. Smith, 83 Mich. 347. See Zucker v. Karpeles, 88 Mich. 413, and see Gibbs v. Linabury, 22 Mich. 479.

¶ 84. Where one of two innocent parties must suffer by the wrong of a third person, it should be that one who has put it in the power of the third to work the injury.—Miller v. Scottish Union & Nat. Ins. Co., 101 Mich. 49, 52; Warren v. Halley, 107 Mich. 120, 124; Fifth Nat. Bank v. Dunham, 109 Mich. 23, 33.

¶ 85. Where one of two parties neither of whom has acted dishonestly must suffer, he shall suffer who by his own act has occasioned the confidence and subsequent injury of the other.—State v. Flint & P. M. R. Co., 89 Mich. 481. Writ of error dismissed 152 U. S. 363, 38 L. ed. 478, 14 Sup. Ct. Rep. 586.

¶ 86. Where the reason for a rule fails the rule also fails.—Durfee v. Risch, 142 Mich. 504; Smith v. Martin, 124 Mich. 34.

MAXIMUM SENTENCES to MECHANICS.

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Expert and opinion evidence on mechanical questions, see Evidence §§ 226, 265.

MECHANICS' LIENS.

TREATS of statutory liens for the protection of persons doing work or furnishing materials for the erection of buildings or the construction of other improvements on land. It excludes statutory and common law liens of laborers and materialmen on forest products (see Forestry, III) on railroad works (see Railroads, VI) on chattels (see Bailments § 3; Liens) and the preference and priority given to claims for labor over other debts and claims (see Liens §§ 5, 11; Corporations §§ 227, 331 et seq.). Bonds for protection of labor and material claims on public contracts for buildings or construction work are treated in Public Contracts, VII.

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IX. Bonds or indemnity against liens.

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§ 68. In general.

I. NATURE OF AND RIGHT TO LIEN IN GENERAL.

§ 1. In general.

Other remedy or security as affecting right to lien, see post § 4.
Common law or possessory lien, see post § 5.
Services, materials and claims for which lien may be had, see post II.
Property and estates subject to lien, see post III.
Necessity of contract to create lien, see post IV.
Manner of perfecting lien, see post V.
Proceedings to enforce lien, see post VIII.
Liens for public work, see post X, and Public Contracts.
Proceedings to foreclose liens, see post § 40.
General law of liens, see Liens.
Liens for labor in mines, see Liens § 5.
Labor liens on logs and forest products, see Forestry, III.
Liens of laborers on railroads, see Railroads, VI.
General provisions as to mechanics' liens, see Comp. L. 1915, §§ 14796-14826.

¶ 1. The doctrine upon which mechanics' liens are founded is the consideration of nat-

ural justice, that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim on such property for the value of the labor or materials.—Smalley v. Gearing, 121 Mich. 190.

¶ 2. The Mechanics' Lien Law protects those who are entitled to protection, but it is not intended to protect materialmen and contractors in perpetrating wrongs against the owner of the property.—Frohlich v. Klein, 160 Mich. 142.

¶ 3. From the mere facts that a debtor owes a bill, and should pay it, it does not follow that his property is subject to a lien; and a lien will not be established unless the creditor has complied with the statute.—Battle Creek Lumber Co. v. Poland, 150 Mich. 690.

§ 2. Construction and interpretation of lien laws.

See also post ¶ 215.
Construction of word "due" in statute requiring filing of statement of demand due, see post ¶ 95.
Proceedings to perfect lien, see post § 18.
Construction of provisions as to service of copy of claim or statement, see post § 28.
Burden of proof as to compliance with statute, see post § 54.
Constitutionality of lien statute as affecting decree declaring lien, see post § 60.
Due process of law in the Mechanics' Lien Law, see Constitutional Law § 149.
Validity of law as impairing homestead rights, see Constitutional Law § 290.
Provisions as to the manner in which the statute to be construed, see Comp. L. 1915, § 14822.
Provisions as to construction of terms "owner," "part-owner," "lessee," "materialman" and "laborer," see Comp. L. 1915, § 14824.

¶ 4. As the statute looks to somewhat summary proceedings in relation to real property, all matters of substance, and proceedings essential to the security of rights and titles, should be strictly adhered to.—Willard v. Magoon, 30 Mich. 273.

¶ 5. The statute providing for these liens is in derogation of the common law, must be strictly pursued, and cannot be extended beyond its terms.—Waggar v. Briscoe, 38 Mich. 587.

¶ 6. As the statute providing for the establishment and enforcement of liens of mechanics, etc., is in derogation of the common law, it is to be construed strictly; the rights given by it cannot be extended; and those who claim benefits under it must bring themselves within its provisions.—Peninsular General Electric Co. v. Norris, 100 Mich. 496; Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18; Sterner v. Haas, 108 Mich. 488.

¶ 7. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon the statute, and therefore, upon the question whether a lien attaches at all, a strict construction of the statute is proper; but, after the lien has once attached, a liberal construction should be put upon the statute, for the purpose of fulfilling its objects.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141; Lacy v. Platt Power & Heat Co., 157 Mich. 544.

¶ 8. The statute providing for a mechanic's lien, Comp. L. 1897, § 10710 et seq., How. 2nd Ed., § 13766 et seq., being in derogation of the common law, must be strictly construed to the point where the lien attaches, but thereafter, because of its remedial nature, a liberal construction must be indulged in.—Burman v. Ewald, 192 Mich. 293.

¶ 9. The Mechanics' Lien Law was enacted for the benefit and protection of laborers and material men and should be construed liberally.—Smalley v. Gearing, 121 Mich. 190

¶ 10. A material man's lien is in derogation of the common law and the essential requirements of the statute must be strictly observed.—Hall v. Erkfitz, 125 Mich. 332.

¶ 11. In asserting a mechanic's lien the statute must be followed in all essentials.—Kleinert v. Knoop, 147 Mich. 387.

¶ 12. Mechanics' liens are pure creatures of the statute, and courts will not extend them to cover cases not included in the statute.—Bauer v. Long, 147 Mich. 351.

¶ 13. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon statutes, and therefore upon the question whether a lien attaches at all, a strict construction is proper.—Goodfrey Lumber Co. v. Kline, 167 Mich. 629.

¶ 14. Mechanic's lien statutes in derogation of the common law are strictly construed.—Wildey v. Gillett, 171 Mich. 153.

¶ 15. Lien statutes are innovations upon the common law over the rights of property not to be extended in operation and effect beyond their plain provisions, and provisions by which the lien attaches must be strictly construed.—J. W. McCausey & Co. v. Gittleman, 201 Mich. 8.

¶ 16. The exception to the repealing clause of Laws 1887, Act No. 270, relative to mechanics' liens, saved only existing liens, for which notice had been filed, or proceedings for their enforcement taken before the act took effect.—John Hanes & Co. v. Wadey, 7 Mich. 178.

§ 3. Persons entitled to lien.

Partial or defective performances as affecting rights to lien, see post § 8.
Parties to foreclosure of lien, see post § 4

¶ 17. One who furnishes materials for the completion of a partly finished building to one who has no legal title is not a contractor for the erection of a "new building" within Mechanics' Lien Law, § 3 (Pub. Acts 1893, No. 179).—Fuller v. Detroit Loan & Building Ass'n, 119 Mich. 71.

¶ 18. A party who deeded his mortgaged property to the mortgagee association, and obtained back a land contract representing the amount of the mortgage and a certain sum in addition, which latter was to be used in the completion of a building on the premises, was not the agent of the association, but contracted on his own behalf, and therefor one who furnished labor and material to the contract holder, was not a sub-contractor within section 1 of the Mechanics' Lien Law (Pub. Acts 1893, Act No. 199).—Fuller v. Detroit Loan & Building Ass'n, 119 Mich. 71.

§ 4. Effect of other remedy or security.

See also post ¶ 185.

Waiver of lien, see post § 35.

Acceptance of note for amount due as waiver of lien, see post ¶¶ 180, 181.

¶ 19. A builder's lien would not attach—under the statute prior to the amendment of 1869—if the contract provided for securing the debt otherwise, as by mortgage upon the premises.—Barrows v. Baughman, 9 Mich. 213.

¶ 20. The seller's retention of title in an elevator installed in a building until it shall be paid for will not prevent him from enforcing a mechanic's lien for the price.—Warner Elevator Mfg. Co. v. Capitol Inv. Bldg. & Loan Ass'n, 127 Mich. 323.

¶ 21. That an electric company retains, until payment, title to an electric lighting plant which it places in a building, does not deprive it of its statutory lien or prevent its enforcing such lien.—Peninsular General Electric Co. v. Norris, 100 Mich. 496.

§ 5. Common law or possessory liens.

General law of liens, see Liens.

¶ 22. A builder under a contract cannot, as against the owner of the building, retain possession of it after the time has expired for the performance of the contract, and, after he has ceased work, to enforce payment of the contract price.—Beller v. Stange, 27 Mich. 312.

II. SERVICES, MATERIALS AND CLAIMS FOR WHICH LIEN MAY BE HAD.

§ 6. In general.

Nature of and right to lien in general, see ante § 1.

Persons entitled to lien, see also ante § 3.

Necessity of contract or consent of owner, see post § 11.

Property to which lien attaches, see post § 9.

Improvements to wife's separate property, see post § 13.

Improvements to joint property of husband and wife, see post § 14.

Extras, additional work and alterations, see also post § 16.

Setting out amount of lien in filed affidavit or statement of claim, see post § 24.

Liens for work done upon public buildings, see Public Contracts.

Estoppel to assert contract for reasonable value after receiving payments on strength of representation that it was for fixed price, see also Estoppel ¶ 202.

Estoppel by agreement to assert that less or more is due, see also Estoppel ¶ 204.

¶ 23. Whether dredging out a slip and distributing the dirt for the construction of a wharf is work upon which a mechanic's lien could be based, quære.—Clark v. Raymond, 27 Mich. 456.

¶ 24. Where a subcontractor agreeing to construct caissons for an office building is compelled to pump water on account of the acts of independent contractors, he is entitled to recover for such work in a bill to enforce a mechanic's lien.—Vaughan v. Ford, 162 Mich. 37.

§ 7. Delivery and application of material or services to building or land.

See also post ¶ 39.

¶ 25. It is not the delivery to the contractor which gives the seller of materials to be used in the construction of a building the right to file a lien, but the delivery to the owner.—North v. Globe Fence Co., 144 Mich. 557.

¶ 26. In order to establish a mechanic's lien, the material furnished must be shown to have been ordered and used in the building alleged to be subject to the lien.—Battle Creek Lumber Co. v. Poland, 150 Mich. 690.

¶ 27. There can be no enforcement of a mechanic's lien against a building for bricks not delivered to the owner and not used in the construction of the building.—North v. Globe Fence Co., 144 Mich. 557.

¶ 28. In computing the cost of a building in order to determine the proportion of the contract price due a lienholder, payments made by the owner for labor and material actually used in construction, though made without requiring the statement mentioned in Comp. L. 1897, § 10713, are proper items.—Godfrey Lumber Co. v. Cole, 151 Mich. 280.

§ 8. Claims for defective or partial performance.

Abandonment or nonperformance by contractor as affecting amount due subcontractors and materialmen, see also post § 33.

Cross-bill for damages for failure to perform the contract, see post § 48.
Delay in performance as waiving right to lien, see post ¶ 187.
Right to offsets for defective performance, see also post §§ 49, 61.
Allowance of offsets in the decree, see post § 61.
Sufficiency of evidence as to performance, see post ¶ 269.

¶ 29. A subcontractor cannot recover on a mechanic's lien for materials furnished which are not in accord with the plans and specifications of the contract.—Frohlich v. Klein, 160 Mich. 142.

¶ 30. Where a subcontractor acts in good faith and is unable to finish his subcontract because of the abandonment of the contract by the contractor, he is nevertheless entitled to a lien for the work done and materials furnished.—Zilz v. Wilcox, 190 Mich. 486.

III. ESTATES AND PROPERTY SUBJECT TO LIEN.

§ 9. In general.

See also post ¶ 49, § 11.
Lien on wife's property, see also post § 13.
Lien on joint property of husband and wife, see also post § 14.
Describing the premises in affidavit or statement of claim for lien, see post § 23.
Averments as to quantity of land upon which lien claimed, see post § 46.
Sufficiency of evidence as to the property upon which lien claimed, see post § 55.
Lien as attaching only to property owned at time materials furnished, see also post ¶ 154.
Right to enforce lien on exempt property, see Exemptions § 46.
Provisions as to property to which lien attaches, see Comp. L. 1915, § 14796.
Provisions as to lien upon buildings where the contracting party has no title to the land, see Comp. L. 1915, § 14798.
Liens for labor done or materials furnished to attach to building or other improvement for which they are furnished, see Comp. L. 1915, § 14804.
All the interest of owner, part owner or lessee, either legal or equitable, subject to lien, see Comp. L. 1915, § 14824.

¶ 31. A mechanic's lien attaches to an entire interest of the debtor in premises considered only as real estate, and not to chattels separated from it.—Wagar v. Briscoe, 38 Mich. 587.

¶ 32. Where a building is erected upon two lots treated as one parcel, a lien for lumber furnished therefor and used on both lots attaches to both.—Lamont v. LeFevre, 96 Mich. 175.

¶ 33. Where, under the Mechanic's Lien Statute, Act No. 17, Pub. Acts 1903, amending Comp. L. 1897, § 10710, a building is erected on a platted city block, the lien may attach not only to the lots on which the building stands, but also on other contiguous territory in the block necessary to the convenient enjoyment and use of the buildings.—Adams v. Central City Granite Brick & Block Co., 154 Mich. 448.

¶ 34. A factory was built upon certain lots in a block in a platted strip of ground. The purpose of the owners was to manufacture bricks from the sand lying on other contiguous lots owned by them, and then to sell the lots. A bill was brought under the Mechanic's Lien Statute, Act No. 17, Pub. Acts 1903, amending Comp. L. 1897, § 10710, to enforce a mechanic's and material man's lien. Held, the lien attached only to the lots upon which the building rested or covered in part, and not to the other contiguous lots.—Adams v. Central City Granite Brick & Block Co., 154 Mich. 448.

§ 10. Homesteads.

Priorities as between mechanics' liens and homesteads, see post § 15.
Contract or consent of spouse to lien on homestead, see post § 15.
Priorities as between mechanics' liens and homesteads, see post § 32.
Sufficiency of evidence to show property exempt as homestead, see post ¶ 268.
General law as to homesteads, see Homesteads.
Provisions as to lien on homestead, see Comp. L. 1915, § 14797.

¶ 35. The susceptibility to mechanics' lien claims of a lot on which improvements are to be made depends upon the fact of whether the lot is or is not a homestead, under the statute (Laws 1887, § 1) whereby the owner is not required to notify the contractor or material man of his claim of homestead.—Mills v. Hobbs, 76 Mich. 122.

IV. THE CONTRACT AND CONSENT OR PRIVITY OF OWNER.

§ 11. In general.

Necessity that materials be delivered to owner, see ante § 7.
Provisions in contract as to liens, see post § 17.
Notice of claim to owner, see post § 18.
Showing as to contract or consent in affidavit or statement of lien, see post § 23.
Averments as to ownership of the property, see post § 46.
Weight and sufficiency of evidence as to the contract and consent, see post § 56.
Necessity that decree adjudge the existence of contract relations between the parties, see post § 60.
Adjudicating contract relation before establishing lien, see post ¶ 227.
General law of contracts, see Contracts.

¶ 36. A mechanic's lien for building materials can arise only on a contract made

by the owner, part owner or lessee of the land to be affected; and cannot attach to anything besides his actual interest.—Wagar v. Briscoe, 38 Mich. 587.

¶ 37. One cannot at the time of contracting for building material, and by that act alone, impose a mechanic's lien against land upon which the building is to be put up, if he had then no legal or equitable title to it. —Wagar v. Briscoe, 38 Mich. 587.

¶ 38. The lien (under code of 1833, p. 406) of a mechanic or materialman, for labor or materials furnished in the construction of a building, attached only upon the interest of the person for whom it was erected; and did not encumber any pre-existing right or title of any other person. —Scales v. Griffin, 2 D. 54.

¶ 39. The contract must relate to and be performed upon the lands against which the lien is sought to be enforced. No lien arises under the statute in favor of parties who merely sell machinery or materials which may or may not go into a building, as the purchaser may determine.—Stout v. Sawyer, 37 Mich. 313; Coleman v. Stearns Mfg. Co., 38 Mich. 30.

¶ 40. The contract relation prescribed by the statute is a necessary prerequisite to the lien, and it must distinctly exist before, or at all events at the time when, the lien is sought to be instituted.—Willard v. Magoon, 30 Mich. 273.

¶ 41. A mechanic's lien cannot attach to a cistern built by A. for B. in C.'s ground under permission granted to B. by C.—Eaton v. City of Monroe, 63 Mich. 525.

¶ 42. A wholesaler who sells building material to a retail dealer in the usual course of trade, for future delivery without any knowledge or understanding that it is to enter into any particular building, is not entitled to a lien therefor on the building in which it is afterwards used, and for which it was in fact ordered by the dealer under contract with the owner.—Van Cleve Glass Co. v. Erratt, 110 Mich. 689.

¶ 43. In a mechanic's lien action defendant's property should not be taken to satisfy claims, unless a contract express or implied is established to which he is a party.—Merrill v. Brant, 175 Mich. 182.

¶ 44. Where defendant, the owner of a hotel, leases it for a term of five years and the lessee and sub-lessee make certain changes and repairs in the interior and defendant has nothing to do with the work except that he allows the sub-lessee $200 credit on the rent, the defendant not being a party to the contract is not liable in a mechanic's lien action.—Merrill v. Brant, 175 Mich. 182.

¶ 45. A mechanic's lien cannot be acquired on property under a contract entered into by one not authorized to act for the owner, and to which the latter was not a party. —John Wallace Sons Co. v. Wilkinson, 181 Mich. 693.

§ 12. Form and sufficiency of contract.

¶ 46. A mechanic's lien in favor of the vendor of materials cannot be predicated merely on the purchaser's statement that he has a house and is building an addition to it and wants the materials for that purpose.—People v. McAllister, 49 Mich. 12.

¶ 47. A promise by the owner to pay a subcontractor a balance due him does not establish a lien on the property in his favor which otherwise did not exist.—Delray Lumber Co. v. Keohane, 182 Mich. 17.

¶ 48. A mechanic's lien is not prevented because of the fact that the contract to erect a building refers merely to "ground situated," in a certain village, it appearing that the building was erected upon the only land owned by the persons contracting, and it was not necessary for a plaintiff seeking to enforce the lien to ask a reformation of the contract by inserting the proper description of the land therein.—Jossman v. Rice, 121 Mich. 270.

¶ 49. A material man in delivering material to the owner of a factory to be built on four lots, asked what was the security for his pay. The owner told him that the ninety or ninety-two surrounding lots owned by them ought to be enough to protect him. Held, this conversation did not amount to an extension, by contract, of the statutory lien to the contiguous lots.—Adams v. Central City Granite Brick & Block Co., 154 Mich. 448.

§ 13. To establish lien on wife's property.

See also post ¶ 143.

To establish lien on homestead, see post § 15.

Evidence to show contract or consent of wife, see post § 56.

Dismissal for failure to show contract with or consent of wife, see post § 63.

What constitutes separate property of wife, see Husband and Wife § 37.

Contract rights and liabilities of wife toward third persons, see Husband and Wife § 73.

Agency of husband for wife in general, see Husband and Wife § 96.

Conveyances of and charges on separate property, see Husband and Wife § 130.

¶ 50. Where husband and wife had been living in a building owned by her which was destroyed by fire, and he bought articles for repairing the building in his own name and on his own credit, it was held that no privity of contract existed between the wife and the vendors so as to authorize

a lien against her property.—Willard v. Magoon, 30 Mich. 273.

¶ 51. Prior to the amendment of Comp. L. 1871, § 6789, by Laws 1879, Act No. 258 (How. St., § 8377), a wife's land was not bound for improvements made upon it on the credit of her husband, even though with her knowledge and consent.—Willard v. Magoon, 30 Mich. 273; Newcomb v. Andrews, 41 Mich. 518; Morrison v. Berry, 42 Mich. 389.

¶ 52. In a suit to enforce a mechanic's lien, the fact that one claimant relied on the husband's representations and filed his claim against the husband and gave the husband the required notice will not defeat the lien against the property which is owned by the wife where both husband and wife attempted to defraud contractors by misrepresenting the true facts and where the husband is really the agent of the wife as undisclosed principal.—Frohlich v. Carroll, 127 Mich. 561.

§ 14. To establish lien on joint property of husband and wife.

Joint property rights of husband and wife, see Husband and Wife, II.

Provisions as to lien on property of husband and wife, see Comp. L. 1915, § 14797.

¶ 53. Comp. L. 1897, §§ 10710, 10711, providing for mechanic's liens do not provide for a lien upon land owned by the husband and wife as tenants by the entirety where the contract was signed only by the husband.—Bauer v. Long, 147 Mich. 351.

¶ 54. Where at the time of the execution of a building contract between complainant and defendant, the latter and his wife held the land under an executory contract, and subsequently the vendor executed a warranty deed to them, no lien could be filed against either the land or the building.—Frolich v. Blackstock, 155 Mich. 604.

¶ 55. It is only when land is owned by husband and wife by entireties, or when the land is held and occupied as a homestead, that a contract for a building thereon is required to be in writing and signed by both husband and wife, in order that a lien may attach to either land or building; and in every other case the contract for the improvement may be written or unwritten, expressed or implied.—Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578.

¶ 56. The requirement of Comp. L. 1897, § 10711, How. 2nd Ed., § 13767, that the signature of both husband and wife be affixed to a contract for the improvements to land held by husband and wife jointly must be strictly complied with before a mechanic's lien can attach.—Burman v. Ewald, 192 Mich. 293.

¶ 57. Defendant contracted orally with complainant for material for a house to be built on lots not at the time owned by defendant. His wife did not join in the contract. Shortly thereafter the lots were conveyed by defendant and his wife so as to make them owners by entireties. Held, that under Comp L. 1897, § 10712, no lien attached to the land for the materials furnished.—Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71.

¶ 58. Defendant contracted orally with complainant for material for a house to be built on lots not at the time owned by defendant. His wife did not join in the contract. Shortly thereafter the lots were conveyed to defendant and his wife so as to make them owners by entireties. After this, to secure a loan, defendant and his wife deeded the land away absolutely and took back a contract of purchase. Held, under Comp. L. 1897, § 10712, no lien attached to the land for the materials furnished.—Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71.

¶ 59. A wife was the owner of land at the time her husband, who owned no interest in the land, made a contract for the erection of a building thereon. The wife did not join in the contract. Shortly thereafter said husband and wife became the owners of the land by entireties. Complainant subcontractor began to furnish materials after the title to the land was held by the husband and wife by entireties. Held, he was entitled to no lien for the materials furnished. (Hooker, J., dissenting.)—Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578.

§ 15. ——Homesteads.

See also ante § 10.

Priorities between mechanics' liens and homesteads, see post § 32.

Proceedings to foreclose lien on homestead, see post ¶ 216.

General law as to homesteads, see Homesteads.

¶ 60. A mechanic's lien will not bind the homestead unless it identifies the premises by written description.—Hammond v. Wells, 45 Mich. 11.

¶ 61. A lien will not attach to a debtor's homestead for building a house thereon under a written contract for furnishing material and building a dwelling-house, which does not in any way describe or specify what land the building is to be erected upon.—Hammond v. Wells, 45 Mich. 11.

¶ 62. A lien by contract to a builder for erecting a dwelling cannot be established on a homestead worth no more than $1,500 and held by a man and his wife, if the wife does not sign the instrument declaring the lien.—Girzi v. Carey, 53 Mich. 447.

¶ 63. A married woman who buys an unimproved and vacant lot, intending, since

she has no land besides, that she and her husband shall occupy it as a homestead; and who during the following year orally contracts for the erection of a house thereon, holds the property free from liability for mechanics' liens, since present intention to occupy land as a homestead, with present action to carry such intention into effect, constitutes a legal homestead, the lien-law of 1887 requiring a written contract to affect a homestead with a lien for improvements. —Mills v. Hobbs, 76 Mich. 122.

¶ 64. The Mechanics' Lien Law, Laws 1891, Act No. 179, does not apply to a written contract describing premises occupied as a homestead, but containing nothing to indicate an intention to create thereby a lien upon the homestead.—Burtch v. McGibbon, 98 Mich. 139.

¶ 65. An oral agreement by the owner of premises occupied as a homestead to pay for materials furnished a contractor, to be used in repairing and making additions to the dwelling house thereon, will not charge the homestead with a lien under the Mechanics' Lien Law of 1891.—Burtch v. McGibbon, 98 Mich. 139.

¶ 66. Under Comp. L. 1897, § 10711, exempting homesteads from mechanics' liens unless for improvements made under written contract signed by both husband and wife, premises claimed as homestead are exempt only to the extent of $1,500, any excess over such amount being liable though the wife did not sign the contract.—McAllister v. Des Rochers, 132 Mich. 381.

¶ 67. Where a father promised to give his married son a lot if he would build a house thereon, and the son thereupon contracted for the erection of a house for the purpose of making a permanent home for himself and family, and after completion he occupied the house with his family as a home, owning no other house, lot, or premises, the house is devoted to homestead purposes, and the lot is not subject to a mechanic's lien incurred in the building where son's wife had not signed the contract, although she was fully cognizant of its execution and that it was being performed by the complainant but she had contributed no money to pay for it.—Holliday v. Matthewson, 146 Mich. 336.

¶ 68. Even though the land on which a house had been erected be a homestead and as such exempt from a mechanic's lien because the wife had failed to sign the contract under which a house had been erected thereon, the lien may attach to the house separately, and it may be sold and removed from the land, by virtue of Comp. L. 1897, §§ 10710, 10712, 10718, providing for a lien on new buildings.—Holliday v. Matthewson, 146 Mich. 336.

¶ 69. Under Comp. L. 1897, § 10711, where a wife does not join in a contract to install a heating plant, a mechanic's lien attaches to the property occupied as a homestead as to the excess over the $1,500 exemption.—Scott v. Keeth, 152 Mich. 547.

¶ 70. A mechanics' lien for the improvement of a building occupied by man and wife as a homestead is prohibited by Comp. L. 1897, § 10711, How. Ann. St., 2nd Ed., § 13767, unless the contract therefor is signed by both of them.—John Wallace Sons Co. v. Wilkinson, 181 Mich. 693.

¶ 71. Comp. L. 1897, § 10711, How. Ann. St., 2nd Ed., § 13767, prevents a mechanics' lien attaching to property owned by a man and occupied by himself and wife as a homestead under a contract for an improvement signed by the wife only.—Holland Furnace Co. v. Hartig, 181 Mich. 342.

§ 16. Extras, additional work and alterations.

Services, materials and claims for which lien allowed, see also ante § 6.
Evidence as to extras and deductions, see post § 58.
Extent and amount of lien, see also post § 33.
Including claims for extras in affidavit or statement of lien, see post § 24.
Evidence as to extras and additional work, see post § 58.

¶ 72. A mechanic's lien suit declaring on performance of a contract in writing according to its terms will not permit a recovery for "extras" which are beyond those terms, and where the contract required all charges for extra work to be "agreed to in writing" which was not done; although the proof is such that the owner's demand for the extras coupled with a threat to abandon the contract if they were not furnished would have supported recovery had the plaintiff declared on a breach of the contract consisting in the contractor's not being allowed to perform according to its terms.—Gier v. Daiber, 148 Mich. 190.

¶ 73. Minor changes made by an owner in good faith, in completing a house after abandonment of the contract by the contractor will not operate as a waiver of the contract so as to require that it be disregarded in determining the amounts due subcontractors under the provisions of the lien law.—Delray Lumber Co. v. Keohane, 132 Mich. 17.

§ 17. Stipulation or provision as to liens.

¶ 74. A provision of an owner's contract with a contractor to the effect that the building must be delivered free of all mechanic's liens or any other claims chargeable to the contractor, does not prevent lien claimants from obtaining a lien as the contract was made in reference to the lien statute, expressly conferring the right to assert liens, and such right cannot be taken away from subcontractors, material men, or laborers, by a stipulation in the contract.—Smalley v. Gearing, 121 Mich. 190.

¶ 75. Under Comp. L. 1897, §§ 10710-10745, a direct lien in behalf of the persons entitled thereto, and not one by subrogation to the rights of the contractors, is provided, and they are therefore not bound by the stipulations of the original contract as to liens or the amounts to be paid thereon, except as to the amount of the contract price.—Vaughan v. Ford, 162 Mich. 37.

V. NOTICES, STATEMENTS OR OTHER ACTS TO INSTITUTE AND PERFECT.

§ 18. In general; notice to owner.

Necessity that claimant comply with statute, see also ante § 1.
Construction and interpretation of lien laws, see ante § 2.
Burden of proof as to compliance with statute, see post § 54.
Evidence as to notice, see post § 57.
Retrospective operation of notice, see post ¶ 154.
Filing lien claim with recorder of deeds, see post § 21 et seq.
Necessity of consent or privity of owner, see ante IV.
Object and effect of notice of lis pendens, see Lis Pendens § 3.
Necessity of statement of amount due, or of satisfaction of outstanding liens in order to sue on building contract, see Building Contracts, IX.
Provisions as to notice to owner, lessee, etc., see Comp. L. 1915, § 14796.

¶ 76. No notice of a lien for materials furnished is required where the contract to furnish them was made with the owner of the premises (Pub. Acts 1885, No. 216, § 3).—Lamont v. LeFevre, 96 Mich. 175.

¶ 77. Under the mechanics' lien law as it was in 1891 before the law of 1891 took effect and when Laws 1885, Act No. 216, was in force, no notice by a principal contractor was necessary; and therefore objections to a notice given are of no force.—McMonegal v. Wilson, 103 Mich. 264.

¶ 78. Where a lien for materials furnished in 1887 had, under the Mechanics' Lien Law of 1885, attached without notice or enforcement proceedings, it was not avoided by the act of 1889 (How. St., § 8398c) requiring filing of notice within sixty days; but the filing in 1890 of a statement according to the law of 1885 was sufficient.—Kirkwood v. Hoxie, 95 Mich. 62.

¶ 79. The proviso attached to Pub. Acts 1893, No. 199, § 1, that notice shall be served upon the owner by persons furnishing material or labor, does not introduce a necessary condition precedent to the attaching of a lien, but is designed for the protection of the sub-contractor or laborer, enabling him, in case the contractor's sworn statement does not embody his claim, to place on the owner the risk of payments made to the original contractor.—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

¶ 80. A plumber and gas-fitter, who furnishes the necessary materials and labor for plumbing, roofing, steam heating, and electric wiring a building, is a contractor, within the meaning of the statute (Pub. Acts 1891, No. 179, § 4) requiring notice to the owner and not a material man, although an aggregate price for the work and material furnished was not agreed upon.—Sterner v. Haas, 108 Mich. 488.

¶ 81. The preliminary notice of a claim of lien under Comp. L. 1897, § 10710, is for the protection of the subcontractor or laborer, and is not a condition to the lien attaching, and a complainant may recover where the owner pays out money with full knowledge of his claim, where the principal contractor admits its correctness, and where the complainant is the sole lien claimant, and where complainant files in due time and form the statement of lien required by Comp. L. 1897, § 10714.—Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544.

§ 19. Statement to owner of names of and amounts due subcontractors, laborers and materialmen.

Effect of making payments to contractor in absence of required statement, see post § 37.
Evidence as to statement of claims, see post § 57.
Provisions as to statement of names of and amounts due subcontractors, laborers and materialmen, see Comp. L. 1915, § 14799.

¶ 82. Mechanics' Lien Law, § 4 (Pub. Acts 1891, No. 179) expressly requires a contractor to furnish to the owner, before suing to enforce a lien, a sworn statement giving the names of all laborers and materialmen under his contract.—Sterner v. Haas, 108 Mich. 488; Martin v. Warren, 109 Mich. 584; Wiltsie v. Harvey, 114 Mich. 131; Dittmer v. Bath, 117 Mich. 571.

¶ 83. A failure to comply with the requirement of Pub. Acts 1891, No. 179, § 4, that a contractor shall give the owner a statement of names of laborers and materialmen with the amounts due them is not excused by the fact that all material and labor has been paid for, and that such statement has never been requested by the owner. If a waiver can ever aid the contractor, as against this express provision,—a point not determined,—it can only be under circumstances amounting to an estoppel.—Sterner v. Haas, 108 Mich. 488.

¶ 84. A contractor is not relieved from furnishing to the owner a sworn statement of labor and material claims required by provisions of Pub. Acts 1891, No. 179, § 4, by the fact that the sixty days after full

completion of the work limited for the filing of liens by subcontractors, laborers, or materialmen, have expired at the time he files his bill.—Martin v. Warren, 109 Mich. 584.

¶ 85. An adverse lienor is entitled to assert the invalidity of a mechanics' lien because of a failure to serve upon the owner the statutory statements, although a bill to enforce such lien has been taken as confessed by the owner.—Wiltsie v. Harvey, 114 Mich. 131.

¶ 86. The provision of Pub. Acts 1891, No. 179, § 4, that the contractor shall have no right of action or lien against the owner on account of his contract until he shall have furnished the statutory statement as to the amounts due to subcontractors, laborers, and materialmen, extends to actions upon the contract, where no lien has been effected, as well as to those brought to enforce a lien.—Barnard v. McLeod, 114 Mich. 73.

¶ 87. The failure of a subcontractor to serve upon the owner of the premises a detailed statement of his claim for material within ten days after the same was furnished, as provided by Pub. Acts 1891, No. 179, § 1, would not relieve the owner from liability therefor, where he paid to the contractor the full contract price without requiring of him the sworn statement as to the claims of subcontractors, laborers, and material men, provided for by section 4.—Blitz v. Fields, 115 Mich. 675.

¶ 88. Materialmen (as distinguishd from contractors) selling material manufactured in their own shops, are not required, as a prerequisite to obtaining a mechanic's lien, to serve notice on the owner stating the names of subcontractors, etc., under section 4 of the Mechanics' Lien Law (Comp. L. 1897, § 10713).—Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111.

¶ 89. A contractor (as distinguished from a materialman) who has failed to comply with section 4 of the Mechanics' Lien Law (Comp. L. 1897, § 10713) requiring service of notice on the owner stating the names of subcontractors, laborers or material men, is not entitled to a mechanic's lien, although no parties other than the contractor complainant and the defendant are interested, labor having however been expended on the premises.—Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111.

¶ 90. A delay in serving upon the owner a sworn statement of the number and names of every subcontractor or laborer and of every person furnishing materials, with the amount due or to become due for work done or material furnished as required by Comp. L. 1897, § 10713, until after the time within which he might file his lien in the office of the register of deeds, under section 10714, is not fatal to the lien, where both were done within the statutory period, it being unimportant that the statement was filed after the claim was filed, inasmuch as no lien attached by the filing of the claim and it did not become effective until the statement was served.—Holliday v. Matthewson, 146 Mich. 336.

¶ 91. In an action by a contractor to enforce a mechanic's lien for balance due, on a building constructed by him, failure to serve the owner with an affidavit under Comp. L. 1897, § 10713, which requires the contractor to make affidavit of the number and names of subcontractors and laborers in his employ, and the amount due them, and provides that until such affidavit is made there shall be no cause of action, is fatal even though at the trial defendant admitted plaintiff had paid all laborers and subcontractors.—Wildey v. Gillett, 171 Mich. 153.

§ 20. ——Statement furnished by claimant upon demand.

Provisions as to furnishing upon demand statement of work and materials, see Comp. L. 1915, § 14803.

¶ 92. Failure to comply with Lien Law § 8 (Comp. L. 1897, § 10717), which requires a lienor to furnish the owner within five days, after demand therefor, a written statement of his claim under penalty of forfeiture of his lien, results in forfeiture of the lien though the owner is not prejudiced by such failure.—Frohlich v. Beecher, 139 Mich. 278.

¶ 93. Comp. L. 1897, § 10717, relating to the furnishing of an itemized statement of a claim of lien has no application to proceedings after a bill of complaint to enforce the lien has been filed, and subpoena has issued, as provided in section 10719, and failure to furnish such a statement on demand made after the institution of suit and issuance of subpoena does not forfeit the lien.—Rohde v. Weinberg, 156 Mich. 318.

§ 21. Filing affidavit or statement of lien or demand.

Assignability of lien claims prior to filing of statement, see post § 34.
Waiver and loss of lien, see also post § 35.
Evidence as to filing of statement of claim, see post § 57.
Priorities as affected by filing of statutory claim to lien, see post VI.
Provisions as to filing statement with register of deeds, see Comp. L. 1915, § 14800.

¶ 94. Comp. L. 1871, § 6790 (How. St., § 8378) requires one who seeks to enforce a mechanic's lien for material furnished to file an affidavit of the amount due within thirty

days after furnishing the material, and also proof of service of notice of the lien. If he does not, it is provided that the lien shall cease as to all persons except the owner of the premises. It is further provided by Pub. L. 1879, Act No. 258, that the lien shall not continue more than sixty days after the filing of the affidavit of amount due, unless proceedings to enforce the lien have been begun. Held, that if no affidavit is filed at all, the lien will be lost after ninety days have passed since the material was supplied.—Comstock v. McEvoy, 52 Mich. 324.

¶ 95. The word "due," as used in Pub. Acts 1891, No. 179, § 5, requiring a subcontractor who wishes to avail himself of the statute to file with the register of deeds a true statement of the demand due him, may be construed, in view of other provisions of the act for the enforcement of claims not presently due and payable, as synonymous with "owing," and, so construed, justifies the statement of a claim, evidenced by notes not due when the statement is filed, as an amount "justly and truly due."—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

¶ 96. The sworn statement required by § 5 of the Mechanics' Lien Act (§ 10714, Comp. L. 1897, § 13770, How. St., 2nd Ed.), need not be given by a contractor who executes a bond under the provisions of a building contract waiving such requirement if security be given.—Maurer v. School Dist. No. 1, 186 Mich. 223.

§ 22. ——Time to file.

Time to file statement of amounts due subcontractors and material men, see ante § 19.

Time to serve copy of claim or statement, see post § 28.

Evidence as to time of filing claim, see post § 57.

¶ 97. A mill built by complainant, upon trial, proved unsatisfactory to the owners, and a memorandum was furnished of the alterations required to perfect the work. A settlement was then had wherein a deduction was made from the contract price for the payment of a millwright, who was to be engaged by the owners to place additional machinery and make specified alterations. At the same time complainant gave a paper reciting the receipt of certain notes in full settlement for all claims accruing through the furnishing of machinery and labor for the mill, and agreeing, in consideration of such settlement, to furnish a stand of 9x24 rolls in exchange for the stand of 9x18 rolls originally furnished. Thereafter the order was changed to 9x30 rolls, the owners to pay the difference in price, and the rolls were supplied accordingly. Held, that the furnishing of the last rolls, and the work done by the millwright in setting them up, were pursuant to a new contract, an the time for filing a claim of lien under th original contract was not thereby extende —Noye Mfg. Co. v. Thread Flouring Mil Co., 110 Mich. 161.

¶ 98. The lapse of a day between th date and the filing of an affidavit and clai of lien, under Mechanics' Lien Law, § will not invalidate the lien or the notice.- Fairbairn v. Moody, 116 Mich. 61.

¶ 99. The Mechanics' Lien Law, § 5 (Pu Acts 1891, No. 179, as amended by Pu Acts 1893, No. 199), providing that a ver fied statement of lien shall be filed withi sixty days from the date on which the la of the materials shall have been furnishe refers to the date when the last of the m terials shall have been furnished to t owner, or delivered at the building, and n when the material was delivered to a co tractor at his yard, as where stone was d livered to a contractor's yard to be dresse and afterwards delivered at the owner building.—Smalley v. Gearing, 121 Mich. 19

¶ 100. A lien claimant who furnishe brick for a building under a contract, t brick being delivered from time to time, required in the progress of the work, entitled to a lien where his statement claim was filed within sixty days after t time of the furnishing of the last materia the contract being continuous.—Smalley Gearing, 121 Mich. 190.

¶ 101. Under Comp. L. 1897, § 10714, upo a contract for delivery of a specified amou of material, delivery of additional items t the same party under separate contrac may be included in the whole claim and lien need not be filed within sixty days aft furnishing each item.—Union Trust Co. Casserly, 127 Mich. 183.

¶ 102. Where materials for the constru tion of a building were furnished on a ce tain date to the contractor, but were nev delivered at the building and therefore n used in the construction thereof, and th were sold to a third person in the empl of the owners of the building, the date furnishing this particular material cann be considered the last date of furnishi from which the time for filing a mechanic lien begins to run.—North v. Globe Fen Co., 144 Mich. 557.

§ 23. Form and sufficiency of affidavit or stat ment.

Service of copy of claim or statement, s post § 28.

Sufficiency of statement to identify proper upon which lien claimed, see also po § 57.

General law as to affidavits, see Affidavit

¶ 103. The affidavit of a claimant und the Mechanic's Lien Law (Laws of 1885, A

No. 216) purports to be by a principal contractor and not a material man, where it averred that the claimant furnished certain labor and material in and for building a house situated on a designated lot, in pursuance of a contract made with the owner of the lot, naming him; that there was due to the claimant therefor, from said owner, over and above all legal set-offs, the sum of $200, balance due on such contract, and the sum of $395, making the total sum of $595, for the value of extras done on said house under such contract, and damages suffered by deponent by reason of the failure of the owner to comply with said contract. —McMonegal v. Wilson, 103 Mich. 264.

¶ 104. Where the land against which a lien is sought to be enforced is imperfectly described in the statement or claim of lien, but the building erected thereon is accurately described, the lien will be held good as against the building alone, under Laws 1893, Act No. 199, § 9, subd. 4, which provides for a lien against the building alone.—Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18.

¶ 105. An erroneous statement in an affidavit for a mechanic's lien as to the time when the first item and the last item were furnished is not prejudicial where there is no claim that the last item was furnished more than 60 days prior to filing notice of lien.—Union Trust Co. v. Casserly, 127 Mich. 183.

¶ 106. Setting out in a claim for mechanic's lien the name of the owner of the premises at the time goods were furnished and notice to him, rather than the owner at the time the claim is filed, is fatal to a bill to enforce the lien unless the mistake is justified by the conduct of the new owners.—Waters v. Johnson, 134 Mich. 436.

¶ 107. Where the affidavit for a mechanic's lien conforms to the statute, and substantially to the form given therein it will be considered sufficient; hence an affidavit that does not state that the material was furnished in pursuance of a contract with the principal contractor or any other person but does set out that the material was furnished for altering and improving the premises, and that the person named as owner was informed and advised that the materials furnished to the contractor were to be supplied by the affiants, is sufficient. —Kleinert v. Knoop, 147 Mich. 387.

¶ 108. A notice of a claim of lien for materials furnished for the building of a house stated that the furnishing of such materials was begun "on or about" the twenty-sixth day of October, 1905, and that the last of such materials were furnished "on or about" the third day of March, 1906. The complaint alleged that claimant served such notice upon the thirtieth day of April, 1906. Held, under section 10714, Comp. L. 1897, that the date of furnishing materials stated in such notice was not sufficiently definite to entitle claimant to a lien.—Godfrey Lumber Co. v. Kline, 167 Mich. 629.

¶ 109. A statement of a mechanic's lien which gives the initial of the Christian name of the owner of the property instead of the full Christian name is sufficient where there is no dispute as to the identity of such person.—Hicks v. Finbarg, 189 Mich. 332.

¶ 110. A contractor's statement of the amount due him is sufficient under Comp. L. 1897, § 10714, How. 2nd Ed., § 13770, although it does not contain the names of former employees or the names of persons who have furnished materials unless some amount is due them.—Halpin v. Garman, 192 Mich. 71.

¶ 111. A claim for a mechanic's lien is fatally defective where it fails to state the name of the owner, part owner and lessee, if known, and resort may not be had to extrinsic evidence.—John F. Noud & Co. v. Stedman, 193 Mich. 459.

¶ 112. A claim for a mechanic's lien which states "that he entered upon the performance of his contract on or about the 19th day of December, 1911, and the last thereon on the 17th day of December, 1912," sufficiently sets forth when labor and materials were furnished, as the last date is more important, and, where it is stated definitely, a claim should not be declared fatally defective because the first date is stated too generally.—John F. Noud & Co. v. Stedman, 193 Mich. 459.

§ 24. ——Amount of lien and effect of erroneous or excessive claim.

Services, materials and claims for which lien allowed, see ante § 6.
Extent and amount of lien in general, see post § 33.
Amount of recovery in proceedings to enforce lien, see post § 61.

¶ 113. By filing a claim of lien for over $900 when it should have been for about $700, knowing that deductions in amounts shown by the contract should be made,—the only excuse being that claimant's attorney who had the contract is away, and no effort being made to get the duplicate thereof,—one loses his lien.—Gibbs v. Hanchette, 90 Mich. 657.

¶ 114. Where, through an honest mistake, the statement of lien mentions but one contract instead of two and by that error claims too much, or where there is a failure of proof as to a part of the amount claimed, the lien is not lost.—Lamont v. LeFevre, 96 Mich. 175.

¶ 115. Inasmuch as the statute requires parties to file "just and true statements of

the demand, over and above all legal set-offs," a statement which is largely excessive must be treated as insufficient; and the inclusion of speculative items is not allowed.—Brennan v. Miller, 97 Mich. 182.

¶ 116. Including in a claim for lien of damages, also one for extras larger than can be justified, but without fraudulent intent will not invalidate the lien.—McMonegal v. Wilson, 103 Mich. 264.

¶ 117. A material-man, who had sold to a contractor $60 worth of material to be used for purposes other than those of the contract, credited generally on the contractor's account a $75 payment made by him the same day that he received a large sum from the owner. The material-man afterwards sold to the contractor other material to be used outside of the contract. After the contractor had absconded, the material man, in making up his lien account, at first credited the full $75 thereon, but afterwards changed the credit so as to discharge all of the items for material used outside of the contract, leaving but said $15 credited to the contractor in the statement or claim of lien, and in this form swore to the account as correct in all particulars. Held, an attempted fraud upon the owner which destroyed the lien.—Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18.

¶ 118. A claimant under the Mechanics' Lien Law is not deprived of the benefit of the statute because he included in his statement of lien items for which he had no right to charge, where such action was the result of an honest mistake on his part.—Scheibner v. Cohnen, 108 Mich. 165.

¶ 119. The lien of a mechanic will not be invalidated by reason of his claiming too great a sum in his statement of claim, unless the misstatement is intentional.—McMonegal v. Wilson, 103 Mich. 264; Fairbairn v. Moody, 116 Mich. 61.

¶ 120. A claim of lien, for material such as stone supplied to an owner may be reduced by the court, by deducting the value of stone not used in the building, as the Mechanic's Lien Law (Pub. Acts 1891, No. 179 as amended by Pub. Acts 1893, No. 199), provides for a lien for materials or labor because of the fact that the value of the property to which they had been applied has been increased.—Smalley v. Gearing, 121 Mich. 190.

¶ 121. A claim for mechanic's lien amounting to $1,938, and allowed in the sum of $760, does not show bad faith where it includes $716 worth of material on hand at the time the building was stopped, through oversight a credit of $75 was not made, and the circuit judge disallowed certain items of extras and differed from the complainant's estimate of the cost of completion of the building.—Hulburt v. Just, 126 Mich 337.

¶ 122. An over-statement by a few dolla in the affidavit of the amount due to a m terial man is held honest error rather tha fraud defeating a right of lien.—Union Tru Co. v. Casserly, 127 Mich. 183.

¶ 123. A clerical error in the amount, the inclusion, through error, of an ite which did not properly belong, in a stat ment of a claim for a mechanic's lien, not such evidence of bad faith or such car lessness as to avoid the lien.—McAllister DesRochers, 132 Mich. 381.

¶ 124. Under Comp. L. 1897, § 10714, r quiring a verified statement to be filed co taining a true and just account of the d mands over and above legal set-offs, the a davit must be made by one who knows t facts, and the law excuses only an hone mistake in stating the amount due.—J. Greilick Co. v. Taylor, 143 Mich. 704.

¶ 125. Where a material man furnish materials to a contractor for a certain buil ing, and at the same time the contract was erecting other buildings for which furnished materials, and the material m did not keep a separate account of the m terials furnished for each job, but his boo showed a general account, and no applic tion of the moneys paid until the contract became unable to pay, whereupon he ma an arbitrary estimate upon the particul building, which in fact proved too large 25 per cent and filed a sworn statement the lien, he in fact acquired no lien und Comp. L. 1897, § 10714, which requires a v ified statement to be filed which contains just and true account of the demands ov and above all legal set-offs.—J. E. Greili Co. v. Taylor, 143 Mich. 704.

¶ 126. A material man in filing his li made a bona fide mistake, and claimed $ too much. Held, he did not lose his li thereby.—Frohlich v. Ashton, 159 Mich. 2

¶ 127. Though a claim be excessive, does not, if filed in good faith, prevent mechanic's lien from attaching.—Vaughan Ford, 162 Mich. 37.

¶ 128. A variance between the amount a mechanic's lien filed and the amount fou to be due will not operate to defeat t lien where the variance in such amounts small and there is no indication of bad fai —Grace Harbor Lumber Co. v. Ortman, 1 Mich. 429.

¶ 129. A contractor may include in t statement of account for a mechanic's li required under Comp. L. 1897, § 10714, Hc 2nd Ed., § 13770, the amounts due from h to subcontractors, where he is unaware the fact that they have been paid by t

owner of the building.—Halpin v. Garman, 192 Mich. 71.

¶ 130. Where a contractor includes in his statement of claim for a mechanic's lien an amount of money loaned to the owner by indorsing notes of the owner so that the latter can obtain funds for the continuance of the building, and the owner is duly credited with every dollar paid to the claimant, the contention that the statement of claim is not a just and true statement of account of amount due the contractor, as required by Comp. L. 1897, § 10714, How. 2nd Ed., § 13770, is without merit.—Fox v. Benham Mfg. Co., 197 Mich. 637.

§ 25. ——Verification of statement or claim.

Tardy objection for verification and signature by agent, see Equity ¶ 476.

¶ 131. Failure to verify a notice of lien filed under the Mechanics' Lien Law of 1887 avoids subsequent proceedings to enforce the lien.—Lindsay v. Huth, 74 Mich. 712.

¶ 132. The statement of claim required to be filed with the register of deeds was verified by two affidavits, one preceding and the other following an account of the items of said claim. The first affidavit was sufficient in form, and was properly verified. The second affidavit was sworn to before an attorney-at-law, who was a member of the firm acting as claimant's solicitors in the attempted enforcement of the lien. Held, that this fact did not invalidate the first affidavit, even if the second affidavit should be treated as void because sworn to before said attorney.—McMonegal v. Wilson, 103 Mich. 264.

¶ 133. A claim of lien signed and verified by one member of a firm, in which he states that he is such member, giving the names of the remaining members; that he makes the affidavit for and on their behalf; that the firm furnished the material for which the lien is claimed in pursuance of a contract with the contractors; and that there is justly due said firm therefor a specified sum, for which said firm claims a lien,—properly shows the affiant's interest in and authority to make and verify said claim of lien.—Yeomans v. Parker, 105 Mich. 323. (The above is from the syllabus and states facts not appearing in the opinion.)

¶ 134. A statement of a mechanic's lien in favor of a copartnership is void where it was sworn to by one partner before another who was a notary, since a notary has no authority to administer an oath where the affiant is his copartner and the oath is in a matter in which the firm is interested.—Smalley v. Bodinus, 120 Mich. 363.

§ 26. ——Amendment of statement or claim.

¶ 135. Comp. L. 1897, § 10736, authorizing amendments to process, pleadings, and proceedings in actions to enforce mechanics' liens, does not authorize the amendment of a statement of lien by substituting the correct name of the contractor to whom plaintiff furnished materials, but relates only to the process, pleadings, or proceedings in actions to enforce the lien.—Lacy v. Piatt Power & Heat Co., 157 Mich. 544.

§ 27. ——Election between statements.

¶ 136. Where a second statement of lien relating to the same debt is filed by a building contractor within the statutory time because it is supposed the first statement has omitted an essential matter, and the claim is the same claim mentioned in the first statement, it is not error not to compel the contractor to elect under which of the statements he will claim.—Fox v. Benham Mfg. Co., 197 Mich. 637.

§ 28. Service of copy of claim or statement.

Service of statement of names of and amounts due subcontractors, laborers and material men, see ante § 19.

Waiver of service of statement, see also post ¶ 162.

Service of process generally, see Process.

Averments as to service of notice of lien, see post § 46.

Admission of personal service of lien statement by failure to answer, see Equity ¶ 608.

Provisions as to service of copy of statement on owner, see Comp. L. 1915, § 14801.

¶ 137. An affidavit attached to a claim of lien filed in the office of the register of deeds, in which the affiant states that he served a true copy of the foregoing statement or claim of lien by "delivering the same to him personally," is prima facie proof that such service was made upon the owner of the land upon which the lien is sought to be enforced, who is named as such in such claim or statement, when offered in evidence in connection with the claim to which it is attached.—Bourget v. Donaldson, 83 Mich. 478.

¶ 138. Where a land-owner, prior to the expiration of the time limited by Pub. Acts 1891, No. 179, § 6, for the service upon him by posting of a copy of a claim of lien, and prior to the expiration of the time within which the claimant could file a new lien, signs an acceptance of service of a copy of such claim in lieu of such posting or other notice, he is estopped from objecting that the statutory service was not made.—Mouat v. Fisher, 104 Mich. 262.

¶ 139. A failure to serve personally, within the county in which the premises are, which are sought to be charged with a lien under the Mechanics' Lien Law of 1891, as amended in 1893 (Laws 1891, Act No. 179, as amended by Laws 1893, Act No. 199, § 6), upon the owner, part owner, or lessee of said premises, or, in case of his absence from

said county, then upon his agent having charge of said premises within said county, a copy of the statement or claim of lien, or, in case neither of said persons can be found within said county, the nonservice of said copy by posting it in some conspicuous place on said premises, is fatal to said lien. Service by mail, or personal service outside of the county, is insufficient under the statute. —Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18.

¶ 140. Pub. Acts 1891, No. 179, § 6, providing for the service of a copy of the statement of lien upon the "owner" of the premises, does not apply to a mortgagee whose security is in the form of an absolute conveyance.—Kay v. Towsley, 113 Mich. 281.

¶ 141. Under Pub. Acts 1891, No. 179, § 6, requiring lien claimants, except those dealing directly with the owner, to serve upon the owner a copy of their claim, but authorizing substituted service, where the owner cannot be found, on the agent "having charge of such premises within the county wherein the property is situated," mere proof of service upon an agent and bookkeeper in charge of the owner's office is insufficient.—Wiltsie v. Harvey, 114 Mich. 131.

¶ 142. Service of a copy of a claim of lien upon the owner on the day of its date, being the day before it is filed, is a substantial compliance with the provision of the statute requiring such service to be made within ten days "after" filing.—Fairbairn v. Moody, 116 Mich. 61.

¶ 143. A material man's lien cannot be enforced against a building erected by the husband on his wife's land without her consent where the husband is not served with notice of intention to assert the lien against his building and he is not a party in the proceedings to enforce.—Hall v. Erkfitz, 125 Mich. 332.

¶ 144. Comp. L. 1897, § 10714, requiring a claim for mechanic's lien to contain the name of the owner, etc., if known, and § 10715 requiring a copy to be served on the owner, etc., and proofs of such service to be filed before proceeding to enforce the lien, refers to the owner at the time the claim for lien is made.—Waters v. Johnson, 134 Mich. 436.

¶ 145. The service of a mechanics' lien statement on the wife of the owner at her residence on the premises, he being temporarily absent is proper service on "his agent having in charge such premises" within the meaning of Comp. L. 1897, § 10715.—J. E. Greilick Co. v. Rogers, 144 Mich. 313.

¶ 146. For the purpose of determining whether a mechanic's lien attaches, Comp. L. 1897, § 10715, How. 2nd Ed., § 13771, relating to service of statement a claim on owner must be given strict construction, and personal service is imperative where possible. —Zilz v. Wilcox, 190 Mich. 486.

¶ 147. The provisions of Comp. L. 1897, § 10715, How. 2nd Ed., § 13771, as to service of copy of statement or claim on the owner are not complied with so as to entitle a subcontractor to a lien, where the service was had by posting, when personal service could have been had on an agent of the owner.—Zilz v. Wilcox, 190 Mich. 486.

¶ 148. Service of a statement of claim for a mechanic's lien may be made upon the bankrupt owner in whose name the title stands of record, although a trustee in bankruptcy has been appointed.—Fox v. Benham Mfg. Co., 197 Mich. 637.

§ 29. ——Return and proof of service.

Provisions as to proof of service of statement, see Comp. L. 1915, § 14801.

¶ 149. Failure of a claimant to file with the register of deeds, before commencing suit to enforce his lien, proof of service upon the owner of a copy of the statement of lien, will not invalidate the proceedings as to such owner, where all of the statutory steps to establish the lien have been regularly taken, and the owner's rights have been fully protected. The provision for such filing before suing is not mandatory.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141.

¶ 150. Proof of personal service of a copy of a subcontractor's statement or claim upon the owner on December 29th in a certain city is not impeached where the owner testified that he was in such city for a few days after Christmas and that he went away on December 29th.—Zilz v. Wilcox, 190 Mich. 486.

VI. PRIORITIES AND EXTENT; ASSIGNMENTS AND TRANSFERS.

§ 30. Priorities.

Doctrine upon which mechanics' liens are founded, see ante § 1.

Right to lien where the debt otherwise secured, see ante § 4.

Necessity of filing statement of lien claim, see ante § 21.

Estates and property subject to lien, see ante III.

Acts estopping subcontractor from asserting lien till other lienors are paid, see post ¶ 186.

Priority of garnishment over lien claim to which wife gave subsequent assent, see Garnishment ¶ 344.

Provisions as to priorities of mechanics' liens, see Comp. L. 1915, § 1484.

¶ 151. A mechanic's lien does not preclude the general owner from replevying the goods as against a stranger.—Bodine v. Simmons, 38 Mich. 682.

¶ 152. A mechanic's lien is terminable on redemption, and therefore gives no fixed right of possession for any particular period and does not concern third persons if not asserted by the parties.—Bodine v. Simmons, 38 Mich. 682.

¶ 153. A bona fide purchaser of the fee without notice, under a deed recorded before notice of a builder's prior lien is filed, is protected against such lien as he would be against a mortgage not recorded until after his record (How. St. §§ 8378-8380).—Sisson v. Holcomb, 58 Mich. 634.

¶ 154. A builder's lien will not attach to any interest in real estate which defendant did not have when materials began to be furnished (How. St. § 8377); nor will filing notice of the lien operate retrospectively; the lien will not, as against bona fide purchasers, attach to property that has been transferred to them before the filing of notice.—Sisson v. Holcomb, 58 Mich. 634.

¶ 155. Work on a bridge was sublet, it being agreed between the contractor and the subcontractor that fifteen per cent of the estimates should be withheld until completion of the work. The subcontractor borrowed money, giving as security a first charge on the drawback, and of this the contractor was notified. Held, that the contractor could pay for the labor and material necessary to protect and complete the work, even though the reserve should thereby be consumed; the contractor's lien on the reserve being prior to the lender's.—Fisken v. Milwaukee Bridge & Iron Works, 86 Mich. 199, rehearing denied 87 Mich. 591.

¶ 155a. The recording laws do not in terms apply to mechanics' liens and such liens have priority to the extent of the owner's interest only.—Peninsular General Elec. Co. v. Norris, 100 Mich. 496.

¶ 156. While the actual interest of a lessee in leased buildings is subject to a lien for an electric lighting plant placed in such buildings under contract with the vendor, yet such lien has not priority over the lien which the lessor, by virtue of his lease, has on the lessee's interest for money due the lessor, even though such lease was not recorded until after the accruing of such mechanic's lien.—Peninsular General Electric Co. v. Norris, 100 Mich. 496.

¶ 157. The vendor's lien upon machinery furnished to the lessees of a mill, existing under Pub. Acts 1891, No. 179, as amended, is not defeated by the forfeiture of the lease, although the lease provided that "all machinery added to the mill shall, at the termination of the lease, whether by forfeiture or otherwise, remain in the mill as the property of the lessor."—Marinette Iron Works Co. v. Cody, 108 Mich. 381.

¶ 158. Where the owner of logs desiring to have same cut by a band-saw agreed with the owner of a mill to procure such a saw, title to remain in the former until the payment of the purchase price, the lien so created for the unpaid purchase price takes priority over liens of mechanics arising out of work performed in installing the saw in the mill.—Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466.

¶ 159. Where, at the time of filing a bill to enforce a mechanic's lien, the record title to the land appears to be in defendant, the lien cannot be defeated by the recording of a deed of the land to defendant's wife, which purports to have been executed prior to the filing of the bill.—Mouat v. Fisher, 104 Mich. 262.

§ 31. ——Between mechanics' and mortgage liens.

See also post ¶ 254.

Decree making mortgage prior lien, see post § 60.

Lien and priorities of chattel mortgages generally, see Chattel Mortgages, III.

Mortgage liens in general, see Mortgages.

¶ 160. A vendor's lien secured by a duly recorded chattel mortgage takes precedence of a mechanic's lien for repairs subsequently done at the purchaser's request.—Denison v. Shuler, 47 Mich. 598.

¶ 161. Under Pub. Acts 1891, No. 179, § 9, subd. 3, as amended by Pub. Acts 1893, No. 199 (Mechanics' Lien Law) providing that such liens shall be preferred to all other titles, liens, or encumbrances which may attach to or upon the building or land subsequent to the commencement of such building, a mechanic's lien takes precedence of a mortgage executed after the actual commencement of the building, although no part of the labor or materials for which the lien is claimed was performed or furnished until after the execution and recording of the mortgage.—Kay v. Towsley, 113 Mich. 281.

¶ 162. A builder's lien is not entitled, by virtue of the land-owner's waiving service of the sworn statement required by Mechanics' Lien Law § 4 (Pub. Acts 1891, No. 179) to priority over a mortgage executed before the completion of the building, where no notice was served before commencement of suit to enforce the lien. The result is that, under section 9 of the same act as amended by Pub. Acts 1893, No. 199, the lien terminates at the end of six months and is therefore at an end as against a mortgagee junior in time.—Dittmer v. Bath, 117 Mich. 571.

¶ 163. Under Pub. Acts 1891, No. 179, § 9, as amended by Pub. Acts 1893, No. 199, providing that mechanics' liens shall be preferred to all other titles, encumbrances, etc., which may attach upon buildings, etc., or to or upon the lands, subsequent to the com-

mencement of such buildings, etc., a mortgage executed after the actual commencement of a building is subject to a mechanic's lien, though no part of the labor performed or material furnished was done or performed until after the execution and recording of the mortgage.—Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111.

¶ 164. A lienor failed to file the statutory notice of his claim until after the owner had mortgaged the premises to another party. He had supplied laborers and material, and had paid the laborers, and settled for the material weekly. Before the giving of the mortgage he had stated an account with the owner as to the amount due him. Held, he was not to be preferred to the mortgagee.—Adams v. Central City Granite Brick & Block Co., 154 Mich. 448.

¶ 165. The owners of a building are not injured by having a mortgage given to the contractor made a prior lien on the premises, although the contractor defaults, and the building is completed at increased expense by the owners, where the owners were secured for the amount of the mortgage by a bond entered into as a part of the same transaction, and the bond was paid by the surety.—Stevens v. Garland, 198 Mich. 24.

¶ 166. The drawing of plans for a building is not the commencement thereof so as to give liens priority over a mortgage given to the contractor under Comp. L. 1897, § 10718, How. 2nd Ed., § 13774, providing that liens "shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement."—Stevens v. Garland, 198 Mich. 24.

¶ 167. Under Comp. L. 1915, § 14804, subd. 4, providing that liens for labor and material are subject to any prior recorded title, claim, lien, incumbrance or mortgage to or upon the land upon which the building or improvement belongs or is put, an assigned mortgage originally given by the owner to the contractor upon the premises where a building was to be erected and recorded before a building permit is issued or excavation begun for the building is a prior lien to the liens of those furnishing labor and materials for the construction of the building where there is nothing in the mortgage or the note that it was given for or had any connection with a building contract.—J. W. McCausey & Co. v. Gittleman, 201 Mich. 8.

§ 32. ——Between mechanics' liens and homesteads.

Right to lien on homestead, see ante §§ 10, 15.

Nature and extent of homestead right, see Homesteads.

¶ 168. Where parties purchase premises for a homestead before contracting for building materials, and move upon them, before statement of mechanic's lien is filed, with the intention of living there, they thereby constitute them a homestead.—Lamont v. LeFevre, 96 Mich. 175.

¶ 169. Lien claimants are entitled to a mechanic's lien free from homestead rights on two houses erected on land adjoining the lot and house occupied by the owner as a homestead.—Frohlich v. Carroll, 127 Mich. 561.

§ 33. Extent and amount of lien.

Property to which lien attaches, see ante § 9.

Lien for extras, additional work and alterations, see also ante § 16.

Sufficiency of affidavit or statement of lien as to amount, see ante § 24.

Evidence as to the amount of claim, see post § 58.

Amount of recovery in proceedings to enforce lien, see post § 61.

Amount and limit of liability to subcontractors, laborers and material men, see Comp. L. 1915, § 14796.

¶ 170. Where the claims of subcontractors, material men, and laborers exceed the contract price, the amount for which a lien may be enforced by one who has received payments upon his claim, and who has estopped himself from claiming a portion of the balance, is limited to the amount in which his pro rata share of the whole exceeds the aggregate of the payments made and the sum he is estopped from claiming.—Fairbairn v. Moody, 116 Mich. 61.

¶ 171. Lien claimants are entitled to interest upon their claims from the time they fall due.—Smalley v. Gearing, 121 Mich. 190.

¶ 172. Where a contractor has abandoned the construction of a house and it is completed by the owner with some minor changes, the subcontractors and material men are entitled to a lien for such portion of the amount of their claim accrued prior to the abandonment as the contract price is of the actual cost of constructing the house.—Delray Lumber Co. v. Keohane, 132 Mich. 17.

¶ 173. A claim for loss of rent caused by the failure of the contractor to perform will not be allowed where the owner had waived his right to insist upon the completion of the contract.—Kotcher v. Perrin, 149 Mich. 690.

¶ 174. A contractor constructing a house abandoned the job and left twelve unpaid creditors. Nine only of these filed liens

Some were already paid. Held, in foreclosing the liens, that the claims of all creditors for labor and materials should be included, in arriving at the cost of the house, and in determining the percentage each lienor was entitled to.—Frohlich v. Ashton, 159 Mich. 265.

¶ 175. Under a building contractor's agreement with defendant owner it was specified that if during the progress of the work defendant should wish to make any alterations or additions, the contractor should carry out such alterations and additions upon a basis of compensation to be agreed upon by himself and the owner. Held, the evidence having failed to show that the contractor had been guilty of fraud in obtaining an agreement for such extra compensation, a complainant who furnished materials to the contractor was entitled to a mechanic's lien on the extra work.—Busse v. Douglas, 165 Mich. 95.

¶ 176. A subcontractor agreed to construct the caissons for an office building at an excavation of 120 feet. An explosion of gas necessitated a change of plans, and the architect represented that under a new plan the amount of concrete required would be approximately the same, whereupon the subcontractor went ahead on the original terms. In a total of 170,837 cubic feet, the subcontractor supplied 1,049 cubic feet more than called for under the original plan. Held, in a suit to enforce his lien, that he was entitled to extra compensation for this excess. —Vaughan v. Ford, 162 Mich. 37.

¶ 177. Where a contractor abandons his agreement and the building is finished by the owner, the cost of the building should be reckoned by leaving out bills for labor and materials which are unpaid and for which no liens were filed, in fixing upon the proper division of the fund among the lienors.—Frohlich v. Ashton, 164 Mich. 132.

§ 34. Assignment of claims.

Validity of assignment of liens to combine in one action, see Champerty ¶ 8.

¶ 178. An assignment by a contractor to a third person of the moneys to become due upon the contract, with notice to the landowner of such assignment, will not deprive a subcontractor of his lien upon the premises under the mechanics' lien law, but such lien will be limited in amount to the sum actually due and owing to the contractor from such owner at the time of filing and serving the notice of lien.—Bourget v. Donaldson, 83 Mich. 478.

¶ 179. Under Comp. L. 1897, § 10734, providing that "all liens or claims for liens which may arise under the terms of this act shall be assignable," a claim for labor or materials may be assigned though no statement of such claim has been made and filed.—McAllister v. DesRochers, 132 Mich. 381.

VII. WAIVER, DISCHARGE AND PAYMENTS.

§ 35. Waiver and estoppel.

See also ante ¶ 83.
Effect of other remedy or security, see ante § 4.
Burden of proof as to waiver, see post § 54.
Sufficiency of evidence to show waiver, see post ¶ 289.
Necessity of giving notice of claim to owner, see ante § 18.
Waiver of service of sworn statement of lien, see also ante ¶ 162.
Effect of failure to make statement of names and amounts due subcontractors and materialmen, see also ante § 20.
Effect of failure to file claim with register of deeds, see also ante § 21 et seq.
Effect of making excessive or erroneous claim for lien, see ante § 24.
General law of estoppel, see Estoppel.

¶ 180. One waives his lien for materials furnished by taking for the amount due and for other indebtedness a note not payable until after the date before which a claim of lien must be filed. And no lien for the account included in the note can thereafter attach even though subsequently to the execution of the note complainant continued to furnish materials.—Blakeley v. Moshier, 94 Mich. 299.

¶ 181. Refusal to accept payment for materials furnished after taking a note which waived it as to prior materials waives right to a lien for the later ones.—Blakeley v. Moshier, 94 Mich. 299.

¶ 182. Where a lien for materials had become vested under the Mechanics' Lien Law of 1885, taking a personal judgment against the land-owner (which it was abortively agreed between the parties should be a lien) under the void act of 1887, did not waive such lien, it being apparent that waiver was not intended.—Kirkwood v. Hoxie, 95 Mich. 62.

¶ 183. The vendor's right to enforce a lien upon machinery furnished to the lessees of a mill is not lost by the action of his attorney in taking from the vendees a bill of sale of the machinery, where the attorney's authority to accept a bill of sale was conditioned upon his securing the right to remove the property, and the consent of the mill-owner to such removal was not obtained. —Marinette Iron Works Co. v. Cody, 108 Mich. 381.

¶ 184. The fact that a book account against a contractor contains other items of charge does not show exclusively that the material man intended to waive his right of lien against the owner of the building.—Union Trust Co. v. Casserly, 127 Mich. 183.

¶ 185. Before one entitled to a lien under the statute should be declared to have waived it, it ought to clearly and unequivocally appear that he has expressly waived it in compliance with Comp. L. 1897, § 10734, How. 2nd Ed., § 13790, providing that the taking of other security for the debt than the real estate shall not defeat or waive a lien under the act in the absence of express agreement that such taking of other security shall be a waiver.—Marquette Lumber Co. v. Albee, 196 Mich. 127.

¶ 186. Where a subcontractor guarantees the performance of the contractor's building contract, he is estopped from participating in the fund until the other lienors have been paid.—Frohlich v. Ashton, 164 Mich. 132.

¶ 187. A contractor does not waive his right to a lien upon the property because the contract progresses slowly, owing to the owner's lack of funds, and the work extends over a long time and is intermittent, where he acts in good faith and diligently pursues the remedy allowed by statute.—Fox v. Benham Mfg. Co., 197 Mich. 637.

¶ 188. A sub-contractor is estopped to assert a mechanic's lien as to payments that have been made by the owner to the contractor in reliance upon the sub-contractor's expressed desire that they be so made.—Fairbairn v. Moody, 116 Mich. 61.

¶ 189. Where a statement of lien is made, and proceedings commenced thereunder, but discontinued, and a second statement of lien is made, the first proceedings do not constitute an estoppel against the second, where the lienor has continued to work between the last day's labor as fixed by the first statement, and the last day as fixed by the second.—Dowd v. Dowd, 126 Mich. 649.

§ 36. Payment, satisfaction and discharge.

See also ante ¶ 28.
Necessity of averring demand for payment, see post § 46.
Evidence as to payments, see post § 58.
Acceptance of note for amount due as waiver of lien, see ante ¶ 180.
Right to lien as affected by discharge in bankruptcy, see Bankruptcy § 10.
Accord and satisfaction between owner and lienor, see Accord and Satisfaction ¶ 16.

¶ 190. Where, upon a contractor's order in favor of a sub-contractor, a land-owner for whom a building is erecting writes, "Accepted as per above order, when A. H. Butts and William Wilson lien or garnishee is satisfied," such acceptance is subject to whatever sums the owner is required to pay to extinguish the liens of the persons named.—Tyler v. Stack, 103 Mich. 268.

¶ 191. In computing the amount due on a contractor's order in favor of a sub-contractor which the owner accepts upon condition that certain specified liens are satisfied the entire sum the owner is obliged to pay to satisfy such liens should be deducted from the face of the order, although, by reason of the insufficiency of the amount due the contractor to satisfy all liens upon the premises, the parties named in the order have been obliged to pro rate with subsequent claimants of liens.—Tyler v. Stack, 103 Mich. 268.

¶ 192. Complainant company decorated the walls of defendant's store and supplied and attached certain fixtures. It also furnished certain personalty in the way of movable furniture. Payment was made on the whole account in amount sufficient to cover the personalty. Held, complainant was entitled in a suit under Comp. L. 1897, §§ 10710-10736, to establish a mechanic's lien for the sum owing for the decorations and fixtures.—Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255.

§ 37. ——Payments by owner to principal contractor.

Payments made to contractor upon request of subcontractor as affecting latter's lien, see ante ¶ 188.
Risk of payments to orignal contractor as affected by notice to owner, see also ante § 18.
Statements to owner of amounts due subcontractors, laborers and material men, see ante § 19.
Evidence as to payments made to principal contractor, see post § 58.
Provisions as to payments to original contractor, see Comp. L. 1915, § 14796.
Retention from money due original contractor amounts sufficient to pay sub-contractors, laborers and material men, see Comp. L. 1915, § 14799.

¶ 193. An owner who makes payments to a contractor without requiring of him the statement as to the amount due or to become due to material men, which, under Pub. Acts 1891, No. 179, he may lawfully demand, does so at his own risk; and the fact that he believed at the time that moneys previously advanced by him to material men on the contractor's order had paid such claims in full will not relieve the property from a lien the material man for the balance due, there having been no misrepresentation on the part of the claimants.—Munroe v. Merrell, 113 Mich. 491.

¶ 194. Under Mechanics' Lien Law, § 1, as amended by Pub. Acts 1893, No. 199, the owner is not protected in payments to the original contractor, though they equal the full contract price, and are distributed for labor and materials, unless the distribution is pro rata among all those entitled to the fund.—Fairbairn v. Moody, 116 Mich. 61.

¶ 195. Under the rule laid down in Fairbairn v. Moody, 116 Mich. 61, which con-

strued Mechanics' Lien Law, § 1 (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), where the owner of a building paid the contractor therefor the full amount of the contract price, including the amount due a sub-contractor which the owner believed had been paid but which the contractor had not paid, the sub-contractor is entitled, in a mechanic's lien suit by him against the owner, to recover only such proportion of the amount due him as the contract price bears to the sum of the contract price and such amount.—Blitz v. Fields, 118 Mich. 85.

¶ 196. Credit for payments made to the principal contractor where the latter was not required to furnish the sworn statement specified in Comp. L. 1897, § 10713, cannot be allowed in his favor as against the lien of a material man where the payments were not distributed pro rata among the subcontractors, laborers, and material men.—J. E. Greilick Co. v. Rogers, 144 Mich. 313.

¶ 197. The owner of a building on which has been placed a mechanic's lien by a material man cannot complain that he has been denied the right to recoup damages where such were based on payments made to the principal contractor for which he could not legally claim credit against the materialman.—J. E. Greilick Co. v. Rogers, 144 Mich. 313.

¶ 198. Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199, differs from Pub. Acts 1887, No. 270 (How. St., § 8398a et seq.), previously held unconstitutional, in that the owner is fully protected from any breach of the contract, being entitled to recoup any damages which he may sustain by reason of any failure or omission of the contractor to perform his contract, by limiting the owner's liability to the amount of the contract entered into, and by providing for a safe way for the owner to make payments.—Smalley v. Gearing, 121 Mich. 190.

¶ 199. The Mechanics' Lien Law (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), section 1, authorizing an owner to make payments to a contractor if distributed among laborers and material men, was enacted to insure payment to those who contributed to the construction of the building, and it is immaterial that the money paid by a contractor to laborers and material men was not the identical money received by the contractor from the owner.—Smalley v. Gearing, 121 Mich. 190.

¶ 200. The Mechanics' Lien Law, § 1 (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), expressly provides that contractors may furnish material and labor and have a lien therefor; and in the distribution of payments made by the owner, credit may be given to the contractor as a material man, especially as section 29 defines a material man to include "all persons by whom any materials are furnished in or for the building."—Smalley v. Gearing, 121 Mich. 190.

¶ 201. Under the Mechanics' Lien Law (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), an owner is entitled to be credited with money paid to the contractor and distributed to laborers and material men, but there is no pro rata distribution where all the laborers and some of the subcontractors are paid in full. The distribution of the entire fund is to be made among those who, at the end of the work, have claims for labor and material without regard to the time when they respectively earned their pay by doing their work or furnishing their material.—Smalley v. Gearing, 121 Mich. 190.

¶ 202. A payment made by the owner of a building to the principal contractor without requiring the sworn statement of indebtedness by the principal contractor affords no protection to the owner.—J. W. McCausey & Co. v. Gittleman, 201 Mich. 8.

¶ 203. Under Comp. L. 1897, § 10713, How. 2nd Ed., § 13769, requiring a sworn statement of the names of subcontractors, etc., to be secured by the owner before making payment to the contractor, the owner is not protected in payments made to the principal contractor, in the absence of a statement on oath by the contractor showing the names of the subcontractors, etc., and such payments are made at the risk of the owner, and do not discharge liens, unless distributed by the contractor among the subcontractors, materialmen, and laborers, or, if distributed in part only, then to the extent of such distribution.—Stevens v. Garland, 198 Mich. 24.

¶ 204. A sworn statement by a contractor of the names of subcontractors, etc., is a sufficient protection to the owner in making a payment to the contractor under Comp. L. 1897, § 10713, How. 2nd Ed., § 13769, where it states that the "amounts due or to become due to such subcontractors, laborers, and persons for work done and materials furnished at the date hereof is correctly and fully set forth opposite their names respectively," even though such statement is false.—Stevens v. Garland, 198 Mich. 24.

¶ 205. A tender, sufficient in amount, will discharge a mechanic's lien for the repair of personal property; and, if not accepted, the creditor must thereafter rely upon the personal responsibility of his employer.—Moynahan v. Moore, 9 Mich. 9.

¶ 206. A subcontractor claiming a lien for materials used in the construction of a

building, is entitled to such a proportion of his claims as the contract price is of the entire cost of the building where the contractor has been paid by the owner contrary to Comp. L. 1897, § 10713.—Godfrey Lumber Co. v. Cole, 151 Mich. 280.

§ 38. ——Payments by contractor to materialmen.

¶ 207. A materialman who receives money from a contractor while a building is under construction which in the absence of instruction he applies to an old account, is not required to reduce his claim by these payments under a lien against the building.—Union Trust Co. v. Casserly, 127 Mich. 183.

¶ 208. The fact that a lien claimant accepts a contractor's note for the price of materials furnished does not estop him from asserting a lien.—Smalley v. Gearing, 121 Mich. 190.

¶ 209. Under the Mechanics' Lien Law (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), where there is no pro rata distribution of funds by a contractor, a new computation must be made, in which all laborers and materialmen must be included, and if, on such computation, it is found that certain of them have been paid more than their pro rata share, the owners will be held liable for such over payments, and that amount added to their liability.—Smalley v. Gearing, 121 Mich. 190.

¶ 210. A right to a mechanic's lien is not defeated because the claimant has failed to credit a payment of $15.00 on account and has included a small item for material which he never furnished because of defendant's failure to give him dimensions for manufacturing.—Frohlich v. Carroll, 127 Mich. 561.

¶ 211. Under the Mechanics' Lien Law where payments are made after a sworn statement by the contractor and there is a deficiency, the payments must be pro-rated among others not included in the statement who were known to the owner to have furnished materials.—Frohlich v. Carroll, 127 Mich. 561.

¶ 212. Where, after the owner has paid the greater part of the contract price to the principal contractor, without requiring from him sworn statements as to the liens of materialmen, and is afterwards compelled to complete the work in default of the contractor, the materialmen are entitled to receive such proportion of their claims as is measured by the ratio of the contract price to the actual cost of the work, as completed by the owner, the amount which the materialmen have already received from the contractor being deducted from their claims.—Kotcher v. Perrin, 149 Mich. 690.

VIII. FORECLOSURE AND ACTIONS ON DEBT.

A. IN GENERAL.

Amount necessary to jurisdiction in equity, see Equity § 16.

Affirmative personal decree on cross-bill to bill for injunction to prevent interference with completion after contractor's default, see also Equity ¶ 844.

Jurisdiction of justice of peace to enforce contractor's bond, see also Justice of the Peace ¶ 56.

§ 39. Actions on the debt.

¶ 213. An action at law by subcontractors to enforce the amount of a claim for work and labor will be postponed until the determination of a mechanic's lien suit in which a personal decree is sought, where, in the lawsuit, complainants had begun garnishment proceedings, and defendant had given a bond in double the amount claimed by complainants to release such garnishment proceedings, and to pay any judgment recovered by them.—Vaughan v. Wayne Circuit Judge, 153 Mich. 478.

¶ 214. An action by the assignee of one who had contracted to erect several houses, to recover for one house built and accepted under the contract, and for work and material done and furnished for the others up to the time the owner prevented further performance of the contract, is an action upon the contract, within the scope of the lien law.—Barnard v. McLeod, 114 Mich. 73.

§ 40. Proceedings to foreclose lien.

Postponement of action on the debt till termination of foreclosure proceedings, see ante § 39.

Discontinuance of proceedings as barring subsequent proceedings, see also ante ¶ 189.

Necessity and sufficiency of filed affidavit or statement of lien, see ante § 21 et seq.

Provisions as to enforcement of the lien, see Comp. L. 1915, § 14805 et seq.

¶ 215. Though a purely statutory lien must conform exactly to the statutory conditions, yet when it once attaches and is put in process of foreclosure, the proceedings, while in part definitely fixed, are largely left to the general course of practice, and no strained construction should be used to defeat them.—Sheridan v. Cameron, 65 Mich. 680.

¶ 216. Proceedings for the foreclosure of mechanics' liens upon a homestead for labor and materials furnished under a contract not signed by the wife must be taken under Comp. L. 1897, § 10369, which provides for the appraisal of the premises so as to ascertain the amount liable after the exemption of the homestead right of $1,500

has been deducted.—McAllister v. Des Rochers, 132 Mich. 381.

§ 41. Time to commence proceedings.

¶ 217. The filing of a bill or petition, not the service of process, is the beginning of suit in the meaning of the mechanic's lien statute which requires proceedings to be begun within sixty days.—Sheridan v. Cameron, 65 Mich. 680.

¶ 218. The six months, within which proceedings to enforce a mechanic's lien must be commenced in order to continue the same (Laws 1891, Act No. 179, § 9) must be computed from the filing in the office of the register of deeds of the statement or claim of lien to the date of the filing of the bill to enforce said lien, or the cross-bill for affirmative relief provided for by section 10 of the same law.—Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18.

¶ 219. Under the Mechanics' Lien Act (Comp. L. 1897, §§ 10718, 10719) providing that liens shall continue for a year after a statement or account is filed, unless proceedings are begun to enforce the same, the rights of a complainant in a mechanic's lien suit cannot be affected by the failure to make the principal contractor a party until after the expiration of the year as the filing of his bill within the year was a commencement of the proceedings.—Casserly v. Wayne Circuit Judge, 124 Mich. 157.

¶ 220. The question as to whether the statutory period for bringing in a new defendant in a mechanic's lien proceeding has expired can only be raised by such new defendant.—Casserly v. Wayne Circuit Judge, 124 Mich. 157.

§ 42. Conditions precedent.

Burden of proof as to compliance with conditions precedent, see post § 54.

¶ 221. Where a building contract provides that the price for extras shall be settled by arbitrators unless agreed upon, the parties will be held to have provided their own forum to determine the value of such extras, and, until such value has been fixed by arbitration or agreement, the same is not due, and a bill will not lie to enforce a lien therefor.—Boots v. Steinberg, 100 Mich. 134.

¶ 222. A bill will not lie to enforce a mechanic's lien for the balance claimed to be due on a building contract, which provides that the work shall be done to the satisfaction of the owner or his superintendent as it progresses, and that it shall not be fully paid for until completed to the satisfaction of the owner, where it appears that the claim of the owner that the work has not been completed to his satisfaction has a substantial basis, and is not captiously made.—Boots v. Steinberg, 100 Mich. 134.

¶ 223. Where an adjoining owner has sued the contractor erecting a building, on an indemnity contract, the masonry subcontractor may bring his bill to enforce a mechanic's lien under Comp. L. 1897, §§ 10710-10745, without awaiting the outcome of the suit.—Vaughan v. Ford, 162 Mich. 37.

§ 43. Venue.

General law as to venue, see Venue.

¶ 224. A bill to enforce a mechanic's lien under Comp. L. 1897, §§ 10714, 10719, must be brought in the county where the real estate is located.—Prather Engineering Co. v. Detroit, F. & S. Ry., 152 Mich. 582.

B. PARTIES AND PLEADING.

Want of verification as affecting jurisdiction, see Courts § 39.

§ 44. Parties.

Persons entitled to lien, see ante § 3.
Parties to cross-bill to assert lien, see post § 48.
Objections as to parties, see post § 51.
Sureties on bond as parties defendant, see also post ¶ 303.
General law as to parties, see Parties.
Provisions as to parties in proceedings to enforce lien, see Comp. L. 1915, § 14805.

¶ 225. The receiver of the person who owns the property is a necessary party to a bill filed by a contractor to enforce a mechanic's lien.—Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614.

¶ 226. One McConn made a contract to build a house for defendant's husband, and plaintiff furnished materials. Plaintiff sued the defendant owner of the house to enforce a mechanic's lien without making McConn a party, and a decree was entered in his favor. Held, the omission of the contractor as a party was a fatal defect, calling for reversal and a remanding, with permission to amend the bill.—Godfrey Lumber Co. v. Kline, 160 Mich. 565.

§ 45. ——Amendments and changes of parties.

Amendments as to parties generally, see Parties.

¶ 227. In proceedings by subcontractors to enforce a mechanic's lien, the original contractors must be brought in as parties, since the contract relation and state of accounts between the defendant and the original contractors, and between the original and subcontractors, must be adjudicated before the lien can be established, and the rights and liabilities of the parties be ascertained.—Kerns v. Flynn, 51 Mich. 573.

¶ 228. It will be assumed that where a copartnership is claimant to a mechanic's lien that the name of the firm affords the

necessary information to the owners, and a petition by a firm to intervene, under Comp. L. 1897, § 10719, which describes the claimant as "F. Bros." is not fatally defective but may be amended by adding the names of the members composing the firm.—Kleinert v. Knoop, 147 Mich. 387.

¶ 229. Where a bill to enforce a mechanic's lien is filed within the statutory period, an amendment bringing in a proper party may be made after the period has expired.—Prather Engineering Co. v. Detroit, F. & S. Ry., 152 Mich. 582.

¶ 230. Where a court of equity has jurisdiction of a property owner, a contractor, subcontractor and material men in a proceeding to enforce a mechanic's lien, it has power to bring in the sureties on the contractor's bond, and to determine the rights of all the parties in one proceeding.—C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316.

¶ 231. Laws 1891, Act No. 179, § 10, which provides that proceedings to enforce a mechanic's lien shall be by bill in chancery, under oath, and that amendments may be made to such bill at any time before final order, does not divest the court of power to impose terms upon allowing a bill to be amended, on the day set for hearing, so as to introduce as co-defendant defendant's wife who is the owner of the land upon which stands the building whereupon the labor was performed. Terms held not an abuse of discretion.—Rugg v. Bassett, 101 Mich. 441.

¶ 232. The fact that the amendment to § 10 of the Mechanics' Lien Act (Act No. 394, Pub. Acts 1913), permitting the bringing in of the sureties on a contractor's bond in a proceeding to enforce a lien, did not take effect until after the sustaining of a demurrer to a cross-bill making a surety a party, does not prevent the act, which pertains merely to the remedy, being applicable to an appeal pending when the amendment became effective.—C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316.

§ 46. Pleading; bill or petition.

Sufficiency of affidavit or statement of lien, see ante § 23.
Issues and variance, see post § 50.
Sworn bill or petition as evidence, see post ¶ 278.
General law as to equity pleading, see Equity, VII.
General law of pleading, see Pleading.
Necessity of averring leave to sue when suit is against receiver, see Receivers, IV, C.

¶ 233. Under Comp. L. 1871, §§ 6789-94 (see How. St., §§ 8377-82), for the enforcement of mechanics' liens upon real property, a declaration that the contract was made with a particular party, and subsequently fully performed, would not comprehend the substance of the facts involved in the idea of a lien under said law, under which no lien will attach unless the contract be with the owner, part owner, or lessee. Simple performance of the contract is insufficient. It is a fatal defect not to show the interest of the contracting party in the land, and the defect will not be cured by an admission of ownership on the part of the respondent. Every fact essential to jurisdiction must appear on the record.—Clark v. Raymond, 27 Mich. 456.

¶ 234. In setting up the respondent's title to certain lands, in a petition for the enforcement of a mechanic's lien against the lands for materials supplied, it should be made to appear that the respondent had some interest in the lands at the time the materials were supplied or when the certificate of the lien was filed, and it is not sufficient to set forth only the state of the title at the point of time when the petition was filed.—Willard v. Magoon, 30 Mich. 273.

¶ 235. Where a bill to foreclose a mechanic's lien charges that notice of the filing of the statement of lien was given to the owner and to the receiver of its estate, the bill will not be held bad on general demurrer for failing to aver that payment of the claim was demanded before the bill was filed.—Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616.

¶ 236. The provision of Chancery Rule 91, permitting, in bills to foreclose mortgages, a general statement that certain defendants "have or claim some interest in the premises as subsequent purchasers or encumbrancers or otherwise," applies to bills to enforce mechanics' liens, such bills being strictly analogous to foreclosure bills.—Steel-Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616.

¶ 237. A bill to enforce a mechanic's lien is bad on general demurrer if it fails to allege that the receiver of the owner's estate—who is a necessary party—is joined as defendant by leave of court.—Burk v. Muskegon Machine, etc., Co., 98 Mich. 614; Steel-Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616.

¶ 238. A bill to enforce a lien under Pub. Acts 1893, No. 199, § 1, is fatally defective if it fails to allege either that defendant was the owner of the land against which the lien is sought to be enforced, or that he was possessed of an interest therein.—Knapp Electrical Works v. Mecosta Electric Co., 110 Mich. 547.

¶ 239. It is not required of the pleader in setting up a mechanic's lien that he negative the exceptions contained in the statute subsequent to the provision declaring the lien, relieving the owner from the risk of payments made to the contractor after exacting from him a sworn statement as to the

amounts due subcontractors, laborers, and material men, and from liability to such persons in any event in a greater amount than he contracted to pay the original contractor.—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

¶ 240. A variance between a notice filed with the registrar of deeds and the bill of complaint to enforce a mechanic's lien is not fatal where it is admitted by the defendant that he owns no other land in the village and that the building is located on the lots attempted to be described in the bill.—Hannah & Lay Mercantile Co. v. Hartzell, 125 Mich. 177.

¶ 241. A bill to enforce a mechanic's lien is sufficient in its statement of the terms of the contract and performance in averring that the labor and materials were furnished under a contract with the owner in improving and repairing the house and barn of the said owner on the land described, and giving the date furnished.—Waters v. Johnson, 134 Mich. 436.

¶ 242. In a bill to enforce a mechanic's lien stating the contract and the materials furnished, the added statement, "And also for certain materials furnished in and for improving and repairing a certain house and barn, situated on the land hereinafter described, in pursuance of a certain contract with Alonzo Curtiss, contractor," may be regarded as surplusage where the contractor is not made a party and the bill fails to state the amount furnished to him.—Waters v. Johnson, 134 Mich. 436.

¶ 243. Under Comp. L. 1897, § 10714-15, a bill to enforce a mechanic's lien is fatally defective where it shows that complainants named as owner in the claim of lien, and served notice upon, the owner at the time the goods and services were furnished and not upon the one who owned the premises at the time the claim for lien was made.—Waters v. Johnson, 134 Mich. 436.

¶ 244. It is the general rule that the mechanic's lien, under Act No. 17, Pub. Acts 1903, amending Comp. L. 1897, § 10710, attaches to the extent of the statutory limit, and the lien claimant need aver and prove no more than that the quantity of land on which he claims a lien is within that limit. If for any reason the owner seeks to have a smaller quantity of land held subject to the lien, it is for him to present the reason and the facts supporting it. Held, however, that if the claimant seeks an apparent enlargement of the statute quantity of land, he should, by averment and proofs, advance reasons and facts in support of his demand.—Adams v. Central City Granite Brick & Block Co., 154 Mich. 448.

¶ 245. Under Comp. Laws 1897, § 10719, a bill to enforce a mechanic's lien must be sworn; and a demurrer on that ground should be sustained, or, if denied, only upon amendment of the bill as permitted under Comp. Laws 1897, § 10736.—Daschke v. Schellenberg, 125 Mich. 216.

¶ 246. A petition in chancery filed to enforce a mechanic's lien need not contain a prayer for process.—Sheridan v. Cameron, 65 Mich. 680.

§ 47. Answer or other defensive pleading.

Waiver of sworn answer, see post ¶ 266.
Raising in answer objections as to parties, see post § 51.
General law as to answers in equity, see Equity VII.

¶ 247. In proceedings to enforce a mechanic's lien upon realty, an answer should be put in by the defendant so that an issue may be properly framed.—Roberts v. Miller, 32 Mich. 289.

¶ 248. An answer to a bill to foreclose a mechanic's lien, which states that the complainant has not performed the acts necessary under the lien statutes, and in particular that Comp. L. 1897, c. 296, has been violated, is sufficient to apprise complainant that defendant may at the trial rely in particular on failure to comply with section 4 of chapter 296.—Wildey v. Gillett, 171 Mich. 153.

§ 48. ——Answer in nature of cross-bill.

Cross-bills generally, see Equity, VII.

¶ 249. An answer in the nature of a cross-bill may be used to assert a mechanic's lien under the provisions and intendment of Pub. Acts 1891, No. 179, § 10, regulating pleadings in mechanics' lien cases.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

¶ 250. An answer in the nature of a cross-bill enables a defendant to assert a mechanic's lien; the Mechanics' Lien Law, § 10 (Pub. Acts 1891, No. 179), contemplates that all parties in interest may be brought into court and have their respective interests adjudicated in one proceeding.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

¶ 251. Defendant in a suit to foreclose a mechanic's lien may maintain a cross-bill to recover damages resulting from complainant's failure to perform the contract which is the ground of such lien, even though there is no special provision in the lien law (Miller's Comp. L., § 10723) authorizing an answer in the nature of a cross-bill; since when a court of equity has jurisdiction for one purpose, it may retain jurisdiction to settle all disputes relating to the same subject-matter between the parties to the suit.—Koch v. Sumner, 145 Mich. 358.

§ 49. Set-off and recoupment.

Of payments made to principal contractor, see also ante § 37.

Allowance of offsets in decree, see post § 61.

General law as to set-off and recoupment, see Set-off.

Provisions as to recoupment of damages for defects or omissions in the performance of the contract, see Comp. L. 1915, § 14796.

¶ 252. A defendant in a suit to enforce a mechanic's lien brought by a subcontractor cannot recoup for alleged defects in a building where he claims payment in full to the contractor and has gone into possession apparently satisfied.—Hannah & Lay Mercantile Co. v. Hartzell, 125 Mich. 177.

§ 50. Issues and variance.

¶ 253. On a bill to enforce a builder's lien upon real estate, and to have it declared a prior lien to a certain mortgage taken with notice, the bill did not allege such notice, and it was held that it was not in issue.—Barrows v. Baughman, 9 Mich. 213.

¶ 254. Where a mechanic's lien has once attached a variation between the allegations in the bill and in the proofs is not fatal if the defendant is not misled by any allegation in the bill, as a practical and reasonable construction should be given the statute.—Zilz v. Wilcox, 190 Mich. 486.

§ 51. Objections and waiver.

General law as to objections to pleading and waiver thereof, see Pleading, XI.

¶ 255. The objection that a petition for the enforcement of a mechanic's lien does not implead necessary parties may be taken in the answer thereto, or at the hearing; and it is not lost by putting in an answer after demurring.—Kerns v. Flynn, 51 Mich. 573.

¶ 256. The objection to a petition for the enforcement of a mechanic's lien, which does not implead necessary parties, may be taken in the answer thereto or at the hearing.—Prather Engineering Co. v. Detroit, F. & S. Ry., 152 Mich. 582.

¶ 257. Three claimants filed several bills to enforce mechanic's liens. The solicitors for the owner of the property, at the hearing, and after answers in the nature of cross-bills, filed by other claimants who had been joined as defendants in each suit, had been served on said solicitors, stipulated that all of the cases might be heard together, and that but one decree need be entered. Held, that, in view of said stipulation, which was acted upon, the defendant owner is estopped from claiming that said answers were filed without leave of the court, or that the same were not seasonably served, or that no process issued.—Hannah & Lay Merc. Co. v. Mosser, 105 Mich. 18.

¶ 258. One McConn made a contract to build a house for defendant's husband. Plaintiff furnished materials under this contract, and sued defendant to foreclose a lien without making McConn a party. Defendant objected to this defect of parties, and also urged that the contract sued on was not her own. Held, by the latter contention defendant did not waive her objection of the defect of parties.—Godfrey Lumber Co. v. Kline, 160 Mich. 565.

§ 52. Amendment of pleadings.

See also ante ¶ 135.

Amendments of pleading generally, see Pleading, VI.

General law as to amendments in equity, see Equity, VII.

¶ 259. Under Pub. Acts 1891, No. 179, §§ 10, 27 (Mechanics' Lien Law), allowing amendments in form or substance, an amendment to an answer in the nature of a cross-bill may be allowed, if it seeks, not to introduce a new cause of action, but to state properly the facts which constitute the cause of action set up in the original answer, even though the statute of limitations would bar a new bill.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141.

¶ 260. A defendant contractor in a mechanic's lien suit, who has joined issue with the complainant subcontractor by denying the complainant's allegations of full performance after delay caused by the defendant contractor and waived by such defendant, and who prayed a personal decree against the owner for the amount of the contract less the claim of complainant, is not entitled thereafter to amend his prayer as against the answering owner (which alleged delay and denied performance), by omitting to ask a personal decree and alleging further that there were other matters unready for settlement or litigation between the two defendants. In such a state of pleadings the owner cannot be forced to an election between recoupment and a separate suit, and the owner rather than the defendant contractor stands as a middleman or stakeholder entitled to have the others litigate their differences.—Kilby Mfg. Co. v. Menominee Circuit Judge, 138 Mich. 277.

¶ 261. An objection that a bill to enforce a mechanic's lien is not verified may be met by amendment after the expiration of the period limited to bring the suit.—Prather Engineering Co. v. Detroit, F. & S. Ry., 152 Mich. 582.

C. HEARING AND EVIDENCE.

§ 53. Hearing and trial practice in general.

Hearings in equity generally, see Equity, VIII.

§ 54. Burden of proof and presumptions.

Burden of proof and presumptions generally, see Evidence, II.

¶ 262. The complainants have the burden of proving on the trial their compliance with all that the statute requires for giving them a lien on the defendant's premises.—Roberts v. Miller, 32 Mich. 289.

¶ 263. In a suit to enforce a mechanic's lien, the burden is on complainants to establish their demand.—Doetsch v. Wetlaufer, 157 Mich. 202.

¶ 264. The burden is upon the owner of the estate to show the relinquishment of a mechanics' lien once established.—Kirkwood v. Hoxie, 95 Mich. 62.

¶ 265. The burden of proof of a waiver of a lien, in a suit to enforce a material man's lien, is upon the owner of the premises.—Marquette Lumber Co. v. Albee, 196 Mich. 127.

§ 55. Admissibility, weight, and sufficiency of evidence.

Extrinsic evidence to aid filed statement of lien, see also ante § 23.

Matters showing waiver of lien, see also ante § 35.

Sufficiency of evidence on appeal, see Appeal, § 433.

Evidence on garnishment as to existence of liens to controvert disclosure, see Garnishment ¶ 178.

General law as to evidence, see Evidence.

¶ 266. Under Comp. L. 1897, § 10719, a verified bill of complaint filed to foreclose a mechanic's lien, and setting out all the necessary facts to establish same, is sufficient evidence to establish a prima facie case, where complainant waives a sworn answer.—Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544.

¶ 267. In an action to enforce a lien for labor and materials furnished under a verbal contract, a finding against defendant's claim that the property was exempt as a homestead, will not be disturbed where defendant testified that while the house was being constructed she lived part of the time in a house on a certain street, which she did not own, and boarded part of the time, and that she owned no other property in the city, and plaintiff thereupon introduced a deed executed by defendant after the lien had attached conveying property on the street mentioned, since the unexplained conveyance discredited her testimony as to ownership.—Delray Lumber Co. v. Keohane, 132 Mich. 17.

¶ 268. Testimony, in an action to enforce mechanics' liens against premises occupied as a homestead as to the value in excess of the $1,500 homestead exemption, that the house was substantially completed at the time of filing the liens, and of the value of the lot and the contract price for the building, and that the contract therefor was taken at too low a figure, furnish some evidence of the value of the property.—McAllister v. DesRochers, 132 Mich. 381.

¶ 269. On a bill to enforce a mechanic's lien, it appeared that under a contract to install a hydraulic elevator in defendant's hotel, the elevator company agreed to supply one with a relief attachment, and guaranteed that the water pressure in the city mains would not vary to exceed five pounds to the square inch, when the elevator was stopped. The defendant was to procure a water pressure of eighty pounds from the city main. Held, where the pressure in the city main at no time fell below eighty pounds, and where the pressure at the city works varied fifty pounds whenever the elevator was stopped, that the defendant had performed, and that the elevator company had not.—J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657.

§ 56. ——As to the contract and consent or privity of owner.

Necessity of a contract or consent of owner, see ante § 11.

Dismissal for failure to show contract with or consent of owner, see post § 63.

¶ 270. When work is alleged to have been done under an oral contract, the terms of which are disputed, a mechanic's lien will not be sustained unless the evidence in support of it is clear and decisive enough to satisfy all reasonable and just minds without much hesitation as to the real nature and terms of the arrangement.—Clark v. Raymond, 27 Mich. 456.

¶ 271. In a suit to enforce a mechanic's lien for material used in buildings on the wife's land, evidence is sufficient to show that the husband contracting for the building in his own name was the agent of the wife where she owned the land, knew the buildings were being erected, wanted them built, used her own funds and borrowed more to pay upon the contract, drew checks on her own bank account and still owns the buildings although the husband may have furnished some of the money to pay for the buildings.—Frohlich v. Carroll, 127 Mich. 561.

¶ 272. In a suit to enforce a mechanic's lien, testimony by defendant that he mentioned to complainant that he had not received certain of the sash, and that complainant said that he would send them right up, and that defendant then replied that he did not know the dimensions of the desired sash, does not constitute an admission on the part of defendant that he gave the order.—Battle Creek Lumber Co. v. Poland, 150 Mich. 690.

¶ 273. Under Mechanics' Lien Law, § 2 (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199) providing for a lien upon property of a married woman if services are performed or material furnished with her knowledge and consent, evidence of a wife that her husband talked with her as

to a building to be erected upon land owned by them as joint tenants, that she sanctioned his acts and was present when the contract was made, shows an improvement made with the knowledge and consent of the wife.—Jossman v. Rice, 121 Mich. 270.

¶ 274. Where a witness for complainant in a suit to enforce a mechanic's lien, testifies that defendant gave an order to complainant for the material, his testimony is not materially strengthened by an order book showing an entry of an order for the material to be delivered at the house in question, it being self-made evidence of a transaction which might or might not justify the entry; it was at most a contemporaneous act which tended to show that he understood that the material was ordered for the houses.—Battle Creek Lumber Co. v. Poland, 150 Mich. 690.

§ 57. ——As to notice, statement, and filing of claim or lien.

¶ 275. On a bill of complaint to enforce a mechanic's lien, evidence held sufficient to establish that, although the description of property in a statement and notice of a mechanic's lien was ambiguous, it clearly identified it as the same land as that described in a mortgage.—Hicks v. Finbarg, 189 Mich. 332.

¶ 276. Allegations in a bill to enforce a mechanic's lien, that the last material was furnished on July 20th and a statement of lien made August 12th and filed with the registrar of deeds on August 13th within sixty days, supported by some proof and not denied by the answer, is sufficient to show a filing within the proper time.—Hannah & Lay Mercantile Co. v. Hartzell, 125 Mich. 177.

¶ 277. In an action to foreclose a mechanic's lien in favor of a subcontractor, evidence held sufficient to sustain a finding that the statement of lien was filed within the time limited by statute.—Zilz v. Wilcox, 190 Mich. 486.

¶ 278. The bill or petition though sworn to is not evidence, and therefore a sworn averment of service upon defendant of notice of the filing of the lien with the register of deeds did not cure the want of proof thereof, unless the answer admitted it.—Roberts v. Miller, 32 Mich. 289.

§ 58. ——As to amount of claim or lien, extras, deductions and payments.

See also ante ¶ 175.

Defective or partial performance as affecting right to lien, see also ante § 8.

Payments and satisfaction of lien, see ante § 36.

Sufficiency and proof of payments on contract, see Payment, V.

¶ 279. Where the evidence in the lower court showed the mortgaged premises to be a three-story building, with two stores a twenty-five living rooms, a decree suppc ing a mechanic's lien of $597.31 will sta without more specific proof as to the va of the premises.—Scott v. Keeth, 152 Mi 547.

¶ 280. In a suit under Comp. L. 18 §§ 10710-10736, to enforce a mechanic's l for work done in decorating the walls defendant's store and supplying fixtures, defendant in its answer admitted the wc done and materials furnished, but clain recoupment for defective quality, no pr of which was offered by defendant. Pla tiff proved the receipt after the complet of the work of a check in part payment, a letters from defendant promising to pay balance due. Held, plaintiff's proof was s ficient to support a decree in its favor Albert Gall Co. v. Dowagiac Gas Co., Mich. 255.

¶ 281. In a suit to enforce a mechani lien evidence by the defendant of payme made to the principal contractor in exc of the original contract price does not title the defendant to deductions as agai the subcontractor where there is no evide negativing extra material or alterations a no showing that the contractor distribu the alleged over payments pro rata.—H nah & Lay Mercantile Co. v. Hartzell, Mich. 177.

¶ 282. On bill to foreclose a mechani lien for a balance alleged to be due for la and materials furnished in erecting a bs for defendant where defendant prays affir ative relief on the ground of alleged n fulfillment of the contract held, that evidence supports a finding in favor of co plainants.—Chadderdon v. Maxwell, Mich. 709.

¶ 283. On bill for a mechanic's lien labor and materials furnished in the c struction of a house where defendant leges defective construction, but does show what it would cost to make good alleged defects, held, that a decree allowi a lien is warranted by the evidence.—Fr erick v. Willis, 176 Mich. 106.

¶ 284. On a bill to foreclose mechani liens, where the owner settled all bills d complainants, and took an assignment the of, and cross-bill by contractor to foreclc a mortgage given as security for fulfillme of contract by owner, and where it appea that the owner took charge of the buildi and completed it, upon failure of the c tractor to complete it within the specifi time, evidence held sufficient to sustain finding that the defectiveness of the wa was due to improper plastering by the pl tering contractor and not to any fault the contractor.—Malcomson-Houghten Co. Gregorian Bldg. Co., 191 Mich. 678; Wadh v. Gregorian Bldg. Co., Id.

¶ 285. On a bill to foreclose mechanics' liens, where the owner settled all bills due complainants and took an assignment thereof, and cross-bill by contractor to foreclose a mortgage given as security for fulfillment of contract by owner, and where it appeared that the owner took charge of the building and completed it, upon failure of the contractor to complete it within the specified time, evidence held sufficient to show that the contractor was improperly charged with certain extras, the expense of which should have been borne by the owners.—Malcomson-Houghten Co. v. Gregorian Bldg. Co., 191 Mich. 678; Wadham v. Gregorian Bldg. Co., Id.

¶ 286. On a bill to foreclose a mechanic's lien and answer and cross-bill asking for affirmative relief because of alleged defects and because of completion of work by defendant, evidence held sufficient to establish that defendant was entitled to an allowance of $200 for cost of completing work and for defective construction instead of $90, as allowed by the trial court.—Halpin v. Garman, 192 Mich. 71.

¶ 287. Evidence held sufficient to show that the architect arbitrarily, captiously and unreasonably refused a certificate to the building contractor for work done, justifying abandonment of the contract by the contractor and warranting recovery in a lien suit of reasonable compensation for his work under Comp. L. 1915, § 14808.—Kunze v. Jones, 200 Mich. 453.

¶ 288. On a bill by a contractor to foreclose a mechanic's lien evidence held to show that no unreasonably unsatisfactory work was performed by plaintiff and that plaintiff at no time between the first payment on the contract and a request for the second payment was informed or led to believe by the architect that his work was unsatisfactory.—Kunze v. Jones, 200 Mich. 453.

¶ 289. Evidence held to sustain the finding that complainant had not waived its lien, in a suit to enforce a lien for lumber sold by complainant to certain contractors for a building on defendant's premises, where defendant made payments to the contractors without demanding the sworn statements required by the statute.—Marquette Lumber Co. v. Albee, 196 Mich. 127.

§ 59. Questions of law and fact.

General law as to jury questions, see Trial, VI.

Provisions as to jury questions in mechanic's lien proceedings, see Comp. L. 1915, § 14806.

¶ 290. The fact that in the statement of lien plaintiff swore that he furnished the materials and labor in pursuance of a contract with the contractor was proper evidence to be considered by the jury in determining whether the work was done in reliance upon a new undertaking with defendant, but was not conclusive that it was not so done.—McLaughlin v. Austin, 104 Mich. 489.

¶ 291. In an action by a subcontractor against the owner for mason work performed in building a residence, the fact that the subcontractor never served upon the owner the statement required by Pub. Acts 1891, No. 179, § 4, will not justify a directed verdict for the defendant where the defendant pleaded the general issue in justice court without any notice of this defense and where the record shows all bills were paid.—Bollin v. Hooper, 127 Mich. 287.

D. DECREE AND DISPOSAL OF CAUSE, COSTS AND FEES.

§ 60. In general.

Taking bill as confessed as preventing subsequent assertion of invalidity of the lien, see ante ¶ 85.

Sufficiency of evidence to support decree, see ante § 55.

Record for appeal, inclusion of testimony, see Appeal § 99, ¶ 459.

Appealability of decree in statutory proceedings, see Appeal ¶ 63.

Affirmance as personal judgment and reversal as to lien, see Appeal § 486.

Decrees in equity generally, see Equity, X.

Provisions as to ordering sale of buildings, machinery or other improvements, see Comp. L. 1915, § 14809.

¶ 292. The final decree in proceedings sustaining a mechanic's lien ought expressly to adjudge the existence of contract relations between the parties, and the establishment of the alleged lien upon the property described.—Willard v. Magoon, 30 Mich. 273.

¶¶ 293, 294. Judgment allowed to stand as a personal liability though reversed as a lien because of the unconstitutionality of the statute giving liens in such cases.—Snell v. Race, 78 Mich. 334; Kirkwood v. Hoxie, 95 Mich. 62.

¶ 295. Lienors are not injured by a decree making a mortgage to the contractor in the hands of an assignee a prior lien where the money represented by such mortgage, through the payment of the surety on the contractor's bond guaranteeing the construction of the building according to the plans and specifications, pursuant to an order of court, has been expended by the owner in liquidating the cost of construction of the building, and it is immaterial that the owner failed to secure a sworn statement from the contractor before delivering to him the mortgage, no money being due or to become due to any contractor or material-man at the time said mortgage

was delivered.—Stevens v. Garland, 198 Mich. 24.

§ 61. Amount of recovery or offsets.

Partial or defective performance as affecting lien, see also ante § 8.
Sufficiency of affidavit or statement as to amount of lien, see ante § 24.
Amount and extent of lien, see also ante § 33.
Right to interest on claims, see also ante ¶ 171.
Offsetting payments made to principal contractor, see also ante § 37.
Evidence as to amount of claim or lien, see ante § 58.

¶ 296. Lien given for unpaid amount of contract and extra work done by the complainant, less what the defendant paid to finish the job after the complainant had left it, less also what the defendant had paid to the complainant's material man.—Landyskowski v. Martyn, 93 Mich. 575.

¶ 297. On a bill to enforce a mechanic's lien, it appeared that the owner was entitled, under the statute, to recoup damages by reason of a failure of the complainant to fully perform his part of the contract; this issue, however, was not presented by the pleadings. Held, that the bill should be dismissed, and that the decree allowing a recovery subject to recoupment of damages for the breach of warranty be set aside.—J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657.

¶ 298. In an action to enforce a mechanic's lien, where it appears that the contractor failed, leaving the building uncompleted, the owners are entitled to damages for delay by the contractor.—Smalley v. Gearing, 121 Mich. 190.

¶ 299. Under How. St., § 8385, providing reasonable proportionate compensation for incomplete performance in case of owner's failure to complete his part of contract, a contractor cannot complain if the value of the work performed is determined by deducting from the contract price the necessary cost of completing the building.—Jewell v. Paron, 94 Mich. 83.

¶ 300. Where the value of the work done on a building when a lien for materials was filed was less than the sum actually paid to the contractor, and where the necessary cost of completion was more than remained unpaid at the contract price, the owner is not liable to a material-man, the rights being no greater than the contractor's.—Jewell v. Paron, 94 Mich. 83.

¶ 301. The claimant-contractor cannot complain of allowances made by the court for defects found on the ground that the cost remedying them was not proved by defendant-owner, where some of them were not in dispute and others were particularly wi in the knowledge of the complainant.—G v. Daiber, 148 Mich. 190.

¶ 302. In proceedings to enforce a s contractor's lien upon a building which contractors had unjustifiably neglected finish, the owner was held entitled to of the actual cost of the completion of work, including the amount necessarily p to the architects for new plans and spe cations in lieu of those withheld by the c tractors, and including also an amount p by the owner to subcontractors who did plastering provided for in the original c tract, and who refused to proceed unless would guarantee the payment to them of contract price for said work.—Yeomans Parker, 105 Mich. 323.

§ 62. Judgment against sureties.

Bonds against liens, see post § 67.

¶ 303. Where the owner of property released mechanics' liens by filing a bond, sureties may be made parties defendant an action in equity to foreclose the li and a judgment fixing the liability of sureties on the bond may be rendered in s action.—Grace Harbor Lumber Co. v. C man, 190 Mich. 429.

§ 63. Dismissal and nonsuit.

See also ante ¶ 297.
Effect of discontinuance upon subsequent ceedings, see ante ¶ 189.
General law as to dismissal and nonsuit, Discontinuance.

¶ 304. A bill to enforce a material-m lien is properly dismissed where the evid shows that the husband made the cont for the erection of the building on the wi property without her consent and that was not a party to the contract and served with notice of the material furnis —Hall v. Erkfitz, 125 Mich. 332.

¶ 305. The court of one county ref leave to make its receiver a party to a chanic's lien suit brought in another cou The supreme court refused to interfere this ruling, having held that the court pointing the receiver had jurisdiction pass on the rights of the claimant on lien. Held, that a decree dismissing the to enforce the lien would not be distu by the supreme court, even though there jurisdiction to entertain the bill wit leave to make the receiver a party.—Pra Engineering Co. v. Detroit, F. & S. Ry., Mich. 582.

¶ 306. A suit to enforce a mechanic's in which it is evident that complainant endeavored to enforce a lien for an am much greater than he honestly believe be due him, will be dismissed.—Gri Clark, 155 Mich. 611.

¶ 307. In a suit to enforce a mechanic's lien, under a contract whereby the defendant was to pay a sum named "when the work is completed and accepted by said party of the first part," such being said defendant, the latter's motion for a nonsuit should be granted on the plaintiff's showing an abandonment of the contract by him and that the work was never accepted.—Evans v. Woodley, 173 Mich. 20.

§ 64. Fees and costs.

General law as to costs, see Costs.
Necessity of tender to carry costs, see Costs § 33.
Allowance of attorney's fees in mechanic's lien proceedings, see Comp. L. 1915, § 14807.
Provisions as to costs in mechanic's lien proceedings, see Comp. L. 1915, § 14816.

¶ 308. An allowance of an attorney fee of $50.00 to each complainant and cross-complainant in a mechanic's lien foreclosure case, under Comp. L. 1897, § 10721, How. 2nd Ed., § 13777, is not excessive.—Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429.

¶ 309. Forty dollars is a reasonable solicitor's fee for the prosecution of a mechanic's lien claim in the circuit court and upon appeal, where the amount involved is small, and a comparatively small amount of work is required of the solicitor.—Wisniewski v. Nawrocki, 153 Mich. 523.

¶ 310. In proceedings to enforce a mechanic's lien, complainant may be allowed actual disbursements and reasonable solicitors' fees.—Wisniewski v. Nawrocki, 153 Mich. 523.

E. EXECUTION SALE AND DISTRIBUTION OF PROCEEDS.

§ 65. In general.

¶ 311. Complainant in a case to foreclose a lien may be allowed an execution to collect a money decree.—Scott v. Keeth, 152 Mich. 547.

§ 66. Sale of property and right or title acquired thereunder.

General law of execution and other involuntary sales wherein sales under lien decrees do not differ from other sales, see Executions; Judicial Sales.
Provisions as to sale of buildings, machinery, structures or improvements, see Comp. L. 1915, § 14809.
Provisions as to sale of the premises, see Comp. L. 1915, § 14810 et seq.

¶ 312. Notice of a sale for the enforcement of a mechanic's lien must be posted and published as in cases of execution sales of real estate, except that twelve days must intervene between the completion of the act of notification and the time of sale.—Wagar v. Briscoe, 38 Mich. 587.

¶ 313. A mechanic's lien enforced against a simple equity must be confined to that, and a sale of the equitable interest must be subject to the rights of the legal owner.—Wagar v. Briscoe, 38 Mich. 587.

¶ 314. The Mechanics' Lien Law, § 9, subd. 4 (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), authorizes the court to order and direct the separate sale of a building upon land, in its discretion, where the lien has attached subsequent to the attaching or execution of a prior title, and where a contractor's lien has attached to a building erected with the knowledge and consent of a married woman, which lien does not attach to her interest in the land, because of homestead exemption rights, the court will permit the contractor to remove the building and dispose of it to satisfy his lien.—Jossman v. Rice, 121 Mich. 270.

¶ 315. If, when the lien attached, the person causing the building to be erected had no title to the premises on which it stood, but a mere right, resting in contract, to a conveyance on the performance of a condition precedent, and that right was afterwards lost by his failure to perform the condition, subsequent proceedings to enforce the lien would convey no right or title to the purchaser.—Scales v. Griffin, 2 D. 54.

¶ 316. A title secured under the mechanic's lien law is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance or enforcement of the lien has been duly taken.—Wagar v. Briscoe, 38 Mich. 587.

IX. BONDS OR INDEMNITY AGAINST LIENS.

§ 67. In general.

Necessity of filing statement with register of deeds when bond is given, see ante § 21.
Amendments to bring in sureties on the bond, see ante § 45.
Judgment against sureties on bond, see ante § 62.
Contractors' bonds in general, see Building Contracts, VIII.
General law of indemnity contracts, see Indemnity.
Bonds on public contracts, see Public Contracts, VII.
Provisions as to giving of bond or security, see Comp. L. 1915, § 14802.

X. LIENS FOR PUBLIC WORK.

§ 68. In general.

Bonds on public work contracts for protection of laborers, subcontractors and material-men, see Public Contracts, VII.

¶ 317. Builders' liens cannot attach to public buildings unless permitted by statute.—Knapp v. Swaney, 56 Mich. 345.

¶ 318. A lien on a public building is not created by a statute requiring an indemnifying bond to be furnished by the contractor.—Ford v. State Board of Education, 166 Mich. 658.

MEDIATION COURT.

Cross-References.

Mediation Court—
Arbitration of labor disputes, see Master and Servant § 32.
Power to grant rehearing, see Courts ¶ 223.

MEDICINE AND SURGERY.

TREATS of the practice of medicine and surgery and other modes of healing sickness and wounds for a compensation or as an occupation, and of the duties and liabilities of practitioners and their employment and compensation. It excludes privileged communications to physicans (see Witnesses, V, B), physicians as expert witnesses (see Evidence, VI; Indictment, VIII, B), and physicians as members of health departments and their duties, powers, and functions as such (see Health).

Analysis.

§ 1. In general; control and regulation.
§ 2. Practice of medicine and what constitutes.
§ 3. Dentistry.
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§ 23. Duty to provide treatment for injured person.

Associations for medical study, see Associations.
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Utterances to physicians as res gestæ, see Evidence, VII, D.
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Medical books as evidence, see Evidence § 511; Indictment § 297.
Allowable comment in argument on medical testimony, see Argument of Counsel.
Instructions as to compensation, see also Contracts § 359.
Libel or slander of physician in his professional capacity, see Libel and Slander, II, C.

§ 1. In general; control and regulation.

Chiropractor as engaged in the "practice of medicine" within the registration laws, see post ¶ 7.
Right of physician or surgeon to engage in the practice of dentistry without license, see post § 3.
Boards of registration and supervising officers, see post § 7.

Police power to regulate and admit to practice, see Constitutional Law § 102.
Unlawful practice or malpractice as crime, see Crimes § 108; Indictment §§ 43u, 324m, 455m.
Indictment for unlawful practice, see Indictment § 43u.
General provisions regulating the practice of medicine, see Comp. L. 1915, § 6724 et seq.
Provisions as to registration and licensing of chiropractors, see Comp. L. 1915, § 6726.
Registration and licensing of chiropodists, see Comp. L. 1915, §§ 6804-6811, as amended by Pub. Acts 1917, No. 230.
Right of chiropractors to use title of doctor or professor, see Comp. L. 1915, § 6726.
Use of title of doctor by optometrists, see Comp. L. 1915, § 6802.
Provisions relative to the incorporation of medical societies, see Comp. L. 1915, §§ 10149-10156.
Examination, licensing and registration of optometrists, see Comp. L. 1915, §§ 6795-6808.

¶ 1. The qualification of those seeking for gain to exercise their claimed special skill and knowledge of the healing art may be prescribed by law.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

¶ 2. Persons claiming to possess special skill or knowledge in the healing art may be required to obtain from the state a license before engaging in the practice thereof.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

¶ 3. No constitutional right of a person is infringed by Act No. 237, Pub. Acts 1899, §§ 5108-5118, How. St., 2nd Ed., regulating the practice of medicine and surgery.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

§ 2. Practice of medicine and what constitutes.
Evidence as to competency to practice medicine, see also post § 15.
Using title of doctor as evidence of practicing medicine, see Comp. L. 1915, § 6732.
Practice of optometry defined, see Comp. L. 1915, § 6801.
Osteopathy as practice of medicine, see Comp. L. 1915, § 6746.

¶ 4. A duly qualified dentist in treating a patient, under the direction of duly qualified physicians, for an incurable cancer of the mouth, held not to be practicing medicine within the meaning of Pub. Acts 1899, No. 237, How. 2nd Ed., § 5108 et seq., nor of Pub. Acts 1913, No. 368.—In re Carpenter's Estate, 196 Mich. 561; Avery v. Woodruff, Id.

¶ 5. That one has held himself out as a medical practitioner may be shown by evidence that he exhibited a sign as "Dr. ——, Magnetic Healer," that he was called to visit sick persons and treated them, that he made a certificate of death and swore to a medical practitioner's statement, and by such certificate and statement and a report by him executed of infectious diseases.—People v. Phippin, 70 Mich. 6.

¶ 6. Pub. Acts 1903, No. 191, providing that on and after passage all men and women "who wish to begin the practice of medicine" shall make application for registration and certificate, includes one who was at the time practicing unlawfully in view of the previous legislation which required all practitioners to be registered and certificated.—Hooper v. Batdorff, 141 Mich. 353.

¶ 7. A chiropractor who treats human ailments by manipulation of the spine and muscles of the back is engaged in the "practice of medicine" within the meaning of Act No. 237, Pub. Acts 1899, §§ 5108-5118, How. St., 2nd Ed., pertaining to the examination, regulation, licensing and registration of physicians and surgeons.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

§ 3. Dentistry.
Exercise of dentistry as practice of medicine, see ante § 2.
Examination, regulation, licensing and registration of dentists, see Comp. L. 1915, §§ 6748-6759.

¶ 8. A practicing physician and surgeon who has not been licensed under Pub. Acts 1907, No. 338, as amended by Pub. Acts 1913, No. 183, relating to the practice of dentistry, may not engage in the practice of dentistry nor advertise that he does so practice.—People v. Blair, 192 Mich. 183.

¶ 9. The fact that the Medical Act, Pub. Acts 1913, No. 368, was passed subsequent to, but at, the same session of the legislature as, the amendment to the Dental Act, Pub. Acts 1913, No. 183, does not authorize the construction of the Dental Act as being amended by the Medical Act, and physicians and surgeons have no authority to practice dentistry except as allowed by the Dental Act.—People v. Blair, 192 Mich. 183.

¶ 10. Where a duly qualified dentist administered under the direction of duly qualified physicians treatment to a patient for an incurable cancer of the mouth, using cocaine, morphine and other drugs in such treatment, in which administrations some skill was required, held that recovery for such services was allowable either as services of a nurse or as services of a duly qualified dentist under Pub. Acts 1913, No. 183, § 7, providing that any person shall be said to be practicing dentistry within the meaning of that act who shall treat diseases or lesions of the human teeth or jaws.—In re Carpenter's Estate, 196 Mich. 561; Avery v. Woodruff, Id.

§ 4. Osteopathy.

Provisions as to licensing and registration of osteopaths, see Comp. L. 1915, §§ 6740-6746.

¶ 11. Under Pub. Acts 1903, Act No. 162, § 2, providing for the issuance of a certificate as an osteopath to any person engaged in practice of osteopathy in this state at the time of the passage of the act holding a diploma from a regular college of osteopathy, the words "at the time of the passage of the act" meant when the act took effect.—Mills v. State Board of Osteopathic Registration and Examination, 135 Mich. 525.

§ 5. Drugs and druggists.

Liabilities of persons compounding and selling drugs, see post § 13.

Vested rights respecting vending of medicines, see Constitutional Law § 241.

Sales of liquor by druggists, see Intoxicating Liquors.

Alcoholic or medicinal nature of compound as jury question, see Intoxicating Liquors ¶ 472.

Regulation, control, examination and licensing of pharmacists, see Comp. L. 1915, §§ 6760-6794.

¶ 12. Claimant ran a store for a legatee, and among other sundries sold drugs, medicines, and poisons. The business was light and sales few. Held, he was required, by Act No. 134, Pub. Acts 1885, as amended by Act No. 332, Pub. Acts 1905, to be a registered pharmacist.—In re Reidy's Estate, 164 Mich. 167; Shattuck v. Watson, Id.

§ 6. Veterinary surgeons and physicians.

Mandamus to compel registration of veterinary, see post § 8.

Examination and licensing of veterinaries, see Comp. L. 1915, §§ 6813-6827.

¶ 13. Relator filed his application and letters for a veterinary certificate within the time required by Act No. 244, Pub. Acts 1907, but failed to state certain material facts. At the request of the board, relator supplied this defect after the expiration of the allotted time. Held, the application was seasonably made.—Jennings v. State Veterinary Board, 156 Mich. 417.

¶ 14. Act No. 244, Pub. Acts 1907, requiring the registration with the state veterinary board of all persons practicing veterinary medicine or surgery, provided that any one wishing to register as an existing practitioner must file with the board his affidavit, before January 1, 1908. Held, the provision as to date was mandatory, and not directory, being a reasonable time fixed by law.—Kerbs v. State Veterinary Board, 154 Mich. 500.

¶ 15. Section 4, Act No. 244, Pub. Acts 1907, requires an applicant for admission to practice veterinary medicine and su to file an affidavit that he has continu practiced the same in their various bra for five years, and to present letters o ommendation from ten reputable stock ers who have employed him, showing to be qualified. Held, that where an cant's affidavit omitted the words "in various branches," and his letters of r mendation did not state the dates or acter of the services rendered, his ap tion was properly denied.—Dusaw v. Veterinary Board, 157 Mich. 246.

¶ 16. Under Pub. Acts 1899, No. 191, and 3, requiring the state veterinary to issue certificates to graduates of re veterinary colleges, the board has no d tion to determine the standing of a v nary school organized under Comp. L. § 8143 which provides that every di granted by such college shall entitle possessor to all immunities allowed by ute or usage to any such institution.— v. State Veterinary Board, 138 Mich. 42

¶ 17. One holding himself out as a inary surgeon undertakes that he poss ordinary professional skill, and therefo an action for services rendered in suc pacity, it devolves upon him to prov qualification, at least so long as his to practice is not regulated by stat Conkey v. Carpenter, 106 Mich. 1.

¶ 18. In an action for professional inary services, where there are no stat regulations, the burden resting upon pla of establishing his qualifications to pra may be discharged by showing his gr tion from some reputable college or s whereby a presumption of competen created, or by proving his study and rience. There is a like presumption of fication where one has been admitte practice under the laws of the state; whether such a statute existing plaintiff be presumed to have been authorize practice thereunder or must prove the quære.—Conkey v. Carpenter, 106 Mich.

§ 7. Boards of registration and super officers.

Who are practitioners of medicine w registration laws, see ante § 2.

Necessity that person selling drugs registered pharmacist, see ante ¶ 1

Registration of veterinaries, see ante § 6

Proceedings against boards, see post §

Nature of proceeding on application for istration, see Actions ¶ 36a.

Police power to regulate and admit to tice, see Constitutional Law § 102

Powers of board of registration as encr ing on judiciary, see Constitutional § 35, ¶ 181.

Invalidity of appointment to board of istration of nurse lacking required fications, see Officers.

Provisions as to boards of registration Comp. L. 1915, § 6724 et seq.

¶ 19. Under Act No. 319, Pub. Acts 1909, the five years' experience specified in the act as one of the qualifications for appointment on the board of registration of nurses means an experience gained as a professional nurse, and the occasional services performed by a person during intervals in her regular profession as a teacher are not to be considered as any part of the required term. —People ex rel. Attorney General v. Galbraith, 163 Mich. 47.

§ 8. Admission to practice and remedies of applicants.

Right of state to require a license to practice, see also ante § 1.
Persons required to be registered, see also ante § 2.
Issuance of certificates to osteopaths, see ante § 4.
Issuance of certificate to veterinary surgeons, see ante § 6.
Liability for malpractice, see post § 12.
Abridgment of privileges and immunities in admission to practice, see Constitutional Law § 229.

¶ 20. Proceedings of the board of registration of medicine under Pub. Acts 1899, No. 237, How. St., 2nd Ed., § 5108 et seq., relating to the granting or refusing of certificates of registration for the practice of medicine, are subject to review by the courts, although the statute in terms makes no provision for such review.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390, affirming 127 Mich. 87.

¶ 21. Mandamus will not lie to compel the state board of registration in medicine to register an applicant under Pub. Acts 1899, No. 237, providing for the issuance of a certificate upon presentation of proof of prior "legal registration" under Pub. Acts 1883, No. 167, as amended in 1887; where the affidavit, which applicant filed pursuant to the latter act, showed on its face that he was not a graduate of a medical college within the meaning of the latter act, it appearing that he attended at a medical college in Chicago for one day during examination and graduated therein.—Metcalfe v. Michigan State Board of Registration in Medicine, 123 Mich. 661.

¶ 22. Relator took in fact only a two years' course in a veterinary college. Act No. 244, Pub. Acts 1907, was passed meanwhile, requiring a course of three sessions of six months each before the veterinary board should register an applicant. The relator's college adopted the three-sessions course and issued him a diploma. Held, that mandamus to compel the board to register him should be denied relator, although his two years' course was taken with studies equivalent to the three-sessions course.—Folsom v. State Veterinary Board, 158 Mich. 277.

§ 9. Duties and liabilities of practitioners.

Actions for misconduct, negligence or malpractice, see post § 14.
Instructions as to damages recoverable, see post § 17.
General law of negligence, see Negligence.
Personal nature of performance required from physician, see also Contracts § 220, ¶ 907.

¶ 23. Where a physician takes an unmarried layman with him to attend a case of confinement, and no real necessity exists for the latter's assistance, both are liable in damages; and it makes no difference that the patient or huband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.—De May v. Roberts, 46 Mich. 160.

¶ 24. If a family doctor or railway surgeon on leaving town recommends, in case of need, some other physician, who is not, however, in any sense in his employment, it does not make him liable for injuries resulting from the latter's want of skill in case he should be employed.—Hitchcock v. Burgett, 38 Mich. 501.

Liability of physician for failure to treat patient in accordance with agreement, see note, 11 N. C. C. A. 531-540.

§ 10. ——Degree of skill or care required.

Liability for malpractice, see post § 12.
Care required in compounding and selling drugs, see also post § 13.
Evidence as to care and negligence, see post § 15.
Evidence as to care and skill in actions to recover compensation, see post § 21.
Jury questions as to care and skill, see post §§ 16, 22.
Instructions as to care and skill required, see post § 17.

¶ 25. All that the law demands from a physician is that he shall bring and apply to a case that degree of skill, care, knowledge and attention possessed and exercised by other physicians under similar circumstances.—Zoterell v. Repp, 187 Mich. 319.

¶ 26. In general, a physician's undertaking is that he will exercise ordinary skill. —Stone v. Jerome, How. N. P. 260.

¶ 27. If one knowingly employs one who is not a regular physician the latter is only required to exercise his best skill.—Stone v. Jerome, How. N. P. 260.

¶ 28. A patient who employs a physician is entitled to a thorough and careful examination, such as the condition of the patient and circumstances will permit, with such diligence and methods of diagnosis for discovering the nature of the ailment as are usually practiced by medical men of ordinary learning, judgment and skill in

similar localities.—Rogers v. Kee, 171 Mich. 551.

¶ 29. A surgeon who, knowing the facts and circumstances of the case, after weighing them, decides on a course of action according to his professional judgment, is not liable for its failure; otherwise, however, if he fails to ascertain the circumstances or does not possess the skill which he claims. —Luka v. Lowrie, 171 Mich. 122.

¶ 30. It is the duty of a physician taking charge of a case where there is a broken limb to inform and instruct the patient as to his conduct and what caution should be observed in moving or using the limb while it is being treated.—Rogers v. Kee, 171 Mich. 551.

¶ 31. The implied contract between a physician and his patient in treating a broken or diseased limb is not to restore it to its natural condition, but giving due consideration to the state of the art at the time, to use that degree of diligence and skill which is ordinarily possessed by the average member of the profession in similar localities.—Miller v. Toles, 183 Mich. 252.

§ 11. ——Emergency cases; consent to operation.

Jury questions as to negligence in operating without consent, see post § 16.

¶ 32. A surgeon is not liable for an error in judgment in amputating a crushed foot when instant action of some sort is imperative and his determination must be based on the physical character of the wound and the general condition of the patient, and his apparent ability to resist shock.—Luka v. Lowrie, 171 Mich. 122.

¶ 33. A surgeon is not negligent in operating on an infant if in the opinion of four surgeons an emergency exists and a delay might prove fatal.—Luka v. Lowrie, 171 Mich. 122.

¶ 34. In an action against a physician for malpractice it appeared that plaintiff's decedent having received a gunshot wound in the calf of the leg, defendant took charge of the case. He failed to make an examination sufficient to disclose that two arteries were severed. Death resulted from arterial hemmorhage. Held, that the case did not come within the rule as to "emergency cases."—Dailey v. Shaffer, 178 Mich. 574.

¶ 35. Consent of parents to an operation on a minor is not necessary when immediate operation is required under an emergency and the obtaining of consent is impracticable.—Luka v. Lowrie, 171 Mich. 122.

¶ 36. A physician is justified in relying on the statement of the house surgeon in a hospital that an injured minor's parents were not present, and in operating i emergency without their consent.—Lul Lowrie, 171 Mich. 122.

Performance of operation without conse patient, see note, 2 N. C. C. A. 38

§ 12. ——Malpractice.

Care and skill required, see also ante § Actions for malpractice, see post § 14. Evidence to prove or disprove malpra see post § 15. Right to show malpractice in action compensation, see post § 20. Excessiveness of damages for malpract treating fracture, see Damages ¶ Administration of anæsthetic as wro act making death actionable, see by Wrongful Act § 6.

¶ 37. One who is not possessed o requisite qualifications of a physician surgeon cannot be exempted from lia for malpractice on the ground that his take was caused by an error in judg —Farrell v. Haze, 157 Mich. 374.

¶ 38. Where plaintiff's attending cian engaged a skilled surgeon and as him in matters of detail in performi operation on plaintiff, he was not j liable with the surgeon for neglect move a sponge from the wound.—Bro Bennett, 157 Mich. 654.

¶ 39. In an action against a phy for damages for malpractice, the cou considering the question of whether th evidence in the case tending to show a ulent concealment by defendant of the of action, need not confine itself to the made by plaintiff, but may consider a sions made by defendant.—Groendal v. rate, 171 Mich. 92.

¶ 40. In an action for malpractice want of the proper care or skill whi minishes the chances of the plaintiff covery, prolongs his illness, increase suffering, or in short makes his con worse than it would have been if due and care had been used, would in a sense constitute injury.—Rogers v. Ke Mich. 551.

¶ 41. In an action for malpractice i lecting properly to diagnose a fractu the neck of the left femur, there can recovery if the result to the plaintiff actly what it would have been if d ant had seasonably discovered and pr treated the fracture, but if the condit not all that could reasonably be ex and the plaintiff suffers thereby, he recover.—Rogers v. Kee, 171 Mich. 551

¶ 42. In an action for improperly s a broken bone there may be recover pain and suffering that would have

avoided if the bone had been properly set. —Duffy v. Charters, 180 Mich. 572.

¶ 43. A physician who is called to treat a diseased joint which has not improved under the attentions of several other physicians is not guilty of malpractice in trying without success a new treatment which, although not generally used, has achieved some remarkable results, where at the time of applying such treatment the only alternative was amputation.—Miller v. Toles, 183 Mich. 252.

¶ 44. A physician who performs an operation is not answerable for a post-operative hernia which is not attributable to any negligence or want of skill on his part.—Zoterell v. Repp, 187 Mich. 319.

Liability for injury to patient by hot water bottle or by scalding, see note, 3 N. C. C. A. 153-157.

Liability of physician for injury to patient by X-ray treatment, see note, 3 N. C. C. A. 167-173.

Liability for leaving sponge or other article in body of patient after operation, see notes, 3 N. C. C. A. 176-183, 14 N. C. C. A. 668-679.

Negligence of physician in setting broken bones, see note, 16 N. C C. A. 1068-1097.

Liability for negligence in removing adenoids, see note, 11 N. C. C. A. 728-740.

Liability of dentist for malpractice, see note, 2 N. C. C. A. 400-406.

Liability of oculist for malpractice, see note, 2 N. C. C. A. 782-797.

§ 13. ——Compounding and sale of drugs.

Regulations as to drugs and druggists, see ante § 5.

¶ 45. In dispensing medicines a druggist is held to a high degree of care; but actual negligence in him or his employees is a necessary element in his liability when a mistake has occurred.—Brown v. Marshall, 47 Mich. 576.

¶ 46. If, in selling medicine, error occurs without fault on the part of the druggist or his servants, the case is one of inevitable accident, and the druggist is not liable for injurious results.—Brown v. Marshall, 47 Mich. 576.

¶ 47. In an action against a druggist for injury caused by his clerk's negligence in delivering one medicine where another is called for, it is no defense that the medical treatment was negligent; but a charge that defendant is liable without regard to negligence or legal fault is error.—Brown v. Marshall, 47 Mich. 576.

Liability of druggist for negligence in sale of drugs or in filling prescriptions, see note, 13 N. C. C. A. 63-78.

§ 14. Actions for misconduct, negligence or malpractice.

Survivability of action for malpractice, see Abatement § 16.

Right to sue for deceit in introducing unprofessional assistant into sick room on assent given by mistake, see also Fraud ¶ 654.

Actions for malpractice against persons professing to treat as physicians, and right to set up malpractice in bar of action for services, see Jud. Act, chap. XX, § 29; Comp. L. 1915, § 12765.

¶ 48. A declaration for malpractice by a surgeon in setting a broken limb may be held, on demurrer, to set forth sufficiently the facts and circumstances necessary to show a cause of action, if the negligence, omission and improper treatment by defendant are stated as facts, thus notifying him with what misconduct in his profession he is charged.—Hanselman v. Carstens, 60 Mich. 187.

¶ 49. A declaration in an action for negligence in setting a broken leg sufficiently states the duty defendant owed to plaintiff when it avers that defendant was a physician and surgeon, and as such was employed by plaintiff to set her broken leg.—Hanselman v. Carstens, 60 Mich. 187.

¶ 50. The question of the unskilfulness or negligence of a physician in performing an operation, held eliminated from a case by the express declarations at the trial of the plaintiff's counsel that the only question involved was whether the operation was performed without the consent of the plaintiff. —Zoterell v. Repp, 187 Mich. 319.

¶ 51. That there was no variance between the declaration and proof, held in an action against a physician in malpractice.—Duffy v. Charters, 180 Mich. 572.

¶ 52. The failure of the ends of a broken clavicle to properly unite may be shown in an action against a physician for malpractice, under a declaration alleging that the plaintiff suffered injury as the result of the defendant's improper treatment, and his failure to place the ends of the broken bone in apposition.—Duffy v. Charters, 180 Mich. 572.

§ 15. ——Admissibility, weight and sufficiency of evidence.

What constitutes "practice of medicine," see ante § 2.

As to concealment from patient of his right of action under the statutes, see ante ¶ 39.

Instructions upon the degree of proof required, see post § 17.

Judicial notice as to skill or ability, see Evidence ¶ 125.

Expert evidence as to proper medical practice, usage and ethics, see Evidence § 256.

Res gestæ of the treatment as evidence in malpractice suit, see also Evidence § 454.

¶ 53. In an action for damages based on defendant physician's misconduct in taking a layman with him to attend a case of confinement, plaintiff may testify that she supposed the intruder was a physician or a medical student, and may show whatever was said at the time tending to support such supposition. And a competent witness may be asked as to the custom in regard to calling assistance in cases of confinement. —De May v. Roberts, 46 Mich. 160.

¶ 54. In an action against a physician for malpractice in treating and amputating a limb, it is improper to produce and offer in evidence bones taken from the amputated limb, where various portions thereof had been removed before the amputation took place, and their condition before and at the time of amputation indicated a continuing disintegration which was active long after the defendant had ceased to treat the injury.—Farrell v. Haze, 157 Mich. 374.

¶ 55. In an action for malpractice it was held that the evidence tended to show such a total want of skill, and such a degree of carelessness, on the part of defendant, a physician (who was employed to remove a tumor from a woman's uterus), as would in law make him guilty of manslaughter.— Hyatt v. Adams, 16 Mich. 180.

¶ 56. That one has had the management of a farm owned by him, but has not personally been largely engaged in farming affairs, does not tend to show general incompetency to practice the profession of surgery. —Mayo v. Wright, 63 Mich. 32.

¶ 57. In an action against a physician for malpractice, where the inferences to be drawn from the facts proved are as consistent with skill and diligence as with unskilfulness, plaintiff must fail; but he is not required to show by a preponderance of the evidence "a state of facts from which no other rational conclusion can be drawn than that defendant was unskilful and negligent."—Pelky v. Palmer, 109 Mich. 561.

¶ 58. A surgeon is not liable for malpractice in amputating an arm where physicians testify that the operation was properly done and the only evidence of malpractice is the testimony of one physician who testified that he would have attempted to save more of the arm lower down near the wrist and possibly the thumb, but that the rest of the hand should have been amputated, and that it was a matter of individual opinion and he would not consider it negligent to amputate as was done.—Pepke v. Grace Hospital, 130 Mich. 493.

¶ 59. In an action against a surgeon for malpractice held that there was no testimony warranting the inference that the disabled arm or the crippled foot resulted from improper surgical treatment.—Neifert v. Hasley, 149 Mich. 232.

¶ 60. In an action for malpractice, plaintiff cannot recover upon proof of facts equally as consistent with due care as with negligence on the part of defendant.—Farrell v. Haze, 157 Mich. 374.

¶ 61. In an action against a physician for malpractice, defendant's want of the requisite qualifications of a physician cannot be shown by proving that he was discharged by a patient, and another physician hired, who changed the treatment.—Farrell v. Haze, 157 Mich. 374.

¶ 62. Whether the method which the plaintiff's evidence shows was adopted by a physician in setting a broken bone was proper, under the circumstances, may be shown by answers to hypothetical questions submitted to medical witnesses in an action for malpractice, although the defendant's evidence tends to show that such treatment was not applied.—Duffy v. Charters, 180 Mich. 572.

¶ 63. In an action against a physician for malpractice, matters of special knowledge strictly involving professional skill and attention, unskilfulness, negligence or failure to do what should have been done, must be shown by those learned in such matters.— Zoterell v. Repp, 187 Mich. 319.

¶ 64. A physician is not answerable for the loss of a patient's limb where there is neither lay nor expert testimony tending to show that his treatment contributed to the loss.—Miller v. Toles, 183 Mich. 252.

¶ 65. The fact that a patient does not fully recover, or that a surgical operation is not entirely successful, is not evidence of the negligence of the attending physician or surgeon.—Zoterell v. Repp, 187 Mich. 319.

¶ 66. That a woman consented to the removal of her ovaries by a physician, held established by the great weight of the evidence in an action against the latter.— Zoterell v. Repp, 187 Mich. 319.

§ 16. ——Questions of law and fact.

Determination by jury of the correctness of treatment of fractured limb, see post ¶ 95.

Jury questions in actions for compensation, see post § 22.

General law as to jury questions, see Trial, VI.

¶ 67. It was error to take from the jury the question whether defendant surgeon was negligent in operating on plaintiff's left leg instead of the right which had been prepared for the operation, where, a doubt having arisen while plaintiff was in anæsthesia, a brother went to make inquiry but before he

returned the operation was proceeded with on an unauthorized assurance by plaintiff's father.—Sullivan v. McGraw, 118 Mich. 39.

¶ 68. In a suit for malpractice there was evidence that defendant attended plaintiff several times and informed her that her child would be prematurely born; that he stated her condition was serious; that he agreed to return to attend her at 11 p. m. of the day in question; and that her child was born about 12 m. Plaintiff's counsel in his opening statement offered to show that shortly after 11 o'clock p. m. on the day in question her husband several times called defendant on the telephone, advising him of plaintiff's condition, and that the latter agreed to attend her at once; that he did not arrive until 2 o'clock a. m., and that he failed, after the birth of the child, properly to repair the lacerations of the uterus. The declaration alleged that on account of defendant's negligence her uterus was unnecessarily lacerated and subsequent to the birth of the child defendant negligently failed to discharge his duty in repairing said lacerations. Held, the trial court was in error in refusing plaintiff permission to introduce further testimony and in directing a verdict for the defendant.—Adams v. Henry, 165 Mich. 554.

¶ 69. Where the relation of physician and patient has existed for a term of years, and they are fellow countrymen, conversing together in their native tongue, and the patient is ignorant and unlearned and relies upon and believes the statement of the physician that her arm is not dislocated but only strained, the question of the diligence of the patient to discover her condition is one of fact for the jury.—Groendal v. Westrate, 171 Mich. 92.

¶ 70. In a suit against a dentist for personal injuries arising from the dislocation of plaintiff's jaw in the process of the extraction of teeth, evidence that the plaintiff upon returning shortly after the operation to the dentist for examination of the jaw for dislocation, was mistakenly informed that it was not dislocated but that the muscles of the jaw were merely contracted, is sufficient to require the submission of the question of defendant's negligence to the jury.—Donoghue v. Shaw, 170 Mich. 544.

¶ 71. In an action for malpractice in neglecting properly to diagnose a fracture of the left femur, the question as to whether or not the plaintiff was suffering from such injury at the time defendant first visited plaintiff professionally was properly left to the jury. There was abundant evidence to show defendant's negligence in failing properly to diagnose and treat the case. Held, that the testimony of physicians called as experts by both sides as to what defendant could and should have discovered and done is sufficient to raise an issue of fact as to defendant's negligence in failing properly to examine, diagnose and discover the fracture, in directing the patient to walk and move the broken limb, instead of keeping it quiet in one position, and in not informing him as to the nature of the injury.—Rogers v. Kee, 171 Mich. 551.

¶ 72. In an action for malpractice in neglecting properly to diagnose a fracture of the neck of the left femur, the testimony tended to show that when defendant was professionally called plaintiff was suffering from a fracture of the neck of the left femur. Held, that the question as to whether or not plaintiff was so suffering was properly left to the jury.—Rogers v. Kee, 171 Mich. 551.

¶ 73. Where, in an action for malpractice in neglecting to diagnose properly a fracture of the neck of the left femur, the defendant's testimony showed that he did not treat the patient in accordance with the methods used universally by physicians and practitioners, and tended to show that the recovery was as good as would ordinarily be obtained in a person of his age under skilful treatment, and the testimony of the plaintiff tended to show that such cases are not left to chance but are given skilful treatment in accordance with methods universally used, it is for the jury to decide whether or not the plaintiff has suffered injury.—Rogers v. Kee, 171 Mich. 551.

¶ 74. Where in a malpractice suit the defendant, a physician, testifies that he discovered the dislocation of plaintiff's shoulder when first called to attend her, and the testimony of witnesses for plaintiff show that defendant repeatedly told her that her arm was not dislocated, and when confronted with the statement of another physician that her shoulder was dislocated protested that it was not so, there is evidence to go to the jury tending to show that he fraudulently and purposely concealed from her the nature of her injury.—Groendal v. Westrate, 171 Mich. 92.

¶ 75. In an action against a physician for malpractice, where the evidence was conflicting as to what would have been the result had the physician made a careful examination, and whether he was negligent in not making such examination, the question of negligence was properly submitted to the jury.—Dailey v. Shaffer, 178 Mich. 574.

¶ 76. An action against a physician for removing the ovaries of a woman without her consent during an operation, held submitted to the jury under proper instructions.—Zoterell v. Repp, 187 Mich. 319.

¶ 77. In an action against a physician to recover damages for malpractice, evidence of negligence in treating a fractured arm, held sufficient to go to the jury.—Wilk v. Black, 188 Mich. 478.

§ 17. ——Instructions and requests.

Care and skill required of medical practitioners, see ante § 10.

Instructions as to care required of druggists, see also ante ¶ 47.

Instructions in actions by medical practitioners to recover compensation, see post § 22.

General law as to instructions, see Instructions.

¶ 78. A physician must exercise reasonable skill, taking into account the advancement of professional learning, but a charge that he must exercise such skill as is ordinarily exercised by educated physicians, without further defining it, is incorrect.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 79. Where a physician is sued for malpractice it is improper for plaintiff's counsel to urge to the jury defendant's general incompetency as a ground of recovery, unless such incompetency has been alleged in the declaration and evidence given tending to show it; and a refusal to charge against recovery on that ground in case there is no such allegation or evidence is error.—Mayo v. Wright, 63 Mich. 32.

¶ 80. In an action for malpractice where the declaration alleges that defendant was guilty of negligence in setting plaintiff's broken leg, and that he negligently and carelessly injured the ligaments of the knee whereby permanent lameness and deformity resulted, a charge is erroneous which treats the question at issue as one of neglect in the care of the broken leg rather than as an injury to the knee caused by defendant's alleged negligence.—Spaulding v. Bliss, 83 Mich. 311.

¶ 81. An instruction, in an action against a surgeon for malpractice, that the measure of defendant's legal duty was to exercise such care, skill, and diligence in his treatment of the plaintiff as physicians and surgeons "in the neighborhood where he resided" ordinarily exercised in like cases, while not strictly accurate, is not prejudicial to plaintiff, where it appears that defendant resided in a city where there were other physicians, presumably of average ability when compared with similar localities.—Pelky v. Palmer, 109 Mich. 561.

¶ 82. It is error to instruct the jury in a malpractice case that plaintiff cannot recover unless he shows, by a preponderance of the evidence, "a state of facts from which no other rational conclusion can be drawn than that the defendant was unskilful and negligent"; the effect being to require the jury to acquit, if they can, upon any theory, find the facts rationally consistent with skill and diligence, notwithstanding a contrary probability.—Pelky v. Palmer, 109 Mich. 561.

¶ 83. In an action against a physician for negligent treatment of plaintiff's foot following which amputation became necessary, expert witnesses declined to state that the result more probably came from the treatment than from the original injury. Held, that the court erred in refusing to instruct the jury that defendant was not liable for the loss of the foot.—Farrell v. Haze, 157 Mich. 374.

¶ 84. In an action against a physician for malpractice the court properly instructed that the damages would be such as were suffered by reason of defendant's failure to administer the proper treatment, and that in assessing such damages the fact that had decedent recovered, after proper treatment, he would have been crippled, should be taken into consideration.—Dailey v. Shaffer, 178 Mich. 574.

¶ 85. The refusal to give plaintiff's requested instruction as to exemplary damages in an action against a physician for performing an operation on the plaintiff without his consent, becomes immaterial where a verdict was correctly returned for the defendant.—Zoterell v. Repp, 187 Mich. 319.

§ 18. Contracts, compensation, and actions for compensation.

Agreements among physicians to divide fees as obnoxious to public policy, see Contracts § 70, ¶ 283.

Necessity that a promise to pay for medical services rendered another be in writing, see Frauds, Statute of, § 22.

Enjoining breach of physician's contract not to practice in stated locality, see Injunctions § 27.

Right to set up malpractice in bar of action for services, see Jud. Act, chap. XX, § 29; Comp. L. 1915, § 12765.

¶ 86. Where a doctor was employed by one who had been injured in a railroad accident to explain his injuries to the company's management, on the secret understanding that his services should be paid in proportion to the amount recovered, such bargain was held void as against public policy.—Thomas v. Caulkett, 57 Mich. 392.

§ 19. ——Authority to employ physicians.

See also post ¶ 99.

General law of agency, see Agency.

Authority to employ medical services for injured persons, see Agency § 34.

¶ 87. Employment in a laundry will not, in the absence of evidence to the contrary, be deemed hazardous so as to make applicable in case of injury to an employee in such laundry, the rule that an employer is liable in hazardous cases, for the services of a physician rendered to an employee in an emergency at the request of a foreman, having no general authority.—Holmes v. McAllister, 123 Mich. 493.

¶ 88. Even if the rule applies in this state that employers are liable in certain emer-

gencies for the acts of foremen in employing physicians to attend employees, the rule would not be extended beyond the emergency, and the employer would not be liable for the services rendered after the emergency has passed.—Holmes v. McAllister, 123 Mich. 493.

Implied authority of agent or employee to bind railroad company for medical services rendered injured passenger, see note, 1 N. C. C. A. 25-28.

Immateriality of nature of disease treated where issue is on agreement for no pay if no cure, see Contracts § 317, ¶ 1312.

§ 20. ——Pleading, issues and variance.

In actions for negligence or malpractice, see ante § 14.

General law as to variance, see Pleading, X.

¶ 89. Under an express provision of Comp. L. 1897, § 10426, malpractice of a physician may be given in evidence in bar of any action for services rendered by the physician. —Vandenberg v. Slagh, 150 Mich. 225.

¶ 90. Under proper pleadings, malpractice may be proven for the purpose of defeating a claim for services rendered by a physician or surgeon.—Vandenberg v. Slagh, 150 Mich. 225.

¶ 91. Under an agreement that a doctor was to have no pay if he effected no cure, the material question would be whether a cure was effected by plaintiff; the nature of the disease is not material either under plaintiff's or defendant's theory.—Hollywood v. Reed, 57 Mich. 234.

¶ 92. Where, in a physician's suit for services, the defense is made that by a special agreement pay was to be contingent on a cure, and that there was no cure, defendant's financial condition is irrelevant in determining whether such a bargain was made. —Hollywood v. Reed, 55 Mich. 308.

§ 21. ——Burden of proof, presumptions and evidence.

What constitutes "practice of medicine," see ante § 2.

Evidence in actions for negligence or malpractice, see ante § 15.

General law as to burden of proof, presumptions and evidence, see Evidence.

Judicial notice as to skill or ability, see Evidence ¶ 126.

Evidence of condition subsequent to time pleaded in action for compensation for services, see also Evidence § 94.

Cross-examination as to value of medical services, see Examination of Witnesses § 54.

¶ 93. The fact that a surgeon changes a course of treatment adopted by another does not in itself show that the former course of treatment was not proper at the time; nor is the patient's failure to recover perfect soundness of limb in itself evidence of malpractice, nor is the fact that he survived, although he refused to allow a particular course of treatment, evidence that such course might not have been proper under the circumstances.—Wood v. Barker, 49 Mich. 295.

¶ 94. In assumpsit for medical services rendered defended on the ground that no cure was effected and that there was to be no pay unless there was, the record of a divorce proceeding between the defendant patient and his former wife is irrelevant.— Hollywood v. Reed, 57 Mich. 234.

¶ 95. The jury cannot be allowed to determine for itself the correctness of a physician's treatment of a fractured limb; and it was held proper to refuse to permit a defendant sued for medical services to exhibit the limb to the jury long after the injury had healed.—Carstens v. Hanselman, 61 Mich. 426.

¶ 96. Evidence that a physician had practiced for eighteen years, and was a graduate of the university, is prima facie proof of the exercise of due care on the part of the person selecting him to treat an injury for which defendant is liable.—Reed v. City of Detroit, 108 Mich. 224.

¶ 97. A physician's average daily receipts do not measure the value of his services so as to exclude competent opinions as to such value.—Thomas v. Caulkett, 57 Mich. 392.

¶ 98. There is no presumption of law as to the value of a surgeon's services; a jury cannot ascertain the value without testimony from competent persons, nor can a jury reduce the compensation claimed for such services, where undisputed testimony shows it to have been appropriate, on the ground, unsupported by evidence, that plaintiff's treatment was improper.—Wood v. Barker, 49 Mich. 295.

§ 22. ——Questions of law and fact, and instructions.

Jury questions in actions for negligence or malpractice, see ante § 16.

Right of jury to determine the correctness of physician's treatment of a fractured limb, see ante ¶ 95.

Instructions in actions for negligence or malpractice, see ante § 17.

General law as to jury questions, see Trial, VI.

Court and jury questions as to party to contract, see also Contracts § 337, ¶ 1428.

General law as to instructions, see Instructions.

¶ 99. A verdict against a railroad company for services of a physician chosen by an injured employee in the absence of the company's physician cannot be sustained on

evidence that after a time the chief surgeon, who had no authority to employ the physician, wrote to him asking for a history of the case and requesting that the bill for services, itemized, be sent to the writer, the charge having been made in the first instance to the injured person at a much less sum than in the bill rendered to the company.—Burke v. Chicago & W. M. R. Co., 114 Mich. 685.

¶ 100. In a suit for professional services by a physician under a bill of particulars for his individual services, a charge that recovery may also be had for the services of an assistant held erroneous.—McNair v. Parr, 177 Mich. 327.

¶ 101. In an action for the services of physicians in attending victims of a wreck on defendant's railroad, it was not error to refuse a request involving the theory that the physicians, in being called to treat any and all persons injured, were working by the day's work.—McKnight v. Detroit & M. Ry. Co., 135 Mich. 307.

¶ 102. The reasonable value of the services of a surgeon was a question for the jury in an action for such services in which plaintiff testified that his charges were reasonable and that the charges depended upon the ability of the patient to pay, and where the defendant claimed that plaintiff had stated that persons who had political jobs were made to pay for cases where doctors worked for nothing.—Crumrine v. Austin, 133 Mich. 283.

§ 23. Duty to provide treatment for injured person.

Duty of master to servant at common law or under statute, see Master and Servant, II; Workmen's Compensation Law.
Duty of parent to provide for treatment of child, see Parent and Child, II.
Duty of husband to provide treatment for wife, see Husband and Wife, § 62 et seq.
Neglect to provide treatment as crime, see Crimes, II.
Public provision for poor persons, see Poor Persons.
Health and sanitary regulations, see Health.

MEDIUM OF PAYMENT to MILEAGE BOOKS.

Cross-References.

Medium of Payment—
See Payment, I.
Meeting of Minds—
In assent to contract, see Contracts, III.
Meetings—
Of creditors of bankrupt, see Bankruptcy § 5.
Of corporations, see Corporations, IX.
Of municipalities, see Municipal Corporations, IV.
Of school districts and townships, see Schools, III; Townships, II.
Criminal disturbance of assemblages, see Crimes, II.
Melancholia—
As insanity, see Insane Persons, I; Will II.
Membership—
See generally Associations; Religiou Societies; Fraternal Associations Corporations, XXIV.
Memoranda—
As evidence, see Evidence, IV-VIII.
To refresh memory of witness, see Examination of Witnesses, I.
Within statutes of frauds, see Fraud Statute of.
Memorial Day—
See Holidays.
Memory—
Element in testamentary capacity, se Wills, II.
Refreshing memory of witness, see Examination of Witnesses, I.
Mental Capacity—
See Insane Persons; Wills, II; Gifts § 2
Admissibility of opinions as to sanity see Evidence, VI; Indictment §§ 19 216.
Mental Suffering—
As element of damages, see Damage §§ 24-27.
Element of damages for wrongful deat see Death by Wrongful Act § 33.
Mercantile Agencies and Reports—
Statements of finances as fraud, se Fraud § 23.
Statements and reports as libel or slan der, see Libel.
Best and secondary evidence of state ments, see Evidence § 110, ¶ 568.
Mercantile Corporations—
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Mercantile Customs—
Judicial notice of, see Evidence § 12.
Merchandise—
As baggage, see Carriers § 245.
Carriage of goods, see Carriers, II.
Sales and other transfers of merchan dise, see Sales; Chattel Mortgages Bailments.
Payments in goods, see Payment, I.
Merchantable Quality and Condition—
Warranty of goods sold, see Sales, VI.
Meretricious Consideration—
See Contracts § 42.
Meretricious Gifts—
See Gifts § 28.
Meretricious Relations—
As badge of undue influence, see Wills III; Gifts § 28.
Merger—
Of prior negotiations in contract, se Contracts, VIII; Evidence §§ 17 171.
Of corporations, see Corporations, XXI
Of crimes, see Crimes § 9.
Of fraud in subsequent transaction, se Fraud § 86.
Of causes and defenses in judgment, se Former Adjudication, IV; Foreig Judgments §§ 8, 13.
Of estates in land, see Real Property.

Of mortgage in fee, see Mortgages § 124 et seq.
Of municipalities, see Municipal Corporations § 10.
Railroad and street railway combinations, see Railroads, VII; Street Railways, II.
Unlawful trade combinations called "mergers," see Combinations.
Meritorious Consideration—
See Contracts, V; Specific Performance, II, III.
Meritorious Defense—
Requisite to opening of default or judgment, see Defaults, VI; Judgments, V, VI.
Merits—
Judgment or dismissal on merits, see Judgments, I, II; Discontinuance, Dismissal and Nonsuit.
See topics treating of specific equitable remedies for propriety of dismissal without prejudice or on merits.
Disposal on merits as controlling right to costs, see Costs.
Mesne Process—
See Process; Civil Arrest; Attachment; Garnishment; Injunctions; Mandamus; Ne Exeat.
Mesne Profits—
See Ejectment, VI; Dower § 57 et seq.
Accountability for, see Life Estates, II; Tenants in Common, II.
Rights between vendor and purchaser, see Vendors and Purchasers, VIII, X.
Element of damages, see Damages.
Messages—
By telegraph or telephone, see Telegraphs and Telephones.
Meter Service and Deposits—
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Metes and Bounds—
See Boundaries.
Michigan Central Railroad—
See generally Railroads; Corporations; Taxes.
Liability as carrier or warehouseman, see Carriers.
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Middlemen—
See Agency; Brokers and Factors.
Midnight—
Point for reckoning time, see Time.
Mileage—
Allowances and reimbursement, see Costs § 62 et seq.; Sheriffs, III; Witnesses, VII; Jury, VII.
Mileage Books—
See Carriers, IV, B; Public Service.

MILITARY AND NAVAL AFFAIRS.

TREATS of the military and naval establishments and forces of the state and nation and of the status of persons therein.

Analysis.

§ 1. In general.
§ 2. Officers and commissions.
§ 3. Soldiers' homes.

§ 1. In general.

Officers and commissions, see post § 2.
Soldiers' homes, see post § 3.
Domicile of soldiers and inmates of soldiers' homes, see Domicile § 6.
Military enlistment bounties, see Bounties.
Duty of county auditing board to allow claim for expenses of militia called to aid of local authorities, see Counties § 45.
Constitutional provisions for militia, see Const. art. XV, §§ 1-3.
Statutes relating to military and naval affairs, see Comp. L. 1915, chaps. 40-42, and Pub. Acts 1917, Nos. 53, 69, 149, which amend the Compiled Laws.
Statutory regulation of privileges of members of United States Army and Navy, see Comp. L. 1915, §§ 8418, 8419.

¶ 1. Laws 1877, Act No. 40, authorizing the incorporation of military companies does not permit a minority of a company to be incorporated; and it is defective in its provisions as to the necessary proceedings to effect incorporation.—Hochgraef v. Milward, 38 Mich. 469.

¶ 2. The Statute Laws 1881, Act No. 150 (How. St. § 978), providing for the enrolment of not more than one hundred and fifty contributing members in each company and battery of state troops, and exempting such members from jury duty, is valid.—Hall v. Burlingame, 88 Mich. 438.

¶ 3. Where the name of a man liable to military duty was fully given and properly spelled upon the enrolment list for a draft, held, that the dropping out of the last letter of his name from the ballot placed in the box did not invalidate the drafting of his name.—In re Spangler, 11 Mich. 298.

Liability of carrier of goods touching carriage or delivery of accepted freights under conditions imposed by military law, see note, 14 N. C. C. A. 917-931.

Accidents within "war zone" and in munitions works, together with questions pertaining to employees in military service, as affected by compensation acts, see note, 13 N. C. C. A. 1011-1027.

§ 2. Officers and commissions.

¶ 4. Since Pub. Acts 1895, No. 63, provides that field and line officers of the Michigan National Guard, except when elected to fill a vacancy, shall be commissioned for a term of three years from the date of their election and until their successors are commissioned, no vacancy exists upon the expiration of a regular term, but the incumbent holds over pending the issue of a commission to his successor.—Baxter v. Latimer, 116 Mich. 356.

¶ 5. An election for the full or regular term of field officers of a regiment of the National Guard is not an election to fill a "vacancy" within the meaning of Pub. Acts 1893, No. 198, which provides that "all vacancies in the field officers of a regiment shall be filled by a majority vote of the field and company officers of said regiment."—Baxter v. Latimer, 116 Mich. 356.

¶ 6. As How. St. § 901, provides that regimental field officers may be elected by the company officers, authority not being conferred upon the field officers to participate in a general election, an election for a field officer for a full term in which election field officers participated whose votes were necessary to make a majority for the person declared elected, was void, and a new election was properly ordered by the commander-in-chief.—Baxter v. Latimer, 116 Mich. 356.

Civil liability of military officers for negligent or wrongful acts, see note, 14 N. C. C. A. 1022-1070.

§ 3. Soldiers' homes.

Voting residence of inmates of soldiers' homes, see Elections § 14.

¶ 7. Since sec. 11 of Act No. 152, Pub. Acts 1885 and amendments, How. Ann. St., 2nd Ed., sec. 3723, establishing the Michigan Soldiers' Home, expressly declares who may become inmates thereof, the Board of Managers is without authority to admit to the Home persons not within such enumeration. —Mason v. Board of Managers of Michigan Soldiers' Home, 181 Mich. 347.

¶ 8. Pension money of inmates of the Michigan Soldiers' Home can be withheld under Act No. 102, Pub. Acts 1911, How. Ann. St., 2nd Ed., sec. 3759, by the Board of Managers of the Home for purposes of discipline only, in trust, to be paid to the rightful owner at his discharge from the Home, or to his heirs or representatives on his death. —Mason v. Board of Managers of Michi Soldiers' Home, 181 Mich. 347.

¶ 9. Act No. 313 of Pub. Acts 1905, H Ann. St., 2nd Ed., sec. 3767, though it mits money accumulated in the "post fu and "posthumous fund" of the Michigan diers' Home to be used for furnishing post hospital and for certain other purpo beneficial to inmates of the Home, does permit the Board of Managers of the Hc to require inmates to turn over to it for manent retention and use of the Hom portion of their pension money, where mo so received was not credited to such fu but was separately kept and accounted although subsequently transferred to s funds.—Mason v. Board of Managers Michigan Soldiers' Home, 181 Mich. 347.

¶ 10. A rule requiring inmates of Michigan Soldiers' Home to deposit t pension money in excess of a certain s with the Board of Managers, to be held s ject to disposal of the board, in order to serve order, enforce discipline or preserve health of the inmates, is valid as a necess police regulation, and authorized by sec of Act No. 152, Pub. Acts 1885, How. A St., 2nd Ed., sec. 3723, empowering the bo to make rules and regulations for the forcement of discipline and preserving der and the health of inmates of the Ho —Mason v. Board of Managers of Michi Soldiers' Home, 181 Mich. 347.

¶ 11. A rule of the Board of Manager the Michigan Soldiers' Home requiring designated portion of the pension money the inmates of the Home to be turned o to the board for permanent retention, ultimately to be turned into the gene state fund, is void, not being within sec of Act No. 152, Pub. Acts 1885, How. A St., 2nd Ed., sec. 3723, empowering the Bo of Managers to enact rules and regulati for the enforcement of discipline, and serving order and the health of inmate Mason v. Board of Managers of Michi Soldiers' Home, 181 Mich. 347.

¶ 12. Acquiescence of inmates of the M igan Soldiers' Home in the unlawful re tion of a portion of their pension money the Board of Managers, for permanent propriation for the use of the state, d not create a contract binding the inma to such disposition of their money, w their consent was obtained under a mista belief that the board was acting accord to law.—Mason v. Board of Managers Michigan Soldiers' Home, 181 Mich. 347.

¶ 13. The Board of Managers of the M igan Soldiers' Home has power, under H St. § 1984h, to adopt a rule requiring mates to turn over to the commandant, to held subject to the board's disposal, t pension money in excess of $5 per mon and such a rule does not infringe the Act

Congress of Feb. 28, 1883, avoiding any assignment or transfer of any right, claim or interest in a pension.—Loser v. Board of Managers of Soldiers' Home, 92 Mich. 633.

¶ 14. The Board of Managers of the Soldiers' Home has not the power of determining what relatives are dependent upon the pensioner for support, and to direct how much of his pension money shall be sent to such relatives; and a rule so providing is pro tanto void, though valid in so far as it requires part of pension money to be turned over to the board.—Loser v. Board of Managers of Soldiers' Home, 92 Mich. 633.

MILK.

Cross-Reference.

Milk—
Regulations of sale and standard of purity, see Food; Adulteration.

MILLS AND MILLING.

TREATS of flour and grist mills for general public service and of milldams and works accessory thereto, excluding water power rights and easements (see Waters).

Analysis.

§ 1. In general; public millers.
§ 2. Raceways, dams and works, and bridges.

§ 1. In general; public millers.

Malicious injury to mills and dams, see Crimes § 105.
Statutes for the support and regulation of mills, see Comp. L. 1915, chap. 126.

¶ 1. The statute relating to the duties of millers and mill-owners (Comp. L. 1857, § 1333 et seq., How. St. §§ 1618-1621) is meant to apply to such mills only as are in the habit of grinding for toll.—Merrill v. Cahill, 8 Mich. 55.

¶ 2. Under the statute, millers who hold themselves out to the community as millers grinding for the public generally are bound to a similar impartiality to that required of common carriers, innkeepers, and those following such public avocations. And it is as clearly their duty to receive grain when the mill is running as to grind it when received.—Merrill v. Cahill, 8 Mich. 55.

¶ 3. Where two or more persons own and run such a mill, they are all liable for a refusal to receive grain brought to be ground, whether the refusal comes from one or all such owners, or from the agent in charge.—Merrill v. Cahill, 8 Mich. 55.

§ 2. Raceways, dams and works, and bridges.

Damming navigable waters, see Navigable Waters.
Unlawful restraint, diversion or acceleration of waters of stream, see Waters, IV, V.
Relative rights of water power owners and remedies by injunction or otherwise, see Waters, IV, B.
Prescriptive easements for flowage, dams and power rights, see Waters, IV, B.
Dams as nuisances, see Nuisances.
Malicious injury to dams, see Crimes, II: Indictment.
Sufficiency of petition for condemnation of lands for dam for mill purposes, see Eminent Domain ¶¶ 195, 228-229.
Rights of dam owner to prevent fishing in dam, see also Easements ¶ 111.
Duty to bridge race, see also Bridges § 2.
Manner of constructing bridge over dam so as to protect water power, see also Bridges § 3.
Alteration of highway from bridge to solid embankment injurious to intersected milldam, see Highways ¶ 405.
Liability for maintenance of bridge over mill race, used as part of highway, see also Bridges § 5.
Liability of mill owner for injury on bridge over race, see Bridges ¶ 12.
Thread or border as line called for by boundary on milldam, see Boundaries § 18, ¶¶ 103, 104.
Injunction to prevent removal of mill fixtures, see Injunction § 75.
Duty to provide bridges for highways over raceways, see Comp. L. 1915, § 4428 et seq.

¶ 4. Comp. L. 1871, §§ 1309, 1310, How. St. §§ 1453, 1454, in requiring mill races to be bridged, applies also to races cut before it was enacted; and this does not give it a retrospective operation, for it is the duty of mill-owners to bridge their races where highways cross them, independent of any statute; the statute imposes no new duty upon them, but only gives an efficient remedy for neglect of a duty existing before; it recognizes an existing duty and provides how its future performance may be compelled.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 5. The exception from the operation of How. St. § 1453—which makes it the duty of all owners of mills or other waterworks, where any race or races appertaining to the

same may cross a highway, to keep a good and sufficient bridge or bridges over the same —of mills erected and races dug previous to the formation of the highway, has reference to races existing when the highway was laid out.—Commissioner of Highways of Richmond Township v. Martin, 88 Mich. 115.

¶ 6. Where a dam and race were built at the same time, and the earth taken from the race was used in the construction of the dam, which was intended to be and was thereafter used as a highway in place of a portion of an old road destroyed by its construction, and the water was not let into the race until after a bridge had been built over the race, which with the dam was used instead of the old highway and bridge, such race comes within How. St. § 1453, cited, and the owners of the mill used in connection with said race are liable for its maintenance.—Commissioner of Highways of Richmond Township v. Martin, 88 Mich. 115.

¶ 7. Under Comp. L. 1871, §§ 1309, 1310, How. St. §§ 1453-4, requiring mill-owners to construct on the highway over their mill races "a good and sufficient bridge or bridges not less than fourteen feet in width," and empowering the commissioners of highways, in case of their refusal or neglect, to build at their expense such bridge or bridges, the construction by the mill-owners of a suitable bridge fourteen feet in width would be a complete performance of their legal duty, and the commissioners are only authorized to do at the expense of the mill-owners what is requisite to discharge their unperformed duty; and cannot charge them with the expense of building a bridge thirty feet wide.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 8. If, when a mill race was dug, there was no traveled road within the limits of the highway crossing where the bridge was built over the race, the mill-owners cannot, under Comp. L. 1871, §§ 1309, 1310, How. St. §§ 1453-4, be held for the cost of building it.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 9. Where a road has remained without alteration at the point where crossed by a mill race, questions of its abandonment and re-establishment, and of variations in its lines at other points, would not preclude the right of the public to insist upon the public way at this point, or affect in any manner the mill-owner's duty to keep the race bridged for public use.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 10. The duty of mill-owners to build and maintain a bridge over a mill race is a common-law duty.—McRae v. Township of Hart, 179 Mich. 325.

¶ 11. Public Acts 1909, No. 283, chap. VIII, §§ 14-16, relative to the construction and repairing of bridges over mill races is an affirmance of the common-law duty of the mill-owner to make a bridge and affords a means of benefit to the public.—McRae v. Township of Hart, 179 Mich. 325.

MINES AND MINERALS.

TREATS of mining and mineral rights and contracts as distinguished from real property rights generally, and of operation of mines and of mining corporations and companies.

Analysis.

I. In general; mining rights and claims.

§ 1. In general; ownership and rights.
§ 2. Easements incident to mining.

II. Conveyances, leases and working contracts, and royalties.

§ 3. Conveyances and grants.
§ 4. Grant or reservation of surface-working rights.
§ 5. Sales and executory agreements for rights.
§ 6. Leases and working agreements.
§ 7. ——Forfeiture, abandonment and re-entry.
§ 8. Rent and royalties.
§ 9. Actions and procedure to enforce rights.

III. Operation of mines and regulations thereof.

§ 10. In general; public control and regulations.
§ 11. Liabilities incident to mine workings.

§ 12. Injury to lateral and subjacent support.
§ 13. Duty respecting pits and openings in surface.
§ 14. Actions and procedure.

IV. Mining corporations and companies.

§ 15. In general.

I. IN GENERAL; MINING RIGHTS AND CLAIMS.

§ 1. In general; ownership and rights.

Conveyances, leases, and contracts for working mines, see post II.
Rights and liabilities arising from operation of mines, see post III.
Sufficiency of bill for taking top soil under gravel bed sale, see post ¶ 43.
Liability of owners for personal injuries, see post § 11.
Taxation of mining property, see Taxes.
Working mines and taking minerals as waste, see also Waste.
Adverse possession of mineral lands, see Adverse Possession, especially §§ 22, 23.
Rights of execution purchaser during redemption period with respect to mines, see Executions §§ 73, 74.
Mining machinery as fixtures, see Fixtures §§ 9, 12.
Measure of damages for conversion of ore in place by mining it out, see Damages § 117.
Conversion of minerals by extraction from soil, see Conversion § 6.
Allotment of mineral lands to widow for dower, see Dower § 52.
Interstate taxation of exported ore, see Commerce § 7.
Estoppel by silence and nonclaim to assert lease rights, see also Estoppel ¶ 129.
Qualifications of mining experts, see Evidence § 283.
Declaration of sovereign ownership of mines and minerals in lands not patented in fee or leased from the state or the nation, see Comp. L. 1915, § 797 et seq.

¶ 1. The ownership of undiscovered minerals constitutes an estate in the land.—Hansen v. Hall, 167 Mich. 7.

¶ 2. A reservation of mineral rights in a contract relating to a sale of land without any qualification, includes gas and oil.—Weaver v. Richards, 156 Mich. 320.

¶ 3. A lessee of lands for years can work an open mine upon the premises unless restrained by the terms of his lease; but he cannot open a new mine unless the privilege of doing so is expressly granted.—Harlow v. Lake Superior Iron Co., 36 Mich. 105.

§ 2. Easements incident to mining.

Easements arising from grant of mining rights, see post § 3.
General law of easements, see Easements.

¶ 4. Where minerals are reserved from a deed in fee simple, easements to do such acts affecting the surface as are reasonably necessary to remove them may be granted or reserved so as to attach to the mining estate.—Erickson v. Michigan Land & Iron Co., 50 Mich. 604.

¶ 5. The right to use shafts or other mining excavations or erections made and used solely for mining purposes is in the nature of an easement which is appurtenant to the mine.—Erickson v. Michigan Land & Iron Co., 50 Mich. 604.

¶ 6. A declaration for an injury caused by the caving-in of the surface over a mine will cover a case in which the caving-in was due in part to the insufficiency of lateral supports, and need not be confined to one in which the surface fell in because of the removal of that on which it rested.—James v. Emmet Min. Co., 55 Mich. 335.

II. CONVEYANCES, LEASES AND WORKING CONTRACTS, AND ROYALTIES.

§ 3. Conveyances and grants.

Grant or reservation of surface-working rights, see post § 4.
Sales of rights and executory agreements, see post § 5.
Leases and working agreements, see post §§ 6, 7.
Rents and royalties, see post § 8.
Actions and procedure to enforce or protect rights, see post § 9.
Easements implied in reservations of minerals, see ante § 2.
Sufficiency of tender of title with mineral rights reserved under contract for sale of "surface rights," see Vendors and Purchasers, III.
General law of deeds and contracts to convey, see Deeds; Vendors and Purchasers.
Effect of deed without reservations to estop successors in title to claim them against original grantee, see Estoppel ¶ 21.
Construction of deeds as to whether fee or incorporeal right passes, see also Deeds § 45.
Construction and effect of reservations and exceptions of mineral rights in deeds, see Deeds §§ 71, 73.
Reservation of "half" of minerals in deed, see Deeds § 236.
Construction of wills disposing of mining properties, see Wills, VI.

¶ 7. A mere reservation, in a conveyance of minerals, or such a reservation with the right of mining, must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority; and such authority will be carefully construed to prevent the destruction of surface rights.—Erickson v. Michigan Land & Iron Co., 50 Mich. 604.

¶ 8. Easements to do such acts as are reasonably necessary to get out the mineral and remove it from the mine may be granted or reserved so as to attach to the mining estate.—Erickson v. Michigan Land & Iron Co., 50 Mich. 604.

¶ 9. The right to use shafts or other mining erections, made and used solely for mining purposes, is in the nature of an easement appurtenant to the mine, so that ejectment for parts of the surface necessarily occupied by them cannot be brought by the grantees in a deed reserving mining rights. —Erickson v. Michigan Land & Iron Co., 50 Mich. 604.

¶ 10. Harvey & Reynolds owned as tenants in common the mineral rights under certain land. Harvey, who owned the surface, in 1867 conveyed a portion thereof to complainant's grantors without reserving any mineral rights. In 1870 Reynolds & Harvey with knowledge on Reynolds' part of Harvey's conveyance conveyed their mineral rights to one Breitung. At that time they did not know that any mineral underlay the portion of the surface conveyed by Harvey. For many years Breitung mined coal under his lease and paid royalties to Harvey and Reynolds. In a bill brought by complainant to quiet title to the land conveyed by Harvey in 1867, held, Reynolds had ratified such conveyance.—Pellow v. Arctic Iron Co., 164 Mich. 87. (Ostrander and Blair, JJ., dissenting.)

¶ 10a. Where the surface rights to real estate are in one person and the mineral rights in another, and the value of both rights is included in one assessment against the owner of the surface rights it is no more the duty of the owner of the surface rights to pay the entire tax than it is the duty of the owner of the mineral rights.—Curry v. Lake Superior Iron Co., 190 Mich. 445.

¶ 10b. Where taxes are assessed on the land as an entirety and either the surface owner or the mineral owner pays the taxes, he is entitled to contribution from the other. —Curry v. Lake Superior Iron Co., 190 Mich. 445.

§ 4. Grant or reservation of surface-working rights.

¶ 11. Grantees in a deed reserving mining rights below the surface, but providing that in case any of the surface shall be permanently occupied by the owner of the reserve right he shall compensate the owner of th fee, cannot bring ejectment on account o such occupation so far as it is necessary t the operation of the mine.—Erickson v Michigan Land & Iron Co., 50 Mich. 604.

§ 5. Sales and executory agreements for rights

Leases and working agreements, see pos §§ 6, 7.

General law of sales of interests in lands see Vendors and Purchasers.

¶ 12. An agreement to sell the location o a mining company construed, and the right of the parties thereunder determined.—Titu v. Minnesota Min. Co., 8 Mich. 183.

§ 6. Leases and working agreements.

Forfeiture, abandonment, and re-entry, se post § 7.

Remedy for breach of agreement to worl mine, see post ¶ 42.

Stipulations as to inspection and liability see also post ¶¶ 48, 49.

Law of leases in general, see Landlord an Tenant.

Applicability of constitutional prohibitio respecting term of lease for agricultura lands where leased for mining purposes see Landlord and Tenant § 34.

Mining leases and contracts as payment fo corporate stock, see Corporations ¶ 988

Duty of tenant in common of mine to giv time to its working, see Tenants in Com mon, II.

Partnerships and joint adventures in general see Partnership; Joint Adventures.

Effect of mining lease to preserve persona character of annexed machinery, see Fix tures § 24.

Mining contract as carrying interest i property, see also Contracts ¶ 879.

Construction of provision in mining contrac for termination at discretion of on party, see Contracts § 173.

Joint adventures and partnerships, see Joint Adventures; Partnership.

¶ 13. A lease granting an undivided interest or right to prospect upon the lands and open and work mines, to appropriate all ores and minerals procured, to obtain wood for said purposes, and to erect buildings needful for the business, is so indefinite and incorporeal as not to be enforceable by an action of ejectment, at least until actual possession of some part has been taken; and while under it the lessee could open as many mines as he pleased, wherever he liked, and could assign his interest, he could not subdivide it and assign to more than one person, partnership or corporation; and a similar undivided right remained in the lessor.— Harlow v. Lake Superior Iron Co., 36 Mich. 105.

¶ 14. A lease of mining land from the war department of the United States government purported to give permanent rights, in-

cluding a right of pre-emption. An act of congress recognized the control of the war department by providing for its transfer to the treasury department, and it also gave to occupants holding under war department leases a right of pre-emption on certain conditions. Held, that this ratified such lease whether it was originally valid or not, and that one who held an agreement from the lessee entitling him to a specified share of the land when the lessee should obtain title had a claim which followed the lessee's purchase, and obtained thereby an equitable title, which the legal owner held in trust for him, and which passed by descent and could be transferred by assignment.—Compo v. Jackson Iron Co., 49 Mich. 39; and see Compo v. Jackson Iron Co., 50 Mich. 578.

¶ 15. A lease to an iron company giving the right to mine ore for conversion in its own furnace only, prohibiting assignment and the mining of ore for furnaces not owned by the company, is the grant of a right appurtenant to the furnaces in existence at the time of the lease where the charter and declarations of the mining company indicate its purpose to build only the ones in existence.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 16. Agreement between the parties for joint mining operations held to include a certain property.—Quinn v. Tully, 174 Mich. 30.

¶ 17. Implied covenants cannot be incorporated in a mining lease, since prohibited by § 8959, Comp. L. 1897, § 10821, How. St., 2nd Ed.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 18. A lease of a salt-well implies no covenant that the well shall be of any particular productive capacity. In the absence of any distinct agreement the lessee takes it as he finds it.—Clark v. Babcock, 23 Mich. 164.

¶ 19. The conditions in a lease of land for mining purposes held to include the right to remove ore from the premises.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 20. Conditions in a lease of land for mining purposes held not to require that it be worked by the lessee, but merely to fix the manner of operation when actually worked.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 21. A lessee is estopped from denying the existence of merchantable ore in paying quantities by a recital in a lease that he had made an exploration and found ore in paying quantities.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 22. Where one purchases a half interest in a mine from another with the agreement that the vendor should have charge of the mine, sell the products, and divide the proceeds equally, it cannot be said that a fiduciary relation exists between them.—Dowse v. Gaynor, 155 Mich. 38.

¶ 22a. The lessee of land for mining purposes under the agreement in his lease to pay taxes assessed on the land, ore and improvements was liable for taxes assessed on the land during a year when he unsuccessfully explored for ore.—Gribben v. Atkinson, 64 Mich. 651.

§ 7. ——Forfeiture, abandonment and re-entry.

¶ 23. A mining lease is surrendered by operation of law where the lessee takes it for a corporation to be organized, holds it for a few days and then assigns it to the corporation with which the lessor deals exclusively for 10 years, during which time the original lessee is never in any way treated as under obligation and the assignee is at all times treated as the owner of the leasehold.—Gingrass v. Mather, 128 Mich. 582.

¶ 24. A lease of land for mining purposes cannot be forfeited by the lessor for the breach of an implied covenant to reasonably operate the demised premises.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 25. The failure of the lessee to mine ore, or to make an exploration sufficient to disclose whether there was mineral on the demised premises, will not permit the lessor to terminate the lease in the absence of an express provision permitting it.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 26. The voluntary abandonment and destruction of a furnace destroys a right to mine ore under the lease granting that right as appurtenant to the furnace in question.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 27. A mining lease prohibited the cutting of timber for the private use of the lessees or their employees, and contained a forfeiture and re-entry clause, to become operative in case of the nonpayment of the royalties and taxes agreed to be paid by the lessees, or in case of the nonperformance of any of the covenants of the lessees at any of the times fixed for such performance. Held, that such clause did not apply to a breach of the provision forbidding the cutting of timber.—Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 28. The failure to pay the royalties reserved in a mining lease when due will not, of itself, work a forfeiture, where the lease does not provide that in the event of such nonpayment it shall become void.—Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 29. Assurances given by a lessor to the officers of a company holding a mining lease, as to the time in which the royalties might be paid under the statute authorizing summary proceedings for the recovery of the possession of lands, were held to have deferred the right of re-entry until such time should elapse, or until notice of the abandonment of such proceedings should be given. —Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 30. An assurance given to the lessee in a mining lease by the lessor, at the time of the service of a notice to quit, that another notice would be given before any proceedings were taken, was held to defer the right of re-entry until such notice should be given. —Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 31. A lessee under a mining lease, which contains no provision for a forfeiture in case of nonpayment of royalties, may, on the lessor's re-entering, for this alleged cause, by collusion with the lessee's servants and holding and operating the property, make the lessor account, in equity, for all the property so held and operated, and for all ore taken from the mine by him, at the market value when taken, less the royalty to which he is entitled under the lease.—Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 32. A demand for payment of rent or royalty due, though necessary before re-entry, may be waived by the parties. Notice of re-entry or of the intention to re-enter is not necessary.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 33. Leases of coal mining lands for terms of twenty-five years, with the privilege of renewal, were given in 1857 and 1858, but the lessees did not go upon the lands and ceased to pay rent in 1871, apparently thinking that the mines were not worth working. The owners regarding the leases as abandoned, no payment having been tendered for several years, did not bring suit for the rent, but let the lands again to other persons at a higher rental. Held, on an injunction bill brought by the assignees of the original lease to establish their own title and restrain the later lessees from mining the lands, (1) that the owners had a right to regard the abandonment as final and to relet the premises; and (2) that the owners were necessary parties to a bill intended to destroy securities under which they were entitled to increased revenues, and should have been impleaded as defendants.—Porter v. Noyes, 47 Mich. 55.

¶ 34. Where a lease of a mine provided that it should be terminated sixty days after delivery by lessee to lessor of a written surrender thereof, and payment of all royalties due, and that upon performance of such conditions the lessee might remove buildings, and where lessee's assignee sent such surrender to lessor, who wrote acknowledging receipt, and stating that it had been recorded and that it disposed of the lease, and where subsequently an arrangement was made between the lessor and the assignee whereby the latter used the pumps for a week, lessor paying charges, and where, without paying royalties due, the assignee removed buildings and machinery from the land, subsequently paying such royalties, it was held that the lessor's action ratified surrender of lease, without simultaneous payment of royalties.—Pendill v. Lucy Min. Co., 105 Mich. 221.

§ 8. Rent and royalties.

Forfeiture for nonpayment of rent or royalty, see ante § 7.

Remedy for disposal of ore defeating lien, see post ¶ 41.

Evidence of exhaustion of ore so as to discharge royalty agreement, see post ¶ 44.

Priority of stipulated lien for royalties, see Liens § 11.

Laches in seeking accounting of profits, see also Equity ¶ 156.

¶ 35. Where a lease of land for mining iron ore upon a royalty expressly reserves to the lessors the use and possession of the land for every other purpose, and restricts the lessees' right to cut timber to such as may be wanted for mining purposes, the lessees are not liable for the stipulated royalty upon the ore, if, upon diligent search and exploration, no iron ore is found and none exists in or under the soil; but they are liable to pay the taxes upon the property as agreed in the lease.—Gribben v. Atkinson, 64 Mich. 651.

¶ 36. A lease of land "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in, or under said land," at stated annual "rent," to which "royalties" as earned were to be applied, presupposes the existence of merchantable ore, and if, after reasonable efforts on the part of the lessee, ore is not found in minable quantities, the lease fails, and no rent can be collected.—Blake v. Lobb's Estate, 110 Mich. 608.

¶ 37. Under a mining lease, covering several years, requiring enough ore to be mined to make certain royalties, and providing for a stipulated sum per year as minimum royalties if not mined, a mining company having exhausted the stipulated quality of ore is not required to pay the ratable minimum royalty for the last half year but will be liable for royalties on the actual amount of ore secured.—Hewitt Iron Mining Co. v. Dessau Co., 129 Mich. 590.

¶ 38. A contract for the sale of the output of a coal mine at a price based on the Michigan mining rate of $1.01 per ton, subject to

increase or decrease as such rate might advance or decline during the term of the agreement, does not entitle the seller to an advance equal to an increase in cost of mining all grades of coal, but only as to the increase on thirty-inch seams of coal, where, at the time the contract was made, that was the only kind of coal subject to the $1.01 rate.—Caledonia Coal Co. v. Consolidated Coal Co., 181 Mich. 431.

¶ 39. Royalties under a mining lease cannot be recovered by the landlord from the lessee's assignees whom he has excluded from possession and from working the mine.—Pendill v. Eells, 67 Mich. 657.

¶ 40. A reservation in a mining lease of a lien on "all ore mined" (that shipped as well as that remaining on the premises), to secure the payment of royalties, is not, as between the parties, waived or destroyed by a further provision contemplating that the ore will be shipped to the customary market in another state before payment of royalty, or by the custom of shipping it to be paid for by advances, since the custom could not overcome the express reservation.—Iron Duke Mine v. Braastad, 112 Mich. 79.

§ 9. Actions and procedure to enforce rights.

[Note. Matters pertaining to remedies and practice generally without anything distinctive to actions about mining rights are treated in the general procedural topics, e. g., Equity; Pleading; Evidence; Trial; Ejectment; Trespass; Conversion; Injunctions; Specific Performance; Rescission; etc.]

Ejectment for surface rights, see also ante ¶¶ 9, 11.

Limitations on action to recover share in location rights, see Limitations ¶ 54.

Limitation of actions for continuing mining trespass, see Limitations ¶¶ 255, 256.

Specific performance suits, see Specific Performance.

Rescission and cancellation suits, see Rescission.

Pleading in trover for removal of ore, see Conversion § 23, ¶¶ 103, 104.

Sufficiency of mining lessee's right to sue for conversion of ore, see also Conversion § 20, ¶ 93.

¶ 41. A lessee of a mine, who disposes of ore in such a manner as to deprive the lessor of a lien for royalties expressly reserved to him by the lease, is liable to the latter in an action of tort.—Iron Duke Mine v. Braastad, 112 Mich. 79.

¶ 42. The remedy of a lessor for the breach of an implied covenant to reasonably mine demised premises, is an action at law.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 43. A bill alleges breach of an instrument conveying gravel in that certain top soil was improperly taken where, even if the provision of such instrument that the top soil not fit for the grantee's use shall be thrown off, cannot be construed to mean that such soil is not fit for the grantee's use, such bill in effect avers a breach by alleging that the top soil was not removed according to the agreement, and that the gravel beneath the rich soil, and the soil and everything were taken though the grantee promised to cease taking such soil.—Putnam v. Pere Marquette R. Co., 174 Mich. 246.

¶ 44. In an action for minimum royalties under a mining sublease, evidence that only a small amount of the stipulated annual tonnage is mined during the last year, that the ore bodies have been exhausted, that ore has been mined in small quantities since the expiration of the sublease under a new lease from the owner which was to take effect at the expiration of the one in question, that the defendant has continued to prospect unsuccessfully and taken out only a fractional part of the minimum required under the lease in question establishes the fact of exhaustion of the ore and avoids the liability for the minimum royalties.—Hewitt Iron Mining Co. v. Dessau Co., 129 Mich. 590.

III. OPERATION OF MINES AND REGULATIONS THEREOF.

§ 10. In general; public control and regulations.

Regulations respecting operation of power or machine drills, see Comp. L. 1915, § 9014 et seq.

Coal mine inspection law, see Comp. L. 1915, §§ 5359-5376, 5516-5563.

Copper and iron mine inspection law, see Comp. L. 1915, §§ 5502-5515.

§ 11. Liabilities incident to mine workings.

Jury question as to sufficiency of timbering, see post ¶ 53.

Liability of mining companies for injuries to their employees, see Master and Servant, III.

Mining labor liens, see Liens § 5.

Notice affecting priority of liens for mining labor, see Liens § 11.

Rank and priority of mining liens, see Liens § 11.

Common-law liability of master to servant, see Master and Servant, III.

Workmen's Compensation Law, see Workmen's Compensation Law.

¶ 45. It is negligence not to keep mining works reasonably well protected from a common danger, such as that of falling rocks.—Lake Superior Iron Co. v. Erickson, 39 Mich. 492; James v. Emmet Min. Co., 55 Mich. 335.

¶ 46. If the owner of a mine turns it over to contractors when he knows or should know that it is in an unsafe condition, he is liable for an injury to a miner who goes to work in ignorance of the danger.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 47. Mere ownership of a mine does not impose the duty of keeping it in safe condition; the owner may transfer the responsibility to lessees or contractors, unless he retains control and gives others to understand that they may rely upon him to protect them from the negligence of the occupants.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 48. Where the owner of a mine in proper condition contracted with certain persons to work it, but the contract provided that the latter, not the owner, should be liable for injuries to workmen, a stipulation in the contract providing that when the contractors repaired the mine the work should be done under the supervision of a person designated by the owner, it was held that such stipulation did not require the owner to supervise, but merely gave him the right to do so, and that neglect of his own interests in this regard would not render him liable for injuries to miners.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 49. Where a mining company contracting for the removal of ore reserves to itself the power of guarding the mine from dangers, it is liable for such injuries as employees of the contractors suffer, without their own fault, from want of protection; and its responsibility is not changed by the fact that the work is done by the ton instead of by the day.—Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

¶ 50. A flooding of one mine from another sustains no right of action if it only results from the exercise, by either mining company, of its right to discontinue operations, or to go on after the other has discontinued.—National Copper Co. v. Minnesota Min. Co., 57 Mich. 83.

Statutory duties and liabilities of mine owners, see note, 3 N. C. C. A. 741-748.
Duty and liability in mining accident cases, see note, 3 N. C. C. A. 750-768.
Work necessarily dangerous to others as affecting liability of employer for acts of independent contractor, see note, 7 N. C. C. A. 928-937.

§ 12. Injury to lateral and subjacent support.

Easements for support, see also ante ¶ 6.
Effect of reservation on surface rights, see ante ¶ 7.
General duty of adjoining owners as to lateral support, see Adjoining Owners.
Right of adjoining owner to enter and inspect mines, see Comp. L. 1915, § 9079 et seq.

¶ 51. A declaration for a negligent injury caused by the caving-in of the surface over a mine will cover a case in which the caving-in was due in part to the insufficiency of lateral supports, and need not be confined to one in which the surface fell in because of the removal of that on which it rested.—James v. Emmet Min. Co., 55 Mich. 335.

§ 13. Duty respecting pits and openings in surface.

Jury questions as to knowledge or notice of open hole, see post ¶ 54.
Sufficiency of evidence of neglect, see post ¶ 55.

¶ 52. Plaintiff's decedent lived on a strip of mining property 3 miles long and 2 miles wide, and in a house owned by defendant mining company. A portion of the property, once operated as a mine, was entirely unfenced and was an open common used for pasture. Across this portion a footpath extended to the highway which was used by the occupants of houses located on said mining property. This footpath ran within some 15 feet of an old open pit filled with water, which had an opening of some 5 by 6 feet in area at the surface, and was so surrounded by grass and bushes as to make its existence unsuspected a few feet away. This pit was about 1,400 feet from the decedent's home and less than 200 feet from the highway. The decedent, twelve years of age, in collecting wood in a wheelbarrow about said mining property, fell into the pit and was drowned. The decedent's father was a lessee or at least an occupant by permission of defendant's house. Held, plaintiff's decedent was not a trespasser or a mere licensee to whom defendant owed no duty, but such a license was possessed by the father as to impose upon defendant the duty to warn the decedent of such existing dangers as were known to it or which should have been discovered by it in the exercise of reasonable care.—Peklenk v. Isle Royale Copper Co., 170 Mich. 299.

Injuries to miners and others caused by objects falling down mine shafts, see note, 6 N. C. C. A. 1065-1075.

§ 14. Actions and procedure.

Declaration for cave-in damaging lateral support, see ante ¶ 51.
Actions based on common-law or statutory tort liability for negligence to servants, see Master and Servant, III, H.
Procedure under Workmen's Compensation Act, see Workmen's Compensation Law.
Actions for death or under Survival Act in general, see Death by Wrongful Act.
Action for death of infant employed unlawfully in mine, see Death by Wrongful Act.

¶ 53. Timbering put up in a mine to stay the walls must be adapted to the incidents of mining, such as the falling of ore and rock, and the shock of explosions; and where experienced mining men differ in their testimony as to the adequacy or inadequacy of such timbering, it is for the jury to form their own conclusions.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 54. In an action for wrongful death of a child, who was drowned by falling into an unguarded and partially concealed old mining excavation situated about 200 feet from a highway and 15 feet from a much traveled path, evidence held sufficient to submit to the jury on question whether officers of the mining company in the exercise of reasonable diligence ought to have been aware of the hole.—Peklenk v. Isle Royale Copper Co., 187 Mich. 644.

¶ 55. Plaintiff's decedent lived on a strip of mining property 3 miles long and 2 miles wide and in a house owned by defendant mining company. A portion of the property, once operated as a mine, was entirely unfenced and was an open common used for pasture. Across this portion a footpath extended to the highway which was used by the occupant of houses located on said mining property. This footpath ran within some 15 feet of an old open pit filled with water, which had an opening some 5 by 6 feet in area at the surface, and was so surrounded by grass and bushes as to make its existence unsuspected a few feet away. This pit was about 1,400 feet from the decedent's home and less than 200 feet from the highway. The decedent, twelve years of age, in collecting wood in a wheelbarrow about said mining property, fell into the pit and was drowned. No responsible officer of defendant had actual knowledge of the existence of the pit, but the superintendent knew of a trench leading from it. Held, there was sufficient evidence of defendant's negligence under Comp. L. 1897, § 11527, imposing the duty of guarding such openings as the one in question, to require the submission of such questions to the jury.—Peklenk v. Isle Royale Copper Co., 170 Mich. 299.

IV. MINING CORPORATIONS AND COMPANIES.

§ 15. In general.

General law of partnerships and joint adventures, see Partnership; Joint Adventures.

Partnership associations, see Joint Stock Companies.

General law of corporations, see Corporations.

Authority of managers and agents of mining corporations, see Corporations §§ 135, 136.

Disability of corporation to put out accommodation paper, see Corporations ¶ 276.

Power of mining corporation to buy timber, see Corporations § 82.

Vote of stockholders to sell corporate property, see Corporations § 104.

Judicial notice respecting personnel of mining corporations, see Evidence § 12.

Extension and renewal of mining corporations in Upper Peninsula, see also Corporations § 8.

Effect of curative act on deeds of mining corporations, how far presumably valid, see Acknowledgments § 22.

Representations as to mines and mining stocks amounting to fraud, see Fraud, I.

¶ 56. Under Comp. L. 1857, chap. 63, How. St. § 4004, the company's business office may be in one county and the mining business be carried on in another.—Van Etten v. Eaton, 19 Mich. 187.

¶ 57. A mining company has power to buy timber.—Adams Min. Co. v. Senter, 26 Mich. 73.

¶ 58. A mining corporation cannot issue accommodation paper and deliver it to third persons.—Beecher v. Dacey, 45 Mich. 92.

¶ 59. Laws 1875, p. 128 (How. St. § 4015), which was passed to confirm sales or leases by mining companies that had been made in good faith and for value though not according to the requirements of Comp. L. 1871, § 2888 (How. St. § 4052), did not make such sales, etc., presumptive evidence of their rightful character; but it must still be shown that they were in good faith, etc.—Marquette, H. & O. R. Co. v. Atkinson, 44 Mich. 166.

¶ 60. Comp. L. 1871, § 2888 (How. St. § 4052), providing that alienations or mortgages of lands, etc., of mining companies should have no force or effect unless authorized by a three-fifths vote of stock at a meeting called by notice as provided in Comp. L. 1871, § 2887, was enacted to protect the interests of stockholders, and would not enable others to raise questions of irregularity as to the notice.—Beecher v. Marquette & P. Rolling Mill Co., 45 Mich. 103.

¶ 61. The fact that the president and treasurer of a mining company who are also its sole corporators having substantial interests conducted their business as if they were partners does not enable one who did not deal with them as partners to recover for notes given and taken as corporate notes unless he shows a corporate liability.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

MINISTERIAL ACTS to MISSIONARY SOCIETIES.

Cross-References.

Ministerial Acts and Duties—

Nature of acts and duties of various officers, see Officers, VI; Courts §§ 6, 38, 86; Judges, II; Justices of the Peace, II; Sheriffs, IV.

Nature of functions of municipal corporations, whether ministerial or discretionary or governmental, see Municipal Corporations, VIII.

Propriety of remedy as depending on ministerial nature of duty involved in cause of action, see Mandamus §§ 18, 28, 74 et seq.; Injunctions, II, D.

Judicial review of acts, see Appeal, XII, D; Certiorari § 54.

Ministers of the Gospel—
See generally Religious Societies, II.
Libel or slander affecting them, see Libel.
Incompetency as witnesses to confidential communications, see Witnesses, V, C.
Minority—
Rights of minority stockholders, see Corporations, XXIV, D.
Right of dissentient minority in partnership association, see Joint Stock Companies § 17.
Term of minority as permissible period for accumulation or suspension of the power of alienation, see Perpetuities.
Construction of wills respecting limitations or conditions turning on minority, see Wills, VI.
Minors—
See Infants.
Minutes—
Admissibility to show or rebut estoppel by explaining judgment, see Former Adjudication § 97.
Entering and enrolling judgments, see Judgments, III.
Use of judge's or stenographer's minutes in making up bill of exceptions or case, see Appeal §§ 106, 107.
Use of minute or memorandum to refresh memory of witness, see Examination of Witnesses § 24.
Minutes as evidence, see Evidence §§ 346, 547; Indictment §§ 289-292.
Minutes to impeach witness by former testimony, see Witnesses, VI, D.
Corporate minutes and records, see Corporations § 181 et seq.
Misapplication of Funds—
Liability for misapplication, see generally such topics as Agency, IV; Corporations; Officers; Municipal Corporations, XIII; Trusts; Estates of Decedents; etc.
Effect of misapplication of proceeds of paper on rights of parties, see Negotiable Instruments.
Recovery back of mistaken payments or applications, see Payment, VI.
Taxpayers' suits to prevent, see Injunctions, I; Counties § 55; Municipal Corporations, XIII, XVI, A; Townships, VIII.
Stockholders' suits to prevent, see Corporations, XXIV, F.
See also references under "Misappropriation."
Misappropriation—
Within meaning of Bankruptcy Act withholding discharge, see Bankruptcy § 10.
Of property or money as crime, see Crimes, II; Indictment.
See also references under "Misapplication of Funds."
Miscarriage—
As consequence of personal injury, measure of damages, see Damages § 141.
Crime of producing abortion, see Crimes, II; Indictment.
Miscellaneous Records—
Sufficiency of recordation of instruments, see Notice and Record of Title § 355.
Misconduct—
The word "misconduct" is of common legal usage in a variety of connections. It has no distinctive legal meaning and therefore cannot be exhaustively covered by cross-references. See generally topic treating of the office or relation in which misconduct is asserted.
New trial or reversal for misconduct of trial, see New Trial; Appeal, XIII; Harmless Error; Trial; Indictment, IX.
Misdelivery—
See Carriers, II; Telegraphs; Escrows; Execution of Instruments, III.
In sale of goods, see Sales, V.
Misdemeanors—
Distinctive grades and degrees of crime, see Crimes § 5.
Particular crimes, see Crimes, II.
Arrest for crime, see Arrest.
Prosecutions for crime, see Indictment.
Prosecutions before justices and minor courts, see Indictment, XVIII.
Misdescription—
In deeds, see Deeds § 61.
In wills, see Wills, VI.
In particulars of boundary, see Boundaries.
In pleadings and indictments, see Pleading; Indictment, I.
Misfeasance—
See Negligence; Officers, VI; Sheriffs, IV; Agency, IV.
Misjoinder—
Of causes in equity, see Equity §§ 73-76.
Of legal causes, see Pleading, II.
In indictments, see Indictment, I, C.
Of parties, see Parties; and see section lines in specific topics treating of "parties" or "actions."
Objections for misjoinder and effect thereof, see Pleading, III; Equity, VII, C; Indictment, I, D.
As ground for abatement, see Abatement § 4.
Misnomer—
General law of names, see Names.
As ground for abatement, see Abatement § 4.
In indictments and informations for crime, see Indictment, I, B, D, E.
In pleadings, see Pleading.
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See also references under "Misdescription."
Misplaced Confidence—
As fraud, see Fraud, II.
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Misrepresentations—
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As basis for estoppel, see Estoppel, III.
In making application for insurance, see Fraternal Associations § 49 et seq.; Insurance, VIII, XII.
Ground for avoiding sales, see Sales, VI.

Missionary Societies—
See generally Religious Societies.
Gifts to missionary society as charities, see Charities.
Devises and bequests to societies or missions, see Wills, VI.

MISTAKE AND ACCIDENT.

TREATS of mistake of law or fact in legal sense and of the equitable doctrine of accident and of the consequences of mistake and accident.

Analysis.

§ 1. Doctrine, elements, and nature of mistake.
§ 2. Mistake of law.
§ 3. ——Executing instrument in ignorance of legal effect.
§ 4. Mutuality of mistake; fraud on one side.
§ 5. Accident.
§ 6. Evidence of mistake.
§ 7. ——Sufficiency of proofs.
§ 8. Effect of mistake or accident; rights and proper relief.

§ 1. Doctrine, elements, and nature of mistake.

Mistakes of law, see post §§ 2, 3.
Mutuality of mistake and effect of fraud on one side, see post § 4.
Accident, see post § 5.
Evidence of mistake, see post §§ 6, 7.
Effect of mistake or accident and rights and proper relief, see post § 8.
Element of mistake or deception in estoppel, see Estoppel §§ 27-29.
Knowledge or notice, actual or constructive, of facts of title or claim to land, see Notice and Record of Title, I.
Record of title as notice of mistake, see Notice and Record of Title § 73.
Mistake as ground for new trial, see New Trial, II, G.
Grant after knowledge of mistake as ratification, see also Mines ¶ 10.

¶ 1. In order to reform a written contract on the ground of mistake the mistake must be both mutual and common to both parties to the contract.—A. E. Wood & Co. v. Standard Drug Co., 192 Mich. 453.

¶ 2. In order to ascertain whether a mistake has been made in describing property in a deed, it is essential to ascertain the intent of the parties—the one in selling, and the other in buying—as to the subject-matter of the sale; and if the deed fails to express that intent, there is a mistake which can be relieved against in equity.—Conlin v. Masecar, 80 Mich. 139.

¶ 3. There is no contract where there turns out to be no subject-matter. So held where the agreement was based on a supposed judgment which did not exist.—Gibson v. Pelkie, 37 Mich. 380.

¶ 4. One who after investigation pays a claim made in good faith, but afterwards found to be baseless, cannot recover back the money on the ground that it was paid under mistake of fact.—McArthur v. Luce, 43 Mich. 435.

§ 2. Mistake of law.

Executing instrument in ignorance of legal effect, see post § 3.
Effect of mistake of law, see also post ¶ 58.
Disability to claim ignorance of terms of contract accepted, see Contracts § 20.
Overruling of former decision as ground for relief of person acting thereon to his detriment, see also Courts ¶ 111.
Suing under unconstitutional law as badge of malice, see Malicious Prosecution ¶ 58.

¶ 5. A mistake of law is something done or suffered under a misapprehension of legal rights, and in reliance upon what one believes them to be; it must be the necessary result of ignorance, and without negligence in its origin, and diligence in seeking relief upon the discovery of the mistake is as necessary as in cases of fraud.—Macklem v. Bacon, 57 Mich. 334.

¶ 6. Mutuality in a mistake of law does not aid the equities that arise from it, for equity will never interfere unless there is something that makes it inequitable to enforce the obligation over which the mistake has occurred.—Macklem v. Bacon, 57 Mich. 334.

¶ 7. Ignorance of the law is no ground for relief.—Hughes v. Pealer, 80 Mich. 540.

¶ 8. The rule that equity will not relieve against a mistake of law is not universal;

where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.—Renard v. Clink, 91 Mich. 1.

¶ 9. There are cases of fraudulent misrepresentations or concealments of matters of law by those holding confidential relations to the person wronged thereby which equity will relieve against.—Tompkins v. Hollister, 60 Mich. 470.

¶ 10. The doctrine which makes a party bear the consequences of his mistakes of law is often hard and can be maintained on grounds of general policy only; hence it is relaxed in some instances where the mistake of this party is combined with the fraud or misconduct of the other party to the transaction.—Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324.

¶ 11. Whether or not it is competent to relieve against the consequences of a mistake of law clearly made out, quære.—Ledyard v. Phillips, 32 Mich. 13.

¶ 12. Where a claim is allowed by a board of auditors after they have been informed that their liability is doubtful and have taken advice, they cannot recover back the sum paid on such allowance, as their mistake is one of law and not of fact.—Wayne County v. Randall, 43 Mich. 137.

¶ 13. One who through gross laches or ignorance of the law fails to redeem lands sold on execution within the time allowed by law has no claim afterwards to relief in equity.—Campau v. Godfrey, 18 Mich. 27.

¶ 14. A husband who had been appointed administrator of the estate of his deceased wife disposed of it in accordance with her ante-mortem oral directions, turning over to her son's guardian notes amounting to over two-thirds of the property. Afterwards he filed a bill to secure the return of the notes, claiming not to have been aware of his own legal rights as an heir of his wife and to have acted under the advice of the probate judge. Relief was denied him.—Hughes v. Pealer, 80 Mich. 540.

¶ 15. Defendant in divorce agreed, after considering the matter, to permit his wife to take a decree of divorce "without costs or alimony." Held, that he could not have the decree set aside for fraud on the ground of his ignorance of his wife's right to dower on divorce.—Orth v. Orth, 69 Mich. 158.

¶ 16. A wife at her husband's request signed with him a note which represented a debt of his, and also sums to be advanced during his illness and for the support of the family. In ignorance of her rights, but without undue influence from any one, she paid the note out of insurance moneys received upon her husband's death, and she acquiesced in the filing of her claim for the amount so paid against her husband's estate, which was solvent. Held, that the payment was voluntary, and could not be recovered back.—Tompkins v. Hollister, 60 Mich. 485.

§ 3. ——Executing instrument in ignorance of legal effect.

Liability for execution of instrument signed by mistake but without inquiry, see Execution of Instruments ¶ 48.

Mistake as defense to note in the hands of bona fide holders, see Negotiable Instruments, XIII, B.

Effect of bill of lading signed without reading, see also Bills of Lading ¶ 2.

Ignorance of legal effect of divorce decree on dower as ground for setting decree aside, see Divorce ¶ 388.

Ignorance or accident or omission as ground to open default, see Defaults §§ 28-31.

Mistake in execution or terms of will, see Wills.

¶ 17. An instrument in writing, deliberately adopted by the parties, must stand as written, although the parties may have mistaken its legal intent.—Holmes v. Hall, 8 Mich. 66.

¶ 18. Mistake as to the legal effect of a written instrument constitutes no ground for relief in equity.—Martin v. Hamlin, 18 Mich. 354.

¶ 19. A contract made on the strength of a decision which is erroneous and is afterwards overruled is made under a mistake of law, if any, and the overruling of the decision affords no ground for relief.—Pittsburg & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

¶ 20. A lessee's foreign birth and ignorance of the law cannot alter the terms of a lease which he has accepted.—Steubben v. Granger, 63 Mich. 306.

¶ 21. Ignorance—arising from failure to read the instrument—of the terms of one's contract will not relieve one person from his contract obligations; the law only relieves therefrom in cases of fraud, mistake, waiver, or estoppel.—Wierengo v. American Fire Ins. Co., 98 Mich. 621.

¶ 22. The fact that the son told his wife that the agreement to support his mother for life and to give a lien on the farm as security was not enforceable will not defeat the wife's liability after the son's death on a contract made by both and read to her

before signing.—Milks v. Milks, 129 Mich. 164.

¶ 23. In an action upon a guaranty given by defendants to secure an indebtedness assumed by a third person and to secure the payment of the purchase price of goods sold to such person, it being shown that defendants knew that such person was about to obtain goods from plaintiff, that before he could obtain same he would have to secure signers to the papers presented to them for signature, but instead of making certain as to what the paper contained relied on such person's representations as to its contents, a defense that they signed same in ignorance of its contents and in reliance on such person's representations that it was a recommendation is not available.—Saginaw Medicine Co. v. Batey, 179 Mich. 651.

¶ 24. In an action on a guaranty, a defense that defendants signed same in ignorance of its contents in the belief that it was a mere recommendation is not available where upon receipt of the instrument the obligee wrote to them acknowledging its receipt and referring to it as a guaranty, to which letter they paid no attention.—Saginaw Medicine Co. v. Batey, 179 Mich. 651.

¶ 24a. In an action for damages for breach of a contract for the exchange of real estate, held that if a supplemental agreement to waive further tender of title was understood by defendant when signed by him and was not obtained by fraud, it was binding on defendant.—Frederick v. Hillebrand, 199 Mich. 333.

§ 4. Mutuality of mistake; fraud on one side.

Effect of mutuality in mistake of law, see also ante ¶ 6.

Ignorance of hearer as factor in fraud by false opinions or estimates, see Fraud §§ 14-17, 72.

Charge on mistake as possible theory in fraud case, propriety under the issues joined, see Fraud ¶ 548.

Fraudulent concealment of cause of action as suspending limitations of action thereon, see Limitations § 30.

¶ 25. Where, in purchasing for a certain sum, all the merchantable pine fit for sawlogs on certain land, the vendee relies wholly upon his own estimates, and the contract, skilfully drawn by experienced men, contains no warranty as to the quantity or quality of timber, the vendee can have no relief as upon an implied warranty or for a mistake, if, through unsoundness, the yield falls far below his expectations.—Nester v. Michigan Land & Iron Co., 69 Mich. 290.

¶ 26. Where the parcel of land offered for sale was fenced, and both parties were upon the ground and saw the inclosed land, which was described to the purchaser as two lots, —it having been so described in mortgages which the vendor had purchased, who had afterwards taken a deed containing a like description,—when in fact one-half of one of the lots was owned and occupied by an adjoining proprietor, such mistake was mutual, and could be corrected in equity.—Conlin v. Masecar, 80 Mich. 139.

¶ 27. A bill of sale of a livery stock included "two two-seated full-top carriages," but it afterward appeared that one of the carriages which the vendor supposed was a full-top was not so. Held, that this mistake of fact could not, in law, relieve him of the obligation to deliver a full-top in its place or account for the value of such a carriage. —Lampson v. Cummings, 52 Mich. 491.

¶ 28. Where an obligor in a bond conditioned to pay any decree that might be obtained in foreclosure proceedings was not fraudulently induced to sign it by the obligee, he cannot be released on the ground that he did not know of a prior incumbrance when he signed it.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 29. A wife's claim that when she joined in a mortgage with her husband she did not know that it included certain lands belonging to herself, that she had not read the mortgage or heard it read, and that, if she had, she would not have recognized her lands by the description, was not sustained where it appeared that the mortgagee had acted in good faith and had done nothing to mislead her, and where the security, excluding her land, would fall far short of satisfying the debt.—Peake v. Thomas, 39 Mich. 584.

¶ 30. Where defendant, the grantee, evidently believed that he was purchasing all the land described in the deeds, and where he paid the full consideration therefor, such deeds will not be set aside as for a mutual mistake in description.—Darling v. Jewell, 96 Mich. 187.

¶ 31. There is no mutual mistake in omitting one of the terms of the former lease from a renewal, where one of the parties testifies that he did it intentionally.—A. E. Wood & Co. v. Standard Drug Store, 192 Mich. 453.

§ 5. Accident.

¶ 32. Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end, but they have no such power to relieve against statutory forfeitures.—Cameron v. Adams, 31 Mich. 426.

¶ 33. A deed from a wife to a husband will be set aside after his death where the evidence shows that they have made mutual deeds to insure the land in the survivor,

that while she was sick he obtained her deed without her knowledge and recorded it and that afterward he undertook to grant back the property, but died before the deed was executed.—Gardiner v. Gardiner, 134 Mich. 90.

§ 6. Evidence of mistake.

Sufficiency of proofs, see post § 7.
Presumable knowledge of law, see Evidence § 47.
Presumption of knowledge of buyer at auction sale, see Auctions ¶ 6.
Parol evidence of antecedent statements and understandings to show mistake in written agreement, see Evidence § 156.
Proof of mistake to avoid accord and satisfaction as variance from denial of the accord, see also Equity ¶ 654.

¶ 34. A person is presumed to know the nature of an instrument executed by him.—Ensign v. Dunn, 181 Mich. 456.

¶ 35. A municipal officer who claims to recover from the city money which he has paid to it by mistake has the burden of showing the mistake and the overpayment; but no different weight of evidence is required than in any other civil issue.—McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 36. The burden of proving that by a mistake a contract failed to embody the terms preliminary agreed on is on the party asserting it against such contract urged as a defense.—Sheley v. Brooks, 114 Mich. 11.

¶ 37. There is no error in rejecting vague evidence offered by an alleged lessee to show that he did not understand he was making a lease when he signed the instrument, where such evidence is opposed to the testimony of the subscribing witnesses, and where the lessee has made no protest for sixteen years after discovering the alleged mistake.—Campau v. Lafferty, 50 Mich. 114.

¶ 38. Plaintiff advertised to sell at public auction his one-half interest in standing wheat, which was bought by the defendant at a named price and paid for. Plaintiff later voluntarily repaid to defendant one-half of the money on the mistaken belief that he had been paid too much. Held, in an action to recover this amount as paid by mistake the defendant should be permitted to show in rebuttal of mistake that he really thought that he was buying the whole and not one-half interest.—Stowell v. Ames, 148 Mich. 439.

§ 7. ——Sufficiency of proofs.

Sufficiency of proof to warrant reformation, see Reformation, III.
Evidence that parties understood effect of instrument, see also Fraud §§ 48, 50.

¶ 39. An alleged mistake in a conveyance calls for very strong proof; and in the case of a mortgage the mortgagor's testimc that he really intended to leave certain p cels out of the description is not of its enough to show they are in by mistake Shepard v. Shepard, 36 Mich. 178.

¶ 40. The evidence of mistake in a wı ten contract, on which the court should in giving relief, ought to be so clear as establish the fact beyond cavil; and es cially where the party setting up the m take has had the contract prepared by own professional adviser, and apparen with care and deliberation.—Vary v. Sh 36 Mich. 388.

¶ 41. A mistake in drawing notes and mortgage to a husband and wife jointly stead of to him alone is shown by evidei that they grew out of a sale of land own by him, that within four days after th were taken he made a will assuming to d pose of them as his, giving his wife a l estate in them, that when he died she his legatee acquiesced in their being inv toried as part of his estate and received t income from them as such, that each of th was possessed of considerable means, a that the scrivener did not draw them cording to the understanding of the parti —McLeod v. Free, 96 Mich. 57.

¶ 42. A clause in a lease requiring the l see to furnish heat and power not "mc than one-half the power of" the leased pla and that "for all such power and heat fı nished the party of the second part" (l see) should receive pay from the perso using it, was sufficiently shown to have be altered by mistake of the scrivener inse ing after the quoted word "furnished," t words "in excess of one-half," where t change was made in course of a revision the lease by agreement between lessor a lessee, and such revision was not one looki in any way to the rental of power but towa a proposed assignment by the lessee wh right to assign was in doubt, which dou it was desired to remove.—Bronk v. Stan ard Mfg. Co., 141 Mich. 680.

¶ 43. On a bill to reform a lease on count of fraud or mistake in not including heating provision therein, evidence held sufficient to establish a mutual mistake. A. E. Wood & Co. v. Standard Drug Co., 1 Mich. 453.

¶ 44. Complainant's right to sue to redee from a mortgage was not cut off by quitclaim deed which was made for anoth purpose than to convey title, where it a peared that the mortgagee in possession the premises caused a quitclaim deed to prepared and sent to the mortgagor, and though knowing him to be a married ma the mortgagee did not include his wife as party to it; and where in her letter tran mitting such deed she called it a power attorney which she required to help her

collecting the rent, and where the deed was in the English language, but the letter in Swedish, the latter language being better understood by the mortgagor.—Shouler v. Bonander, 80 Mich. 531.

¶ 45. On a bill to foreclose a mortgage on a wife's separate property where she claimed she never executed the contract or note and mortgage with a knowledge of their contents, a finding that the mortgage sought to be foreclosed was given by the mortgagor, a married woman, with full knowledge of its contents, was approved, where there was evidence that the scrivener had explained to her the contents of the papers before she signed, and further that he had explained that the mortgage was a lien on her individual property.—Knowlson v. Bruist, 86 Mich. 588.

¶ 46. A deed will not be set aside at the suit of a wife who joined with her husband in its execution to secure his creditor, which indebtedness the wife had advised her husband to secure, on the ground that she was ignorant of the contents of the deed, where it appears that no misrepresentations were made to her at the time she executed the deed, and that she made no inquiry as to its form or contents.—Sanborn v. Sanborn, 104 Mich. 180.

¶ 47. A verdict ought to be set aside which holds a lease to be void on the lessee's claim that he signed it supposing it to be something else, and which, in so holding, ignores the testimony of the subscribing witnesses, and the fact that after the lessee discovered the alleged mistake he made no protest for sixteen years.—Campau v. Lafferty, 50 Mich. 114.

¶ 48. A vendor's claim that the word "heretofore," in a land contract providing for releases to the vendee on account of payments "heretofore" made in case of platting and sale of parts of the land at agreed minimum prices for each foot of frontage, was a clerical error, and that "hereafter" was intended, is sustained by the testimony of the vendee and his agent that neither of them expected, at the time of the transaction, that the release clause would cover the down payment, taken in connection with other clauses in the contract indicating clearly that the parties had in mind releases for future payments only.—Johnson v. Wilson, 111 Mich. 114.

¶ 49. Evidence of mutual mistake in conveying the wrong lots corroborated by the fact that the grantor continued to pay taxes on the lots conveyed and neglected the ones intended to be conveyed, is held sufficient to justify a reformation of the deed.—Norris v. Sargeant, 126 Mich. 557.

¶ 50. A stipulation in a lease that the property adjoining the premises leased shall not be used as a billiard hall was properly found to have been with the full consent and knowledge of all parties, where, in an action for an accounting under instrument, the evidence shows that no fraud or misrepresentation was in any way practiced upon defendants, to induce them to make such a contract, and that all parties entered into such lease with full knowledge of all its terms and conditions.—Emigh v. Whiteley, 140 Mich. 21.

¶ 51. Mutual mistake in not incorporating in a deed a reservation of an alley created by quitclaim deeds is shown by testimony of the scrivener that in drawing a mortgage he had before him an abstract, which showed the facts, by the reference in the description of the deed to a "private alley" on the line in question, by evidence that the grantee knew of the alley and that the mortgage though not read to him was expressly subject to "all the rights and easements created by" the deed; though the grantee, who gave the mortgage to obtain the purchase price, testified that the alley was a private driveway belonging to the lot rather than to the adjoiners.—Fitch v. Vatter, 143 Mich. 568.

¶ 52. An intention on both sides to have a deed cover not only the lands of the grantor described therein but also an alley adjoining in which he had a possessory interest or claim and which was used in connection with said described land as a coal and wood yard, being contiguous with the opposite half of the alley and abutting land of a railroad company used under lease for the same purpose, was shown by testimony of the broker and the scrivener of the contract that grantor was selling the "whole business" or all of his property, the testimony of grantor that he asked and "found out" that grantee "wanted the whole lot," and the testimony of him and another showing that he knew of the alley and had held it as his own and that he considered that "it would always go with that property" coupled with the fact that the buyer and grantee had no knowledge of the existence of the alley and supposed it was included in the description and would not have bought the land had he known the contrary.—Kinyon v. Cunningham, 146 Mich. 430.

¶ 53. On a bill to correct a mistake in the description of a deed, evidence held sufficient to sustain a finding that a mutual mistake was made as to the amount of land to be conveyed.—White v. Grand Rapids & I. Ry. Co., 190 Mich. 1.

¶ 54. On a bill for reformation of a contract for the sale of land on the ground of mistake, where it appeared that the contract called for a certain number of feet off a certain lot, being the building then occupied by defendant as a drug store, all of which lot complainant expected to and did acquire title to, and defendant found out before signing

the contract that the drug store did not cover all of the ground, and complainant was unaware of the discrepancy until after the contract was signed, evidence held insufficient to show a mutual mistake warranting reformation of the contract.—Schlossman v. Rouse, 197 Mich. 399.

¶ 55. Evidence held to sustain the finding, on a bill to correct a certain deed, that the grantor in such deed possessed a one-half interest only, in the lands described therein and that by mutual mistake the deed was made to convey the entire interest instead of such one-half interest, only, of the grantor in the lands.—Gustin v. McKay, 196 Mich. 181.

§ 8. Effect of mistake or accident; rights and proper relief.

See also ante ¶ 8.

Relief against statutory forfeitures, on ground of mistake, see ante ¶ 32.

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¶ 56. A mistake in the description i deed by reason whereof it fails to co grantee's proper land cannot be rectified an action of ejectment by being set up fensively, or at all in an action at law, resort must be had to equity.—Michi Land & Iron Co. v. Thoney, 89 Mich. 226

¶ 57. A mistake in a deed or other w ten instrument is a good ground for refu relief to which complainant would other be entitled.—Garlinghouse v. Dixon, W.

¶ 58. Mistakes of law cannot usually made a ground of equitable relief w standing alone.—Lapp v. Lapp, 43 Mich. Tompkins v. Hollister, 60 Mich. 470.

¶ 59. A mortgage taken in good f from husband and wife, and covering p erty the record title to which was in husband, is not invalidated as to pa which the wife afterwards claims unde unrecorded deed from her husband on ground that he had included them in mortgage by a mistake for which the m gagee was not to blame.—Shepard v. S ard, 36 Mich. 173.

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¶ 1. A mortgage is no longer in this state what it was originally at the common law—a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified time. It is a mere chattel interest, a security or lien upon the land for the debt, which can be enforced only by sale on foreclosure. The estate in the land is still in the mortgagor; his title is a legal one, and the mortgagee gets no title or right of possession until after foreclosure.—Dougherty v. Randall, 3 Mich. 581; Batty v. Snook, 5 Mich. 231; Caruthers v. Humphrey, 12 Mich. 270; Ladue v. Detroit & M. R. Co., 13 Mich. 380; Hogsett v. Ellis, 17 Mich. 351; Ormsby v. Barr, 22 Mich. 80; Gorham v. Arnold, 22 Mich. 247; Wagar v. Stone, 36 Mich. 364; Hazeltine v. Granger, 44 Mich. 503.

¶ 2. In this state a mortgage is not a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become

absolute on failure to pay at the specified time. It is a mere security, the estate in the land and the right of possession remaining in the mortgagor until the mortgage is foreclosed and the equity of redemption has expired.—Bowen v. Brogan, 119 Mich. 218.

¶ 3. Once a mortgage always a mortgage. —Thompson v. Mack, H. 150; Batty v. Snook, 5 Mich. 231; Emerson v. Atwater, 7 Mich. 12; Reed v. Bond, 96 Mich. 134.

§ 2. Parties to the mortgage.

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Power of national banks to take mortgages or to loan on mortgage security, see Banking § 91.

¶ 4. There can be no mortgage without a mortgagee.—Sinclair v. Slawson, 44 Mich. 123.

¶ 5. At law, to constitute a mortgage, the grantor himself, and not a third person, must be entitled to the benefit of a defeasance.—Case v. Ranney, 174 Mich. 673.

¶ 6. A mortgage may be given to one person in trust for another.—Comstock v. Howard, W. 110.

§ 3. Debt or obligation or consideration for mortgage.

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¶ 7. A mortgage cannot be sustained without an obligation capable of proof.—Sackner v. Sackner, 39 Mich. 39.

¶ 8. The nonpayment of any consideration for a mortgage deprives the mortgagee of all equities.—Terry v. Tuttle, 24 Mich. 208.

¶ 9. Where a mortgage does not represent a real debt chancery will order it to be surrendered and cancelled.—Teed v. Marvin, 41 Mich. 216.

¶ 10. A mortgage for amount of the fine given to a county as the condition of a pardon from sentence of imprisonment and fine is upon sufficient consideration.—Rood v. Winslow, W. 340; Rood v. Winslow, 2 D. 68.

¶ 11. A mortgage given in Michigan on settlement of a debt that is payable in Canada is not invalidated by the fact that in fixing the amount of it the current premiums on gold were allowed upon the amount of the Canadian debt, Canadian currency being then on a gold basis.—Oliver v. Shoemaker, 35 Mich. 464.

¶ 12. The liability of one for a deficiency judgment rendered on the foreclosure of mortgages on land, which he had bought for a partnership association afterwards formed and which land he conveyed to it, is a sufficient consideration for a mortgage to him of other lands to secure him, the association being legally liable to him for the amount.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 13. A mortgage given by the vendee in a land contract to secure the purchase price of a resale at a larger sum made to him by his vendor's grantee who had no greater rights than the vendor, held without consideration.—Converse v. Blumrich, 14 Mich. 109.

¶ 14. Where a mortgage was given on the understanding that the mortgagor should have a future credit, and the mortgagee's agent, who took it, knew that it would not have been given otherwise, it cannot be enforced for a different purpose, and if no credit is thereafter given and no advances made, it is held to be without consideration. —Mizner v. Kussell, 29 Mich. 229.

¶ 15. A mortgage by a legatee to secure the performance of an agreement whereby an executrix is to perfect title to property or in default to repurchase the same for a stipulated price, it appearing that the executrix purchased indirectly a homestead at an executrix' sale, which property she wished to sell, is based on sufficient consideration, and a default occurs where an effort to obtain deeds from nonresident heirs to the property is unsuccessful.—Litchfield v. Tunnicliff, 118 Mich. 383.

¶ 16. Where a bill seeks to enjoin the foreclosure of a mortgage on the ground that it was procured through fraud and misrepresentation and was without consideration, and the evidence shows that when the mortgage was given the parties had an accounting and agreed on the amount due, no complaint can be made as to the consideration passed, though a part may have been given to discharge an earlier obligation founded upon an illegal agreement.—Quigley v. Wolf, 177 Mich. 467.

¶ 16a. Note and mortgage given for an existing debt are presumed to have been

taken as security and not as payment, in absence of evidence to contrary.—Dempsey v. Pforzheimer, 86 Mich. 652.

¶ 16b. A mortgage given by an execution debtor pending a bill by him to set aside an execution sale of the land mortgaged, upon which bill a decree is entered giving the purchaser at such sale a lien for improvements and disbursements, to be paid by the debtor, the land to be sold in case of default, is valid as against the debtor and a grantee from him with notice, where the land is sold under such decree, and purchased by a third person for the benefit of such debtor.—Seeley v. Sharrer, 112 Mich. 267.

§ 4. Estoppel to question character of mortgage.

General principles of estoppel, see Estoppel.
Estoppel of mortgagor to dispute mortgage, persons bound as privies to estoppel, see Estoppel ¶ 235.

¶ 17. If the assignee of a mortgage which is in form of a mortgage on real estate, and which was recorded as such by the original mortgagee, instead of being filed as a chattel mortgage, treats it as a real estate mortgage in proceedings for foreclosure, he is afterwards estopped by his conduct from asserting the contrary.—Miles v. McNaughton, 111 Mich. 350.

II. FORM AND CONTENTS.

A. IN GENERAL.

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¶ 18. Where a contract is given whic really an instrument of defeasance, it is essential that it be sealed.—Enos v. Sut land, 11 Mich. 538.

¶ 19. A mortgage without witnesses good as between the parties thereto.—B v. Clark, 52 Mich. 22.

¶ 19a. The mere addition of the title "g dian" to the name of a mortgagor will nc itself invalidate the mortgage where it is n ifestly not the purpose in giving it to ac guardian.—Brayton v. Merithew, 56 M 166.

B. ABSOLUTE DEED INTENDED A MORTGAGE.

§ 6. In general.

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¶ 20. A deed absolute on its face may be enforced as a mortgage, when given as security for a loan.—Mintz v. Soule, 182 Mich. 564.

¶ 21. A deed absolute upon its face may be shown in fact to be a mortgage.—Ruch v. Ruch, 159 Mich. 231.

¶ 22. An instrument of conveyance that on its face purports to be given to secure a payment is merely a mortgage.—Cowles v. Marble, 37 Mich. 158.

¶ 23. A deed may be properly taken as security when the amount to be secured is uncertain and depends on future advances.—Abbott v. Gregory, 39 Mich. 68.

¶ 24. To render a conveyance absolute in its terms a mortgage, it must be so in its inception. It can never become a mortgage by any subsequent act; and if it once become an absolute deed for a moment it must always remain so.—Swetland v. Swetland, 3 Mich. 482.

¶ 25. A deed absolute will be decreed, on appropriate evidence, to have been given as a security requiring to be treated as a mortgage in an accounting between the parties.—Jordan v. DeGolia, 91 Mich. 370.

§ 7. Sufficiency, form and effect of defeasance.

Sufficiency of mortgage between parties without recordation, see Notice and Record of Title, II, A.
Statutory provision as to deed absolute in form where intended as mortgage, see Comp. L. 1915, § 11723.

¶ 26. The character of a deed as security is not destroyed by the fact that no defeasance was given until after the delivery of the deed, provided the transactions were substantially contemporaneous and were manifestly meant to amount to a mortgage.—Jeffery v. Hursh, 58 Mich. 246.

¶ 27. The recital in a bond of defeasance that the obligor will reconvey such interest as he has now acquired establishes the contemporaneous character of the deed and defeasance and cannot be contradicted by parol.—Jeffery v. Hursh, 58 Mich. 246.

¶ 28. A bond of defeasance, being under seal, is an instrument of as high order as the deed which it accompanies.—Jeffery v. Hursh, 58 Mich. 246.

¶ 29. A bond to reconvey is valid as a defeasance even though it covers lands belonging to a third person and included with the grantor's land by virtue of a power of attorney to him to sell them. It would be good at law as to the grantor's land, and in equity as to the third person's, the last not being mortgageable under a power of sale.—Jeffery v. Hursh, 58 Mich. 246.

¶ 30. A deed absolute taken in connection with a bond or separate defeasance or agreement, executed at the same time, to reconvey on payment of a stated sum, constitutes a mortgage if the instruments are of the same date or are executed and delivered at the same time and as one transaction. When this is the case it is a conclusion of law that they constitute a legal mortgage.—Jeffery v. Hursh, 58 Mich. 246.

¶ 31. The mortgagor of land that was worth considerably more than the mortgage debt deeded it to the mortgagee and took back a contract of sale which provided that, in case of default in payment, the party of the first part should be entitled to immediate possession, and should also have a lien on the crops. Held, that the deed and contract together should be construed as a mortgage, amounting, only, to a change in the form of a security for a continuing liability, and that it was unimportant that the conveyance and defeasance were, as indeed was formerly customary, separate instruments.—Ferris v. Wilcox, 51 Mich. 105.

§ 8. Determining tests and construction of instrument.

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¶ 32. In doubtful cases courts of equity incline to construe a deed with a condition to be a mortgage; and may do so where a deed and bond to convey are concurrent instruments, in the absence of facts showing the intention of the parties to be otherwise.—Swetland v. Swetland, 3 Mich. 482.

¶ 33. In doubtful cases the court will lean to the conclusion that a security rather than a conditional sale was intended; and where the idea that a security was intended is conveyed with reasonable distinctness by the writings, and no evil practice or mistake appears, the court will incline to re-

gard the transaction as a security, because of the general reasons which in all cases of uncertainty favor written evidence. But if it satisfactorily appears that a conditional sale was intended, the transaction must retain the stamp which the parties themselves have given to it.—Cornell v. Hall, 22 Mich. 377.

¶ 34. The form of a contract cannot prevent an examination of the whole transaction on a bill in equity, if it was entered into in continuation of an earlier agreement. —Curtiss v. Sheldon, 47 Mich. 262.

¶ 35. The omission of the power of sale from a mortgage merely limits the mode of foreclosure to that by bill in equity, and does not show the instrument to be a conveyance.—Cowles v. Marble, 37 Mich. 158.

¶ 36. Land mortgaged for half its value was exchanged by the owner for personalty worth about the amount of the mortgage, and a warranty deed was executed by the owner, the grantee agreeing to pay the mortgage and also giving a paper agreeing to reconvey to the grantor in six months for a certain sum. The grantee soon after paid the mortgage, but the grantor made no repayment. Held, that the transaction was an absolute sale of land, and not a mere security for the price of the personalty. —Stahl v. Dehn, 72 Mich. 645.

¶ 37. Where it appears that, by express agreement of the parties, a debt due from the grantor to the grantee was extinguished by the deed, or that the money paid was not advanced by way of loan, or that it is at the option of the grantor to refund or to keep the money, the transaction is a conditional sale and not a mortgage. But if the remedies of grantor and grantee are reciprocal—the former bound to repay the money, the latter to reconvey the premises—then the deed will be construed a mortgage.—Swetland v. Swetland, 3 Mich. 482.

¶ 38. The character of an instrument in the form of a warranty deed with conditions, which is construed as a conditional sale, is not changed by the fact that it is assigned by a party, where the assignment calls the deed a "mortgage," or by the fact that such parties treat the instrument as a mortgage.—Blumberg v. Beekman, 121 Mich. 647.

¶ 39. An instrument must be construed a mortgage if, taken alone or in connection with surrounding facts, it seems to have been given as a security; the mere absence of terms of defeasance cannot determine its character as being or not being a mortgage. —Cooper v. Brock, 41 Mich. 488.

¶ 40. A quitclaim deed cannot be considered as a final surrender of all the grantor's interest, where the intention was in fact to secure the grantee for a debt due him fr the grantor, and enable him to dispose the property the more readily for the sa faction of the debt.—Curtiss v. Sheldon, Mich. 262.

¶ 41. A deed to secure money lent, with an understanding that the land is deemable by its payment, is a mortgage between the parties and those who purch from them with notice.—Hurst v. Bea 50 Mich. 612.

¶ 42. A wife's deed is not enforced as equitable mortgage where the arrangem was simply to secure the husband's de and was not assented to by her.—Harve Galloway, 48 Mich. 531.

¶ 43. A wife gave a deed of her separ estate, in which her husband joined, to cure a loan made to them, and all par executed a written instrument explaining transaction. This arrangement was ab doned, however, and the lender made a n one with the husband for his debt al to which the wife did not, so far as pears, assent. Held, that proceedings wo not lie to enforce the deed as an equita mortgage.—Harvey v. Galloway, 48 M 531.

¶ 44. A son was indebted to his mot and, on the third day before fleeing to av arrest for crime, he executed to his mot a deed, in which his wife joined, of all his real estate, including his homestead. took the deed, as also a bill of sale of interest in a vessel, to his mother, and t her that he had some papers to deliver her, and, upon being asked by her what t were, answered that she "need not wo any more." At about the same time he e cuted to his mother a bill of sale of all his remaining personal property, and pla the same on file in the office of the c clerk. The mother had no knowledge, u after her son had left the country, of execution of the second bill of sale. greater part of the indebtedness was denced by promissory notes, which were delivered to the son, nor was anything s about their surrender. Held, that the d is in fact a mortgage, and the only pro remedy open to the grantee is by a bill foreclose the same.—Sanborn v. Sanb 104 Mich. 180.

§ 9. ——Intention of parties.

Sufficiency of evidence of intent of part see post ¶ 88.

¶ 45. The intention of the parties is vital question in determining the charac of an instrument in the form of a warra deed with conditions inserted, which claimed to be a mortgage.—Blumberg Beekman, 121 Mich. 647.

¶ 46. Though contracts for repurch contemporaneous with conveyances absol

in form are sometimes strong evidence tending to show that the conveyances are intended to be mortgages, yet, where it appears that the parties really intended an absolute sale and a contract permitting repurchase, such intention must control, and, to ascertain the intention, the court will look beyond the writings to the circumstances surrounding the transaction.—Stahl v. Dehn, 72 Mich. 645.

¶ 47. Where a deed is given by a debtor to his creditor to secure a debt, the effect only of a mortgage can be given to the transaction, whatever the intent of the parties.—Hosley v. Holmes, 27 Mich. 416.

§ 10. ——Inadequacy or disparity of consideration.

¶ 48. In determining whether a deed absolute on its face was intended to be given as a mortgage, the adequacy or inadequacy of the price paid is a circumstance of great importance.—Schmidt v. Barclay, 161 Mich. 1.

¶ 49. A deed from a client to his attorney conveying property worth more than $9,000 for a stated consideration of $1,000, but subject to dower interest of a widow 54 years of age, held to be a mortgage to secure the amount stated as consideration, testimony being in conflict as to whether it was intended as a deed or as a mortgage.—Dean v. Radford, 137 Mich. 617.

¶ 50. On a bill to obtain an accounting and to have a deed declared a mortgage and the amount due ascertained, where it appears that the husband possessed considerable influence over the decedent grantor, and that she was in a helpless physical feeble mental condition, that she had reposed great trust and confidence in him, and could only transact business through him, when the consideration mentioned in the deed and bill of sale is disputed by him, the burden of proof of showing the true consideration, and that his transactions with her were fair and honest is upon the husband, the wife and grantor being dead.—Cady v. Burgess, 144 Mich. 523.

¶ 51. Complainant who owned the equity of redemption of certain lands, agreed with defendant that the latter should furnish the money to redeem and take the deed to the lands upon agreement to resell to complainant within two years for the amount advanced with interest and expenses. Subsequently and without any new consideration complainant also conveyed to defendant's wife by warranty deed. He failed to repurchase within the two years and brought this suit to have the transaction declared a mortgage. Held that equity would treat the conveyance as a mortgage to secure the money advanced.—Malone v. Danforth, 137 Mich. 227.

§ 11. ——Agreements and options for reconveyance.

¶ 52. A conveyance absolute in form will not be held to be a mortgage from the mere fact of an agreement to reconvey with or without an advance in price.—Stahl v. Dehn, 72 Mich. 645.

¶ 53. Where land is conveyed by a debtor to his creditor, and an instrument given back which shows that the land is to be reconveyed on payment of the debt, such instrument cannot be regarded as an agreement for the sale of the land, but the transaction is plainly a conveyance of the land as security for the debt—in other words, a mortgage.—Enos v. Sutherland, 11 Mich. 538.

¶ 54. Defendant Miller and his wife owned, separately, each four lots. Mrs. Miller was in jail for failure to pay a fine of two hundred dollars. She told her husband that if he would raise two hundred dollars to pay her fine she would deed him absolutely her four lots. Miller went to one Cronks and borrowed $270, deeding him his four lots. Mrs. Miller also deeded her four lots to Cronks. Cronks gave back a land contract to defendant Miller, on all eight of the lots, which called for a conveyance of the lots upon payment of the $270. Held, the transaction resulted in a mortgage lien with the legal title to their respective lots remaining in defendant Miller and his wife.—Ferry v. Miller, 164 Mich. 429.

¶ 55. A certain contract of sale of certain premises signed by a mother and her son wherein she agreed to sell the premises to him at a certain price corresponding to the amount of a certain note signed by him and indorsed by her and containing the customary provisions of an ordinary land contract but not containing a condition binding him to buy, and providing that the stipulations therein should apply to and bind the heirs, assigns, etc., of the respective parties, held to be sufficient in connection with a deed of the same date to her of said premises for a consideration of one dollar to show such deed was a mortgage.—Maginn v. Cashin, 196 Mich. 221.

¶ 56. A conveyance to a mortgagee by deed, absolute in form, of land previously held under an indemnity mortgage with the understanding that the grantor could pay off the debt due on an appeal bond for which the mortgage was given as indemnity, and thus be entitled to a reconveyance, or the grantee could settle the amount due on the bond and pay the balance of the sale price of the land to the grantor is a mortgage and not a sale where the purpose of the deed was to facilitate sale if necessitated.—Sowles v. Wilcox, 127 Mich. 166.

¶ 57. An absolute deed conveying land to a creditor, in which the debtor is given a

lease with an option to repurchase, does not constitute a mortgage.—City Lumber Co. v. Hollands, 181 Mich. 531.

¶ 58. A conveyance and a contemporaneous land contract whereby the grantor may repurchase on paying his indebtedness to the grantee, within a specified time, may be construed to constitute a mortgage.—Clark v. Landon, 90 Mich. 83.

¶ 59. A deed to one accompanied by a letter of authority to another unlimited in time by which that other was authorized to rent or sell the property and by which the grantee signing the letter agreed to ratify any sale or rental made by the other, which letter also gave the so-called agent an option to purchase on payment of $400 with stated interest from date and taxes paid out, will be treated as a mortgage; where $400 was the sum advanced by the grantee and signer of the letter to buy the equity in the land on application of the so-called agent, and where the understanding was that the latter was to have a substantial interest in the land.—Leach v. Grube, 147 Mich. 348.

¶ 60. Execution having been levied upon a leasehold owned by a copartnership of which defendant was a member, he assigned his interest to complainant by written instrument providing that the latter should purchase at the sale with funds to be provided in part by defendant, should acquire the legal title to the fee, and reconvey to defendant, who was to remain in possession, upon the payment of the amount invested by complainant, together with an additional sum for services and expenses, in default of which payment complainant should have the option to declare the contract void, and treat defendant as his tenant holding over without permission. A subsequent agreement provided that complainant's lien was to be subject in part to that of a third party advancing moneys to the defendant whereby to make the purchase. Complainant, having complied with the terms of the contract, upon default of payment by defendant, instituted summary proceedings to recover possession. Held, that the relation of mortgagor and mortgagee was created between the parties.—Anderson v. Smith, 103 Mich. 446.

¶ 61. Where A., being indebted to B. in the sum of $2,000, secured on real estate, conveyed to him the same real estate, and took back a contract for the purchase of it from B. for $2,000, payable as therein specified, which contract provided that "time is now, and shall be at all times, considered and deemed a material part of this contract"; and that on default being made by A. in any of its conditions to be performed by him, he should thereupon forfeit all rights under the same, and be thereafter a tenant at will to B. at a specified yearly rent; and it appeared that the tr action was intended merely to secure B. $2,000 due him, held to be a mortgage; that A. did not forfeit his right to red by a failure to pay at the time specifie Batty v. Snook, 5 Mich. 231.

¶ 62. The character of a transaction which a landowner has made a deed a lute in form, and he and the grantee h executed a land contract whereby he r repurchase at the same price within a st period, is not affected by the fact that contract gives possession to the grantee til payment.—Clark v. Landon, 90 Mich.

¶ 63. A conveyance of property, m after the beginning of foreclosure proc ings on the day of sale, mu·t be consid an absolute conveyance with the optio the grantors to repurchase, within a cer time, where the grantors were given right to repurchase for a sum less than amount required to redeem if the mortga property had been sold, and where the dence showed that the grantors did not a themselves of the privilege of repurchas within the time stated, but rented the p erty and permitted the grantees to imp it.—Abbott v. Gruner, 121 Mich. 140.

¶ 64. A conveyance of land express in payment of a debt of stated amount a clause providing that the grantee sh reconvey upon receiving such sum withi specified time is a deed with an optio repurchase, where it appears that repurcl was optional with the grantor.—Reed Bond, 96 Mich. 134.

¶ 65. An instrument in the form o warranty deed containing the following dition, "This deed being made under following condition, viz.: That said p of the second part shall not cut any st ing timber, or allow to be, within the pe of ten years from the date hereof, on twenty acres; and furthermore, that parties of the first part, for themselves t heirs, executors, and administrators, hereby reserve the privilege of redeen the said above-described twenty acres time within the period of said ten years paying to the said party of the second p his heirs, administrators, or assigns, above-mentioned seven hundred dollars, interest at seven per cent, which shall n this instrument void and of no effect," none of the characteristics of a mortg but appears to be an absolute sale, with option to the grantor to repurchase, must be held a conditional sale.—Blum v. Beekman, 121 Mich. 647.

¶ 66. Where a mortgagor of real est after satisfaction of the debt by the m gagee, for the purpose of securing the d deeds the land to the mortgagee and t back a contract with a provision tha case of default the rights of the mortg

therein should be foreclosed in chancery, such deed and contract constitute a mortgage.—Detroit Cavalry v. Ranney, 193 Mich. 472.

¶ 66a. Where land is deeded away absolutely to secure a loan, and the grantors take back a contract of purchase, the transaction is to be treated as a mortgage.—Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71.

§ 12. ——Agreement for sale and payment of surplus in excess of debt.

¶ 67. A debtor conveyed certain lands to a trustee to be sold for the payment of debts, and the deed provided that the surplus and all unsold lands be returned to him after deducting costs and expenses. Held, that it was properly treated as a mortgage. —State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 68. The rule that in doubtful cases the law will construe a contract to be a mortgage, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression, was applied in a bill to declare a deed absolute on its face a mortgage, where at the time of giving the deed, a contract was executed providing that in the event of a sale of the land within a certain time for a greater sum than a mortgage then on the premises together with interest, taxes, improvements and other expenses, one-half of any remainder should go to complainant.—Carveth v. Winegar, 133 Mich. 84.

¶ 69. Where a sister furnished her brother money to redeem certain land from a mortgage and he deeded a part of it to her with the understanding that she was to pay taxes and expenses and when the profits realized equaled the amount advanced with interest she should reconvey, and the whole transaction indicated that security was intended, the deed will be declared to be a mortgage. —Wall v. Albion College, 130 Mich. 526.

¶ 70. Where a conveyance of land without a defeasance nevertheless recites that the grantor "is" desirous of securing payment of certain debts and of indemnifying certain parties, and requires the surplus to be returned to the grantor, it is, as between the parties, a mortgage.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 71. Where a judgment debtor gave to the attorney of the creditor a deed of lands authorizing him to sell and dispose of them, and apply the money in payment of the judgment, and to execute and deliver to the purchaser a deed, provided the judgment was not paid in six months from that time; and the judgment not being paid the attorney caused the lands to be sold at public auction, and they were struck off to the creditor who was the highest bidder, it was held that the deed was a mortgage, and the right of redemption could not be barred except by foreclosure either at law or in equity.—Comstock v. Howard, W. 110.

¶ 72. A conveyance in trust to sell for the benefit of specified creditors and turn any surplus remaining back to the grantor though in the nature of a mortgage, is not a mortgage but an absolute conveyance subject to reconveyance upon the grantor's paying the debts mentioned therein.—Geer v. Traders' Bank of Canada, 132 Mich. 215.

§ 13. Persons entitled to establish mortgage character of deed.

Rights and titles under deed given as mortgage, see post § 72.

Rights and liabilities of subgrantees of conveyance absolute in form intended as mortgage, see post § 73.

Right of fraudulent transferee to hold deed as absolute conveyance where intended as security, see Fraudulent Conveyances ¶ 496.

¶ 73. Either a grantor or a grantee may prove that a deed in form absolute is in fact a mortgage; hence on a suit against the grantee for the balance due on the price of the land, he may show defensively that the deed was given as a mortgage.—Kellogg v. Northrup, 115 Mich. 327.

§ 14. Estoppel to claim mortgage or deed.

Shifting theory from absolute deed as mortgage to theory of deed procured by undue influence, see also Equity ¶ 656.

¶ 74. A woman who had little to do with her own affairs was not estopped from impressing a mortgage on a quitclaim deed made by her to a third person in simulation of a bona fide deed, where she had a contract for purchase of the land assigned at the time to defendant to protect advances and to shield the property from her husband's debts.—Crawford v. Osmun, 70 Mich. 561.

¶ 74a. Defendant took an absolute deed of realty from complainant as security for money loaned to plaintiff from time to time. Third parties secured a judgment against complainant and proceeded to levy an execution on said realty. Defendant filed a bill against said third parties claiming absolute title to the property, but at the time of filing the bill admitted to the complainant that he was in fact the holder of the mortgage only. Defendant did not prosecute the bill and subsequently said third parties secured a sale and purchased the premises at the same. Thereupon defendant paid off the claim of said third party and took from them a deed to the premises. Held, defendant could not change his relation from that of mortgagee to that of owner, and as between him and complainant he was still mortgagee after taking the deed from said

third parties, and complainant should be allowed to redeem.—Williams v. Bolt, 170 Mich. 517.

§ 15. Burden of proof and presumptions.

See also post ¶ 82.

Burden of proving beyond reasonable doubt, see also post ¶ 86.

Failure to testify as to character of deed as making unfavorable inference against party, see Evidence § 63.

¶ 75. Although a conveyance absolute in form may be shown by parol to be a mortgage, the burden of proof is upon him who asserts the defeasible character of the instrument.—Kellogg v. Northrup, 115 Mich. 327.

¶ 76. On a bill to have a deed absolute in form declared a mortgage, the burden rests upon the complainant to show primarily that at the time the instrument was executed there was a contract between himself and the grantee by the terms of which he agreed to repay the vendee the consideration advanced and that thereupon the lessee should reconvey the property to him.—Frolich v. Aikman, 194 Mich. 569. (Bird and Person, JJ., dissenting.)

§ 16. Admissibility of evidence.

See also post ¶ 338.

General law of evidence, see Evidence.

Inadmissibility in summary proceeding by lessor that his deed is a mortgage from defendant, see Forcible Entry ¶ 139.

¶ 77. Where a conveyance by an illiterate old man was claimed to have been made merely to obtain a loan, evidence of the grantor's mental capacity was admissible as bearing upon the relations of the parties and the nature of the transaction.—Reilly v. Brown, 87 Mich. 163.

¶ 78. In a bill to have a deed declared a mortgage, the circumstances under which the transaction took place, the conversation at the time and the value of the land were competent evidence to show that the transaction was intended to be a mortgage.—Carveth v. Winegar, 133 Mich. 34.

¶ 79. A deed absolute in form may be proved by parol to have been intended by the parties to operate only as a mortgage for money loaned; and such proof will entitle the grantor to redeem.—Wadsworth v. Loranger, H. 113; Emerson v. Atwater, 7 Mich. 12; Van Wert v. Chidester, 31 Mich. 207; Barber v. Milner, 43 Mich. 248.

¶ 80. It is competent, in a suit to declare a deed absolute in form to be a mortgage, to show by parol testimony that the deed was in fact made as security for a loan.—McArthur v. Robinson, 104 Mich. 540.

¶ 81. Parol testimony may be admitted in equity to show that an instrument on its face a deed, is, in fact, a mortgage, though there is no fraud or mistake shown in the procurement of the deed.—Flynn v. Holmes 145 Mich. 606.

§ 17. Degree and sufficiency of proofs.

See also post ¶ 848.

Parol evidence as to character of instrument, see post § 18.

General law of evidence, see Evidence.

Parol evidence to reduce absolute transfer by writing to defeasible or conditional one, see Evidence § 180.

¶ 82. A complainant seeking to have a deed absolute on its face declared to be a mortgage, while having the burden of proof need establish his case only by a preponderance of the evidence, and not beyond a reasonable doubt.—Schmidt v. Barclay, 161 Mich. 1.

¶ 83. The evidence required to show that a deed absolute on its face was given as a mere security must be such as to command the unhesitating assent of every reasonable mind.—Etheridge v. Wisner, 86 Mich. 166; Abbott v. Gruner, 121 Mich. 140; Frolich v. Aikman, 194 Mich. 569. (Bird and Person, JJ., dissenting.)

¶ 84. The proof that a deed absolute in form was in fact given as a security for a loan should be clear and convincing, and sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety; but, in weighing the testimony, the fact that there was a considerable inadequacy of consideration as well as the fact that the original application was for a loan, are deemed of weight and importance in determining the main question.—McArthur v. Robinson, 104 Mich 540.

¶ 85. Where the complainant, under a mutual contract with the defendant to purchase real estate, fails to meet his obligations because of financial difficulties and thereupon assigns all his rights in the agreement to the defendant by an instrument absolute on its face, he cannot, in a chancery proceeding, have such assignment construed as a mortgage without proof so clear and convincing as to leave no doubt in the mind of the court.—Dalton v. Mertz, 173 Mich 153.

¶ 86. One who files a bill to have a deed given by him construed as a mortgage has the burden of proving beyond reasonable doubt that this was actually meant to be its effect.—Tilden v. Streeter, 45 Mich. 533 [Note. The expression "reasonable doubt" as used in the foregoing has been explained in other opinions cited in this section.]

¶ 87. A bill to have a deed construed as a mortgage cannot be sustained unless there is convincing proof in complainant's favor

even though defendant's showing is such as to establish no claim on the confidence of the court.—Tilden v. Streeter, 45 Mich. 533.

¶ 88. Whether a deed in form absolute was in fact a mortgage is a question of intent, and such intent is to be gathered from the instruments executed and from the facts and circumstances attending the transaction, as well as from other testimony.—Jeffery v. Hursh, 58 Mich. 246.

¶ 89. A deed in form absolute given by one who held a power of attorney to sell and convey may be shown by admissions of the grantee to be a mere security for money loaned.—Jeffrey v. Hursh, 49 Mich. 31.

¶ 90. The fact of relationship between the parties to a bill filed to have a deed construed as a mortgage has no force except as it is pertinent to the case and will aid in proving or disproving it.—Tilden v. Streeter, 45 Mich. 533.

¶ 91. Where a brother and sister were owners in common of certain premises in which their mother had a life interest, and the mother indorsed the brother's note given to his sister for money loaned and received from him a deed to his interest in the premises for an expressed consideration of one dollar and gave him a contract of sale and defeasance of the same property for a stated consideration corresponding in amount with such note and later conveyed the premises to the sister for a nominal consideration, held that the surrounding facts and circumstances strengthened the legal presumption that the instruments referred to of even date operated together as a mortgage.—Maginn v. Cashin, 196 Mich. 221.

¶ 91a. A man made an absolute conveyance of his property to his brother in order to avoid the payment of certain paper upon which, he claimed, his liability had been fraudulently obtained. He was also otherwise indebted. In a suit by creditors to set aside the conveyance as fraudulent as against them, it was proved by the brothers to have been bona fide. The grantor afterwards filed a bill against his brother for an accounting and for leave to redeem, claiming that it had been further agreed between them that the defendant, after paying his debts out of the proceeds and profits of the property, should reconvey. Held, on the evidence, that the bill was rightly dismissed.—Nickodemus v. Nickodemus, 45 Mich. 385.

¶ 92. Evidence held sufficient in view of circumstance and with corroborate testimony to show that a deed was in fact a mortgage.—Cady v. Burgess, 144 Mich. 523.

¶ 93. On a bill to have a deed construed to be a mortgage, the complainant testified he had held the land under a lease with an option to purchase, and that the defendant loaned him the money to make the purchase and took a deed as security, verbally agreeing to recovery on payment of the loan. The defendant testified that he declined to make the loan and that at the expiration of the option made the purchase for his own benefit, and the evidence of the grantor tended to support the defendant. Held, the proof was not sufficient to overcome the presumption that the absolute deed was what it purported to be.—Crane v. Read, 172 Mich. 642.

¶ 94. A surety who had given a previous mortgage to certain property, later gave an absolute deed to the mortgagee to the same property, which deed recited a consideration of $4,000. The evidence disclosed that there was in fact no new consideration given, and that the mortgage was not intended to apply as a payment on the previous mortgage. Held, a bill to have the absolute deed declared a mortgage and to redeem, was supported by sufficient evidence.—Miller v. Peter, 158 Mich. 336.

¶ 95. Where the maker of a deed absolute in form was indebted to the taker and the land value exceeded the debt, and thereafter they treated the debt as still subsisting and the debtor sued to have it declared a mortgage and foreclosed, and the proceeds applied upon the payment of the debt, the court was equally divided as to whether the evidence showed the deed was intended as a mortgage or not.—McMillan v. Bissell, 63 Mich. 66.

¶ 96. A conveyance of land worth $6,000 by an illiterate and mentally infirm old man was declared to be a mortgage and a reconveyance ordered, it being shown that it was made merely to enable grantee to obtain for the grantor a loan of $3,000.—Reilly v. Brown, 87 Mich. 163.

¶ 97. On a creditor's bill attacking a conveyance by the debtor to another creditor, where the evidence showed that the land conveyed was of much less value than the debts for which it was conveyed, and that the debtor was hopelessly insolvent, a contention that the conveyance was intended merely as a mortgage, could not be sustained by testimony that a few subsequent entries on the creditor's books included the rents of the property in his account with the debtor.—Rathbone v. Maltz, 155 Mich. 306.

¶ 98. Complainant owned an equity worth $46,000 in a lot of land and a business house located thereon. Defendant had been her father's trusted business associate in his lifetime. After his death complainant intrusted absolutely to defendant the management of the said property. She was a woman suffering greatly from ill-health and lacking in business capacity, and she placed implicit confidence in defendant. Under the stress of financial embarrassment, she

deeded the said premises absolutely to defendant for the sum of some $16,000. Held, the evidence justified the lower court in finding the deed was intended as a mortgage.—Schmidt v. Barclay, 161 Mich. 1.

¶ 99. In an action to declare a deed made by a father to his son to be a mortgage, evidence by defendant and two witnesses who would profit if the deed were a mortgage, held, to sustain finding that the conveyance was in fee.—Smith v. Smith, 177 Mich. 268.

¶ 100. On a bill to have a deed absolute in form declared a mortgage evidence held insufficient to show that complainant ever agreed to return the sum paid to him by the defendant as consideration for the deed.—Frolich v. Aikman, 194 Mich. 569. (Bird and Person, JJ., dissenting.)

¶ 101. Evidence held not to establish that a deed was given as security for a loan.—Mintz v. Soule, 182 Mich. 564.

¶ 102. On a bill to have a deed absolute in form by one of the members of a partnership to a creditor of the partnership decreed to be a mortgage, which had been paid, and to have it discharged of record, evidence held sufficient to sustain a decree for complainant.—Rozycki v. Leppek, 199 Mich. 617.

¶ 103. On a bill to declare a deed to have been given as security and to redeem, the evidence showing that the parties had been friends for many years and that complainant had amassed considerable property and among others the farm in question and defendant was a lawyer, though not in active practice, with whom plaintiff had been in the habit of consulting as to business matters; before acquiring the farm the plaintiff had had some difficulty with his wife which later culminated in a separation, and defendant made a compromise with the wife by which she was to receive $1,500 in cash and some personalty, and to carry out the compromise the wife executed a deed of her interest to defendant and retained the deed until she should have received the stipulated property, the money to pay her being obtained by discounting plaintiff's note indorsed by defendant. Efforts to sell certain property were made without success, and arrangements were made that if plaintiff would make out a deed of his property to him and hold the deed until by a sale of the farm or other property he could realize sufficient money to pay plaintiff $10,000 he would take it and take care of the note of $1,500 that had been discounted to pay the wife and the mortgages, which deed was made with a consideration stated of $10,000. The complainant went west and returned in about two months and demanded a reconveyance of the deed after the defendant had compromised with the wife and sold the farm, paid the plaintiff $2,000 and taken care of the mortgages. The defendant claimed that no demand for a reconveyance was made until the suit was brought, held that the evidence did not establish that the deed should be held or treated as security.—Etheridge v. Wisner, 86 Mich. 166.

§ 18. ——Parol evidence as to character of instrument.

¶ 104. Parol evidence that a deed prima facie absolute was only meant as a mortgage must be explicit; mere general declarations to that effect by a party claiming the benefit of such a construction are not enough.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 105. The parol evidence to show that a warranty deed absolute in form was intended to secure a debt and to operate as a mortgage must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail.—Cadman v. Peter, 118 U. S. 73, 30 L. ed. 78, 6 Sup. Ct. Rep. 957, aff'g 12 Fed. 363.

¶ 106. To establish an equitable right in lands in opposition to the muniments of title the parol evidence of the understanding of the parties must be very clear and distinct.—Van Wert v. Chidester, 31 Mich. 207.

§ 19. Questions of law and fact.

¶ 107. The question whether a deed absolute was meant as a mortgage or not may properly be submitted to a jury where the fact depends on extraneous matters.—Stevens v. Hulin, 53 Mich. 93.

¶ 108. Where there is evidence tending to show that on the one side there was an absolute sale by a mortgagor to the mortgagee of the mortgaged premises with a contract for repurchase; and, on the other side, that the arrangement was merely to save the expense of foreclosure, the contract being taken in lieu of the mortgage, the question is one of fact for the jury.—Knight v. Hartman, 93 Mich. 69.

C. EQUITABLE MORTGAGES; TRUSTS, ETC.

§ 20. In general.

Executory agreements for mortgage loans, see post § 21.
Contemporaneous agreement reserving possession or lien to grantor, see post § 22.
Land contracts as equitable mortgages, see post § 23.
Assignment of land contract or certificate see post § 24.
Lease as mortgage, see post § 25.
Priority of mortgages of equitable title, see post § 92.
Trust mortgage, see also post ¶ 151.
Trusts for security and payment of debts, see Trusts.
Trust mortgages in so far as the trust is concerned, see Trusts.
Conditions requisite for equitable liens, see Liens § 3.

¶ 109. An agreement in writing, intended by the parties to give a lien on real estate for the payment of a debt, though not witnessed as required by statute to convey real estate, is good as an equitable mortgage.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

¶ 110. Where a husband conveyed realty to secure a loan and thereafter upon payment of the loan by his wife the land was with his consent conveyed to the wife, he was entitled to have the deed declared an equitable mortgage and to have a reconveyance from the heirs of the wife upon payment of the amount due under the mortgage.—Darling v. Darling, 123 Mich. 307.

¶ 111. Where a husband conveyed realty to secure a loan and thereafter upon payment of the loan by his wife, the land was conveyed to her and during her lifetime she made improvements, her heirs were not entitled to an allowance for such improvements in a proceeding in which the deed was declared an equitable mortgage.—Darling v. Darling, 123 Mich. 307.

¶ 112. When it has been shown on a bill to cancel that a mortgage given by a wife upon her property was executed under duress to save her husband from jail, a lien upon part of the land in defendant's favor cannot be established upon the claim that such part was bought with money embezzled from the mortgagee by the husband, unless such fact is affirmatively made to appear.—Bentley v. Robson, 117 Mich. 691.

¶ 113. A deed absolute given to secure an indebtedness, which does not have the effect to divest the legal title of the grantor and convey it to the grantee, but conveys only a right by way of security, because of the contract between the parties of which it is the culmination, is an equitable mortgage.—Flynn v. Holmes, 145 Mich. 606.

§ 21. Executory agreements for mortgage loans.

¶ 114. There can be no recovery for breach of a contract to lend money on mortgage security until a valid mortgage according to contract duly executed has been tendered to defendant.—Lansing Turnverein Society v. Carter, 71 Mich. 608.

¶ 115. An oral agreement to give a mortgage upon lands cannot be sustained as an equitable lien if uncertain in its terms.—McClintock v. Laing, 22 Mich. 212.

¶ 116. Where a party had failed to execute a mortgage as agreed, chancery enforced a lien on the property under the equitable circumstances of the case.—Williams v. Rice, 60 Mich. 102.

¶ 117. An old man and a divorced woman thirty-five years old agreed to live together as father and daughter and did so live, it being understood that she should take care of him in case of sickness and that he would leave her his property when he died. He consented that premises bought by her with his money should be deeded to her, she to give him a mortgage thereon as security for his maintenance and support, but she neglected to execute it. A decree enforcing a lien in his favor on the property was sustained.—Williams v. Rice, 60 Mich. 102.

§ 22. Contemporaneous agreement reserving possession or lien to grantor.

Contemporaneous agreements or options for reconveyance, see ante § 11.

¶ 118. A written agreement between the parties to a deed made at the same time, and allowing the grantor to keep possession of part of the property deeded, for a specified term, in consideration of his assistance in selling it again, in which event he was to receive certain specified benefits, held not to operate to give the grantor a lien in the nature of a mortgage, and to be no defense to a summary proceeding by the grantee under the statute to obtain possession of the land at the expiration of the term therein granted.—Ellis v. Brown, 29 Mich. 259.

¶ 119. A. conveyed a farm to B., his son-in-law, in consideration of $2,500. By the same instrument, B. bound himself to pay the debts of A., especially a mortgage on the farm, and to account to A. for the balance of the $2,500, after paying the debts; and B. promised and obligated himself, besides the payment of the $2,500, to board, lodge and clothe A., in health and in sickness, during his natural life, etc., and A. reserved to himself the right to live with B.; and for the security of the payment of the $2,500, and the fulfilling of the "clauses and conditions" above stated, B. was not to give, alien, exchange or sell the farm without permission of A., and the farm was to stand hypothecated until the payment in full of the $2,500, when A. was to "release the present mortgage in a legal manner." Held not to be a deed of trust, or a deed upon condition, but an absolute deed, incorporating within it a lien in the nature of a mortgage.—Campau v. Chene, 1 Mich. 400.

§ 23. Land contracts as equitable mortgages.

¶ 120. Evidence that the assignee of a mortgage bid in the property at foreclosure and subsequently leased the premises to the original mortgagor with an agreement to sell for a specified sum within a specified time is not sufficient to entitle the mortgagor to have the land contract declared a mortgage.—Doudt v. Loveridge, 138 Mich. 295.

¶ 121. Where a bank which had taken from a depositor a contract for the purchase of a building, and which had paid part of the price, subsequently took the depositor's check for the amount of his payment, and

executed with him an agreement in writing acknowledging its indebtedness to him upon the contract in a sum covering the amount of the check and the rest of the purchase price, such agreement, upon the bank's becoming insolvent, was given effect as an equitable mortgage of the bank's interest in the property.—Whitney v. Foster, 117 Mich. 643.

¶ 122. P. contracted to sell to A. the undivided half of a tract of land at a price specified in the contract, and by the same contract A. agreed to render his personal services in the care, management and sale of the land. P. conveyed to A. the land in pursuance of the contract, taking back a mortgage to secure its performance. A. having failed to perform on his part, P. files a bill to foreclose the mortgage and claims an equitable lien upon his interest in the land, not only for the value of services which were not rendered, as required by the contract, but for the amount of a deduction from the real value of the interest sold to A., made as a special inducement to A. to enter into the contract. Held, that the considerations moving P. to contract with A. were of such a nature as to present an inherent difficulty in the attempt to estimate the pecuniary damage to P.; and whether or not P. would have a remedy at law for damages occasioned by the breach of contract, they are of a character too uncertain to constitute the subject of an equitable mortgage, or a vendor's lien.—Payne v. Avery, 21 Mich. 524.

§ 24. Assignment of land contract or certificate.

¶ 123. In an action to set aside an assignment of a land contract, to have it decreed to be a mortgage, for an accounting and to secure a discharge of the mortgage upon payment of the amounts due, and to set aside an assignment by the first assignee and to compel such subsequent assignee to surrender the premises, evidence held sufficient to establish that the original assignment was as security for a loan.—Jackiewicz v. Siwka, 187 Mich. 165.

¶ 124. Where the vendee in a land-contract assigned it to third parties as collateral security for the performance of a contract with them, and to secure them for money advanced to pay the balance of the purchase-price of the land, and in the assignment authorized the vendor to convey the land to the assignees, the papers will be construed together, and the deed treated as a mortgage.—Gamble v. Ross, 88 Mich. 315.

¶ 125. An assignment of a land-contract by a vendee in possession, with a defeasance that if the assignee should be obliged to pay any part of a specified sum for which he had become surety, and the assignor should not repay the same by a given date, the assignee should have absolute ownership in the contract, and if repaid he was to surrender all claim thereto, is a mere mortgage of th land.—Meigs v. McFarlan, 72 Mich. 194.

¶ 126. An assignment of a land-contra for security and as a shield against cre itors and subsequent quitclaim deed of th land to defendant by complainant on no ne consideration were found to have been in tended as a mortgage, and complainant wa allowed to redeem.—Crawford v. Osmun, 7 Mich. 561.

¶ 127. Where an assignment of a lan certificate is meant by the parties as securit for debts existing and to be incurred, th relation established between them is that o mortgagor and mortgagee.—Gunderman Gunnison, 39 Mich. 313.

¶ 128. Defendant having assigned certai land certificates, in form absolutely, but i fact as security for debts he was owing t complainants and for advances to be mad and having afterwards paid up the indeb edness and advances, but desiring furth advances, it was arranged he should r deliver the assignments as security for suc further advances as complainants shoul make him; and redelivery thereof beir made, further advances were made by con plainants on the faith of such security, an settlements were had from time to time an defendant's due-bill taken, with interest a ten per cent, for the amount found du -Held, that a bill in equity will lie on con plainants' behalf for an accounting as to th amount of such advances and for the for closure and sale of such securities unle payment should be made in a reasonab time, in which event the certificates are t be assigned back.—Case v. McCabe, 35 Mic 100.

§ 25. Lease as mortgage.

Lease of the land as further security, s post § 62.

Law pertaining to leases in general, s Landlord and Tenant.

¶ 129. An unconditional conveyance of farm by a man to his son, and an imm diate mortgage back by the latter to secu a loan of $1,400, also a lease of the far by him to his parents at a rental of o dollar a year, followed by the son's suppor ing his parents on the farm until his deat are to be regarded as parts of one transa tion, and in proceedings to foreclose th mortgage and for an accounting, the instr ments must all be construed together, th lease plainly having been intended as an a ditional security for the payment of th mortgage debt, and the clause giving th parents the use of the farm during the lives intended to insure to them a home o the farm while they lived, while the valu of the timber sold by the father, and of h use and occupation of the land from th time of his son's death until his own, shoul be deducted from the amount due on th notes.—Abele v. McGuigan, 78 Mich. 415.

III. CONSTRUCTION, VALIDITY, AND EFFECT IN GENERAL.

Presumptive validity and genuineness of acknowledged instrument, see Acknowledgments § 20.

§ 26. Construction in general.

See also post ¶ 708.

Debts and amounts secured by the mortgage, see post §§ 28-33.

Property or interests covered, see post §§ 34-39.

Maturity of right under mortgage, see post §§ 40, 41.

Covenants and promises in the mortgage, see post §§ 42-44.

Conditions and stipulations, see post §§ 45-49.

Condition for perfection or warranty of title sold to mortgagor, see post § 50.

Effect of collateral agreements or indorsements, see post § 51.

Effect of mortgage, see post § 52.

Defects and invalidities, see post §§ 53, 54.

Estoppel and ratification, see post § 55.

What mortgages are usurious, see Usury.

What law governs mortgages and loans secured thereby, see Conflict of Laws, II, III.

Law governing the loan as dependent on the place of the contract, see Conflict of Laws § 17.

Construction of bond for performance of services on foreclosure of mortgage to secure such bond, see Bonds § 4.

Effect of variance between mortgage and authority of representative's license, see Estates of Decedents § 255.

Validity in general of mortgages by representative, see Estates of Decedents §§ 254-257.

Validity of mortgage of land held adversely to mortgagor, see Champerty § 3.

Mortgages as estoppels, see Estoppel, II.

Construction of foreclosure decrees, see Foreclosure § 103.

Statute of frauds as preventing parol evidence to aid or vary mortgage, see Frauds, Statute of, § 153.

Presumption as to stated consideration being correct, see also Contracts § 139, ¶ 605.

Validity of sole mortgage of homestead interest, see Homesteads, VI.

Res adjudicata effect of dismissal of bill to declare mortgage invalid, see Former Adjudication ¶ 109.

Invalidity or voidableness of mortgages of insane person, see Insane Persons § 30.

What law applies in construing notes or loan agreements secured by mortgages, see Conflict of Laws §§ 17, 28.

¶ 130. A mortgage is to be construed most favorably for the mortgagee.—Stuart v. Worden, 42 Mich. 154.

¶ 131. A mortgage is to be construed in connection with other writings given at the same time, and in the light of surrounding facts; and where the condition secured is not clear the mortgage is to be construed most favorably for the mortgagee.—Stuart v. Worden, 42 Mich. 154.

¶ 132. Where there was some doubt whether a mortgage was, by its condition, payable in work or in money, it was held to be the duty of the court to construe it most strongly against the mortgagor, and in such manner as to make it a valid and binding security which might be enforced against him.—Jerome v. Hopkins, 2 Mich. 96.

¶ 133. A mortgage executed, payable, and covering lands in Michigan, is a Michigan contract, and is subject to interpretation by and enforcement under the Michigan laws.—Stack v. Detour Lumber & Cedar Co., 151 Mich. 21.

§ 27. Debts and amounts secured by the mortgage.

Optional or future liabilities, see post § 28.

Balance of running account, see post § 29.

Security for past or future indorsements, see post § 30.

Mortgage covering "all debts" without specifying as to amount or character, see post § 31.

Claims of third persons, see post § 32.

Mortgage running to two or more co-mortgagees, see post § 33.

Effect of error in statement of amount due, see post ¶ 226.

Parol to identify debt secured, see Evidence ¶ 1107.

¶ 134. A mortgage given for money advanced and lands to be conveyed can only be enforced by the mortgagee to the amount of money advanced, when he has wrongfully refused to convey the land.—Robinson v. Cromelein, 15 Mich. 316.

¶ 135. Where a person indebted on certain notes gives a mortgage deed for a sum less than the amount of the notes, and which does not refer to them or expressly identify the debt, or specify a time for payment, or make any provision for interest, it is due as soon as given, and is by implication a security bearing interest from its date, or at least from the maturity of the notes.—Eaton v. Truesdail, 40 Mich. 1.

¶ 136. Where, after a mortgage has been given securing a bond, the mortgagor's due-bill is substituted by parol agreement for part of the bond, and is made payable at a different date from any provided for in the mortgage, the mortgage-lien is not held to secure the due-bill, unless, at least, it is clearly shown that it was so agreed when the exchange was made.—Tucker v. Alger, 30 Mich. 67.

¶ 137. Describing the same parcel twice in a deed thereof from a mortgagee to a mortgagor does not show that it was twice

taken into account in fixing the amount of the mortgage.—Hart v. Carpenter, 36 Mich. 402.

¶ 138. Where, in a conditional pardon, the person pardoned was required to secure the payment of $1,000 to the county, and the county commissioners obtained a mortgage for $1,150 (the $150 being added as the costs of prosecution of the mortgagor), the mortgage was held good for $1,000 and void as to the residue.—Rood v. Winslow, W. 340: Rood v. Winslow, 2 D. 68.

¶ 139. A mortgagee, having acquired the interest of an execution purchaser in the mortgaged premises, entered into an agreement with the execution debtor, before the expiration of the redemption year, by which certain additional claims were to be included in the mortgage security. After the filing of a foreclosure bill and a notice of lis pendens, a second judgment creditor sought to redeem, and received a sheriff's deed. Held, that such agreement was valid as against said judgment creditor.—Burt v. Gamble, 98 Mich. 402.

¶ 140. A mortgage, securing the sum of $1,500 which contained the condition that when the mortgagor's indebtedness to the mortgagee was reduced to a sum less than $3,500 the mortgage should stand discharged, construed as providing that the security for the sum of $1,500 was not in any respect to be affected until the indebtedness was reduced to the sum named.—Commercial State Savings Bank v. Stevens, 180 Mich. 35.

¶ 141. One of several mortgages given to a widow by the several children respectively in return for the conveyance to them of all her interest in her husband's estate "to secure the payment of $5,000, interest payable annually at 7%, mortgage to become null and void at the decease of the widow," must be construed to give the widow the right to the interest on one or all of the mortgages as she desires and this right is assignable. —Holmes v. Holmes, 129 Mich. 412.

¶ 142. Where a husband, having got his wife's consent to mortgaging her land for the purchase price of goods bought by him, obtained without false representations the execution of a mortgage covering, in addition to such purchase price, an old debt of his whereof she was not informed, the mortgage was held valid as to the purchase price only.—Smith v. Osborn, 33 Mich. 410.

¶ 143. A stamp upon a mortgage given while the laws requiring securities to be stamped in proportion to their amount were in force raises a strong presumption that the mortgage was not understood to be operative as a security beyond the amount covered by the stamp.—Lashbrooks v. Hatheway, 52 Mich. 124.

§ 28. ——Optional or future liabilities.

¶ 144. Where a mortgage is given to secure the mortgagee for liabilities which it is optional with him to incur or not, such mortgage is at any time a lien upon the land only to the extent of the liabilities then actually incurred; and a deed given by the mortgagor and placed upon record will take precedence of the mortgage as to liabilities subsequently incurred.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

¶ 145. The mortgage being duly recorded is notice to a subsequent purchaser; but he is chargeable with notice only to the extent of the liabilities which had been actually incurred prior to his purchase.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

§ 29. ——Balance of running account.

¶ 146. A mortgage to secure a balance of a running account can only be enforced to the extent of money actually advanced or indebtedness actually accruing.—Brackett v. Sears, 15 Mich. 244.

¶ 147. A person made a bond and mortgage to a partnership, with which he had dealings in the way of mutual accommodation discounts, acceptances and indorsements, and took the receipt of the partnership therefor, which, after describing the papers, concluded as follows: "From which we are to deduct our account with him, and to pay him the balance, or to be returned to him at our option." The party subsequently pursued a similar course of business accommodations, the balance being always against the mortgagor, but never equaling the amount of the bond and mortgage. Held, that they must be considered as security for all these dealings.—Brackett v. Sears, 15 Mich. 244.

§ 30. ——Security for past or future indorsements.

¶ 148. A mortgage to secure a sum and all obligations the mortgagee may assume or become liable for by indorsement will not secure the mortgagee for the payment of the pre-existing note of the mortgagor, upon which the mortgagee is not an indorser, nor will such payment be covered by a mortgage securing the mortgagee for all indorsements theretofore made, or which he shall thereafter make, for the benefit of the mortgagor.—Burt v. Gamble, 98 Mich. 402.

¶ 149. A mortgage securing the payment of $4,000 within ninety days from date, and all obligations the mortgagee may assume or become liable for by reason of any paper indorsements or obligations he may make for or at the request of the mortgagor, and which provides that, upon payment of such sum or sums for which the mortgagee shall become liable within the ninety days, he shall discharge the mortgage, secures only such claims, aside from the $4,000, as are based upon indorsements, or obligations

made within the ninety days.—Burt v. Gamble, 98 Mich. 402.

¶ 150. A mortgage given as security for a debt due and to stand as security for any and all accommodation indorsements up to a given sum to the extent of which sum the mortgagee agrees to indorse the mortgagor's paper is held to cover a liability on an indorsement prior to the date of the mortgage.—Holliday v. Snow, 129 Mich. 494.

¶ 151. A trust mortgage stated that the mortgagor, being indebted to certain persons therein named upon promissory notes, some of which were indorsed by R., "and to R." upon certain notes made by the mortgagor to U. and P., "indorsed by R., and upon which he is liable as indorser," executed the mortgage "for the purpose of securing payment of said debts, and securing R. against his liability upon said indorsements," and authorized the trustee, upon default in the payment of said indebtedness, or if R. should be obliged to pay the notes upon which he was liable, to foreclose and sell the property, retaining from the proceeds of such sale "sufficient to pay said debts and indorsed notes." Held, upon a bill filed by U. to enforce an alleged interest in the security, that, so far as its debt was concerned, the mortgage constituted a mere personal indemnity to R., and that complainant was not a beneficiary thereunder.—Union Nat. Bank v. Rich, 106 Mich. 319.

§ 31. ——Mortgage covering "all debts" without specifying as to amount or character.

¶ 152. A printed clause in a mortgage extending it to all debts not covered by the amount specifically stated seems to be to some extent counterbalanced by the presumption arising from the fact that the stamp on the mortgage corresponds to the specified sum.—Lashbrooks v. Hatheway, 52 Mich. 124.

¶ 153. A mortgage given to secure all existing debts of the mortgagor to the mortgagee is valid without specifying the debts or their amounts. And a subsequent purchaser of the land, with actual or constructive notice of the mortgage, takes subject to it.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

¶ 154. A statement in a mortgage that it is given to indemnify an accommodation maker against all notes outstanding and that such notes amount to $31,500 when supplemented by testimony that the mortgagor had stated that the mortgage was made to cover specified notes and when these notes total $31,500 will be held to apply to them only notwithstanding the existence of other notes upon which the mortgagee is accommodation maker.—Albion State Bank v. Knickerbocker, 125 Mich. 311.

¶ 155. A mortgage which is so drawn as to cover any demands which the mortgagee may hold against the mortgagor cannot authorize the mortgagee to buy up claims against the mortgagor and enforce them unless the provision that he may do so is very clearly expressed. The provision can ordinarily cover only such demands as arise directly out of the dealings between the mortgagor and mortgagee.—Lashbrooks v. Hatheway, 52 Mich. 124.

§ 32. ——Claims of third persons.

¶ 156. A mortgagee cannot take claims held by third persons against his mortgagor and include them in his mortgage unless the mortgagor consents and third parties are not prejudiced.—Perrin v. Kellogg, 38 Mich. 720.

§ 33. ——Mortgage running to two or more co-mortgagees.

¶ 157. Under a mortgage which contains no personal covenant, but which secures a certain sum to each of several creditors, no creditor is secured for a sum larger than that which was mentioned as due to him.—Shelden v. Erskine, 78 Mich. 627.

¶ 158. The presumption is that each of two mortgagees owns an equal interest, which presumption, however, may be overcome.—City of Detroit v. Jacobs, 145 Mich. 395.

§ 34. Property or interests covered.

Sufficiency of description, see post § 35.
After-acquired property, see post § 36.
Mortgages on life estates, reversions and remainders, see post § 37.
Mortgages covering individual or partnership property, see post § 38.
Fixtures, machinery and buildings attached to freehold, see post § 39.
Effect of subsequent mortgage on erections of tenant not removed on renewal of lease with new landlord, see Landlord and Tenant ¶ 343.
Improvements as accession to another's land, see Accession and Confusion § 5.
Prohibition against mortgage upon cemetery, see Comp. L. 1915, § 11168.

¶ 159. A mortgage covering "all the right, title and interest" of the mortgagor in "any and all contracts" to certain land covers an interest in real estate.—Balen v. Mercier, 75 Mich. 42.

¶ 160. Where a mortgage purports on its face to convey an indefinite interest in the premises, not exceeding that possessed by the mortgagor, and does not profess to transfer the whole or any particular portion of the premises, or any specific undivided interest, it must be taken as meaning to convey the right which the mortgagor had, and subject to all existing equities, and that right or its extent is to be ascertained by inquiry; and the mortgagee is bound to make inquiries and is chargeable with notice of all the facts to which such inquiries must lead.—Case v. Erwin, 18 Mich. 434.

§ 35. ——Sufficiency of description.

Effect of notice of misdescription in record of mortgage, see Notice and Record of Title, II, B.

Effect of mistake in description of premises on rights under mortgage and subsequent purchasers, see Notice and Record of Title, II, B.

Sufficiency of description in the record to impart notice, see Notice and Record of Title, II.

¶ 161. A mortgage is not to be held void for uncertainty in the description of the premises, unless all means to sustain it have failed.—Dwight v. Tyler, 49 Mich. 614.

¶ 162. The omission, from a mortgage, of the names of the township, county and state in which the lands lie, does not invalidate it, if there are other adequate means, such as known descriptive signs, of identifying the lands.—Slater v. Breese, 36 Mich. 77.

¶ 163. A mortgage is not necessarily defeated by adding to the description elements that are untrue; such details will be rejected and the mortgage will stand if there is enough to identify the subject-matter.—Slater v. Breese, 36 Mich. 77.

¶ 164. Where a mortgage described the land conveyed as "lot four of block one of the La Fountaine farm, lying south of the river road and fronting the Detroit river, being now used and occupied with the steam sawmill thereon by the parties of the first part," and it appeared that that portion of said farm had been platted into four lots or blocks, which had not been subdivided, that the mill was situated on the one numbered four on the plat, and the others were fenced in, used and occupied with the mill, held, that the words "of block one" of this description should be rejected, and the mortgage held a valid lien upon lot four, according to the evident intent of the parties.—Anderson v. Baughman, 7 Mich. 69.

¶ 165. A mortgage described the premises as "the southeast quarter of the quarter of section 32," etc., containing "forty acres." The mortgagor owned the entire half of a quarter section, being eighty acres, and the mortgagee, supported by the parol testimony of the scrivener who drew the mortgage, claimed that it was meant to cover this whole parcel. Held, that this construction would contradict the terms of the mortgage, and that the lien must be confined to a quarter section.—Hurst v. Beaver, 50 Mich. 612.

¶ 166. Misdescription does not invalidate a mortgage of a homestead where it would not invalidate a mortgage of any other property, and where the premises can be identified by possession.—Beyschlag v. Van Wagoner, 46 Mich. 91.

¶ 167. An ambiguous description in a mortgage is not to be extended by parol unless upon positive proofs.—Hurst v. Beaver, 50 Mich. 612.

§ 36. ——After-acquired property.

After-acquired title passing under mortgag by doctrine of estoppel, see Estoppel § 2(

Inapplicability of doctrine of inurement o after-acquired title to purchase mone; mortgagee as to lands not covered b; purchase but described in mortgage, se Estoppel ¶ 51.

Inurement of after-acquired title by estoppe against mortgagor, see Estoppel § 21.

¶ 168. A patent obtained by a mortgago and vendee in possession inures to the ben efit of his mortgagee and vendor.—Haney v Roy, 54 Mich. 635.

¶ 169. Where the mortgagor's title to par of the mortgaged premises fails, and is per fected by his securing a quitclaim deed of th premises, such subsequently-acquired titl inures to the mortgagee's benefit under hi mortgage.—Gray v. Franks, 86 Mich. 382.

¶ 170. Husband and wife, to whom a undivided half of a lot of land had been con veyed, mortgaged the whole lot without cove nants of warranty or title, and pending fore closure in chancery the wife inherited th other undivided half. Held, that the wife' subsequently-acquired interest did not inur to the foreclosure purchaser.—Brennan v Eggeman, 73 Mich. 658.

¶ 171. The lien of a mortgage covering al the property and franchises of a gas com pany, together with "all improvements and additions, of every name and nature," ex tends to a new municipal franchise obtained in place of that belonging to the mortgago at the time of the execution of the mortgage —Lewis v. Weidenfeld, 114 Mich. 581.

¶ 172. One who gives a purchase-money mortgage that includes lands not granted to him is not estopped as against the grantors and mortgagees from denying that it covers those lands if he acquire them afterwards.—Brown v. Phillips, 40 Mich. 264.

¶ 173. A purchase-money mortgage cannot attach to anything which the purchaser did not own at the time of giving it.—Brown v. Phillips, 40 Mich. 264.

¶ 174. A widow who had a life estate in land of which her children were residuary devisees gave a mortgage on the land. One of the children afterward died, so that as the child's heir she became entitled to a share in fee. Held, that as long as there were no outside equities, such as may rise with subsequent purchasers, the interest she acquired by inheritance inured in aid of the mortgage. —Brayton v. Merithew, 56 Mich. 166.

¶ 175. Where land subject to two mortgages is purchased by the first mortgagee at

a foreclosure sale under his mortgage, and after the expiration of the equity of redemption, the land is repurchased by the mortgagor, the title thus acquired does not inure to the benefit of the second mortgagee.—Swarthout v. Shields, 185 Mich. 427.

§ 37. ——Mortgages on life estates, reversions and remainders.

Law pertaining to life estates in general, see Life Estates.

¶ 176. A mortgage on certain land given by the holders of a life estate therein is an encumbrance on the life estate only.—Stroh v. O'Hearn, 176 Mich. 164.

¶ 177. A life tenant and the owners of the fee, having taken a single mortgage for the purchase price of land and they having conveyed their interest in the land and with it assigned their interest in the mortgage, it was held proper to allow the fee owner to have the amount of interest to accrue to the life tenant determined from the date of the decree according to life tables, and on payment of that amount with interest to have the mortgage discharged from the life tenant's claim.—Horton v. Howard, 95 Mich. 134.

¶ 178. Under How. St. § 5548, prohibiting the barring of an expectant estate by any act of the owner of the intermediate estate, etc., a mortgage by a devisee whose estate in the mortgaged property would by the devise go to the other devisees should he die before the termination of another's life estate is void on the mortgagor's death during such life estate.—L'Etourneau v. Henquenet, 89 Mich. 428.

¶ 179. Where at the time of a certain quitclaim deed grantor had only a life estate and a lien for his support, as was subsequently ascertained by decree, but the grantor subsequently joined with another in mortgaging the land and later the quitclaim grantee received a conveyance of the fee to a part of the premises subject to one-half of all the incumbrances on the whole tract, it was equitable to charge his portion with the mortgage.—Montague v. Haviland, 101 Mich. 80.

§ 38. ——Mortgages covering individual or partnership property.

See also ante ¶ 147.

¶ 180. A mortgage taken by the brother of a deceased partner of a firm from the surviving brother securing his notes some time after the death and when the affairs of the firm survivor were embarrassed must be held to have been taken for an individual debt, where it covered only the individual interest of the survivor in firm lands and was ostensibly to cover a loan by the mortgagee, who was administrator of the deceased brother as well as an employee of the surviving brother, and his circumstances and relationship were such that he must have known that it could not be for an advance on firm account.—Brown v. Watson, 66 Mich. 223.

§ 39. ——Fixtures, machinery, and buildings attached to freehold.

Rights of land mortgagee in chattels affixed to land at time of mortgage, see Fixtures § 27.

Giving chattel mortgage on fixtures as an agreement that they are personalty rather than realty covered by the land mortgage, see Fixtures § 22.

Effect of making chattel mortgage in addition to real estate mortgage to impress chattel character on things mortgaged, see Fixtures § 16.

¶ 181. A lien created by a mortgage upon a building attached to the freehold in such a way as to make it part of the real estate is not defeated by a removal of the building to other premises. A later mortgagee of the building is therefore not let in to priority.—Johnson v. Bratton, 112 Mich. 319.

¶ 182. Prior to the assignment of a mortgage to a bona fide assignee, the mortgagor removed the buildings from the mortgaged premises upon another lot, owned by his wife, and which she subsequently conveyed by quitclaim deed, such removal being made without the consent of the mortgagee or assignee. Held, that the buildings were still encumbered by the mortgage, and could be sold on its foreclosure if the land did not bring enough to satisfy the mortgage.—Partridge v. Hemenway, 89 Mich. 454.

¶ 183. A mortgage on realty used as a foundry and machine shop covers machinery placed by the owner in the building many years before, although some of the machines were not fastened to the soil, being so heavy as to render annexation unnecessary; especially where the parties understood the mortgage was to cover the machinery.—Smith v. Blake, 96 Mich. 542.

¶ 184. A mortgage upon a manufacturing plant will, in the absence of evidence of a contrary intent, be held to cover machinery subsequently purchased to replace such as was old and out of repair, or which is adapted to the purposes of the business.—Sturgis Nat. Bank v. Levanseler, 115 Mich. 372.

¶ 185. Certain letters written by a real estate mortgagor to a mortgagee after the latter's purchase of the property at a foreclosure sale under prior mortgages relating to the property held not to show a surrender either of title or the right of possession of machinery belonging to the .mortgagor.—O'Dell v. Day, 200 Mich. 259.

§ 40. Maturity of right under mortgage.

Mortgages to secure conditional or collateral liability, see post § 41.

Effect of certifying amount due as acknowledgment tolling limitations, see Limitations ¶ 309.
Right to foreclose and maturity of cause of action under mortgage, see Foreclosure, I.
Sufficiency of acknowledgments of debt to toll limitations, see Limitations § 81 et seq.
Jury question as to time of completion of bar on lost note and mortgage, see Limitations ¶ 440.
Effect of mortgage to withhold debt from operation of limitations, see Limitations ¶ 35.
Period of limitations applicable to debt created by mortgage or sealed instrument, see Limitations § 15.

¶ 186. The right to foreclosure does not mature until the debt secured by the mortgage under foreclosure falls due.—Kelly v. Bogardus, 51 Mich. 522.

¶ 187. A mortgage for a debt made payable after several years, the interest payable annually, is in default after the expiration of the year, if interest is in arrears.—Dederick v. Barber, 44 Mich. 19.

¶ 188. Breach of the condition of a bond given by a son to support his parents during their natural lives entitles them to foreclose the mortgage securing the bond.—Wright v. Wright, 49 Mich. 624.

¶ 189. Where a mortgage payable absolutely at a specified time is given to secure the payment of another encumbrance on land conveyed to the mortgagee, it may be foreclosed by him upon default, without first paying off such encumbrance.—Raffel v. Epworth, 107 Mich. 143.

¶ 190. The omission, before filing a foreclosure bill, to demand payment at the place stipulated in the mortgage prevents the recovery of costs but does not defeat foreclosure.—Norton v. Ohrns, 67 Mich. 612.

¶ 190a. On a mortgage of Michigan land back to the grantor, accompanied by a deed of Wisconsin lands under an agreement that the mortgagee, so receiving title, was to sell the Wisconsin lands and apply the proceeds on the mortgage, the mortgage was not to become due until the mortgagee had discharged the obligations cast upon him by the agreements, it being their obvious intention to satisfy the mortgage out of the proceeds so realized.—A. P. Cook Co. v. Bell, 114 Mich. 283.

§ 41. ——Mortgages to secure conditional or collateral liability.

Right and title under preliminary and collateral agreement, see post § 57.
Right to foreclose mortgages given to secure conditional or collateral liability, see Foreclosure § 5.

¶ 191. Where a mortgage is conditioned indemnify a surety, the mortgagee can foreclose until he has been damnified Thurston v. Prentiss, W. 529.

¶ 192. Where a mortgage is condition to pay the demand, as well as to save surety harmless, the mortgagee may fo close on failure of the mortgagor to pay, order to raise the money to pay the dema and rid himself of responsibility.—Thurst v. Prentiss, 1 Mich. 193; Dye v. Mann, Mich. 291.

¶ 193. There is no breach of condition a maturity of right under a mortgage until grantor is actually damnified where a c veyance was made as security for a d upon the express condition that the gran shall save the grantor harmless from c tain debts; a failure to pay the debts, reason of which the grantor is threaten with suit, is not a breach.—Michigan St Bank v. Hastings, 1 D. 225.

¶ 194. A condition in a mortgage that mortgagor "shall promptly pay and discha all notes and papers of his upon which mortgagees shall become indorsers or ceptors, together with all the interest, co and charges accruing thereon, so as to sa said mortgagees harmless by reason of th connection with such paper," is broken once on a failure to pay the paper at n turity, and a right under the mortgage crues, without further action of the mo gagees.—Butler v. Ladue, 12 Mich. 173.

¶ 195. The cause of action on a mortga does not mature where it secures an agr ment, conditioned on the success of a pe ing suit, and the suit fails.—Lamb v. Scull 61 Mich. 280.

¶ 196. A purchase-money mortgage giv upon condition that should the vendor before perfecting title by procuring a d charge of a prior mortgage and an und taking to save harmless against any cla for rents and profits, the mortgage is to fully discharged, cannot be foreclosed un the prior mortgage has been discharged a an acquittance of any claim for use a profits obtained.—McCrath v. Myers, Mich. 204.

¶ 197. Mortgagees holding a mortgage security of a bond given by the mortgag conditioned to pay certain notes within time certain after they mature, the mo gagors and mortgagees being respectiv principals and sureties on said note, may the stipulated time sue to foreclose, althou they have not then been compelled as su sureties to pay the notes; since the bond absolute and not by way of indemnity.—H v. Nash, 10 Mich. 303.

¶ 198. A mortgage given as collateral curity for the notes of third parties, does require the mortgagee to first attempt to c

lect the notes from the makers and endorsers before right under mortgage matures. —Clare County Sav. Bank v. Goodman, 119 Mich. 338.

¶ 199. Where the note for which a mortgage was security was made a part of the defeasance clause, and contained a distinct and unequivocal promise to pay the principal sum on or before a specified number of years after date together with interest of a specified rate, but further stipulated that the note should become void and canceled at the death of the payee, provided the interest was fully paid at the time specified, and a later section of the defeasance clause provided that if the maker should pay the interest on the principal to the payee or his assigns when the same fell due, and the mortgage and note should become void upon the death of the payee, otherwise to remain in full force and effect, and the payee was living after the maturity of the note and the interest was not fully paid as therein provided, held that the mortgage was not intended as security for the payment of interest only but also for the principal, and that the complainant was entitled to a decree for both principal and interest, and that the land should be sold and the proceeds applied to satisfaction of the same.—Engler v. Engler, 192 Mich. 361.

¶ 200. Under a mortgage containing a condition that if at the expiration of the time limited for the payment of the instalments there should remain due on the mortgage a specified sum, the mortgagor might have the privilege of paying the amount due by giving therefor his note, secured by mortgage on other real estate, the instalments fall due at the time stipulated; but the mortgagor may in such case stop the sale by insisting on and complying with the terms of the condition.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

§ 42. Covenants and promises in the mortgage.

Provisions for interest, bonus or commission, see post § 43.

For payment of taxes or insurance, see post § 44.

Covenants to assume debt, see post § 115.

Covenants by strangers to mortgage, see post § 116.

Covenants for release of parcels, see post § 151.

Covenants to release parcels from mortgage lien, see post, VII, C.

Right of purchaser under mortgage to enforce covenants for title, see Covenants for Title §§ 12-15.

Covenants for title in mortgage, see Covenants for Title.

Statutory prohibition against implied covenants, see Comp. L. 1915, § 11692.

Implication as to covenant in mortgage for payment of debt, see Comp. L. 1915, § 11692.

¶ 201. Covenants cannot be implied in a mortgage.—Howe v. Lemon, 37 Mich. 164; Brown v. Phillips, 40 Mich. 264; Brennan v. Eggeman, 73 Mich. 658.

¶ 202. A personal covenant in a mortgage will bind the mortgagor's estate after his death.—Dennis v. Sharer, 56 Mich. 224.

¶ 203. A purchaser under a mortgage is entitled to the benefit of such covenants as run with the land.—Ely v. Hergesell, 46 Mich. 325.

¶ 204. How. St. § 5561, which excepts mortgages from the general provision of the statute (How. St. § 5560), that "all grants and devises of lands made to two or more persons shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy," does not operate to prevent the execution of a mortgage with covenants that are several, but leaves the rule as at common law. —Cooley v. Kinney, 109 Mich. 34.

¶ 205. A wife joining in the mortgage to bar her rights does not become bound by the covenant to pay the husband's debt thereby secured.—Kitchell v. Mudgett, 37 Mich. 81.

§ 43. ——Provisions for interest, bonus, or commission.

¶¶ 206, 207. The mortgagee in a mortgage which provides that the mortgagor shall pay interest "at the rate of 6 per cent per annum if the mortgagee pays the taxes, or otherwise, if the mortgagor pays all taxes assessed on the mortgage, to be computed at 5½ per cent," is entitled to interest at six per cent where no assessment whatever is made upon the mortgage.—Rauch v. Seip, 112 Mich. 612.

¶ 208. The fact that the balance of accommodations and advances was always in favor of the mortgagees would not entitle them to charge commissions on such balance unless it had been so agreed.—Brackett v. Sears, 15 Mich. 244.

§ 44. ——For payment of taxes or insurance.

Liability for taxes, insurance and interest charges, see post § 64.

Validity of covenant to pay taxes, see Contracts § 52.

Breach of warranty in insurance policy against mortgage incumbrance, see Insurance § 140.

Forfeiture of insurance for breach of condition in policy against mortgage incumbrance, see Insurance § 168.

¶ 209. Under the general tax law and Comp. L. 1897, § 6168, How. 2nd Ed. § 6488, relating to the taxation of the capital of trust, deposit and security companies a tax on a purchase price mortgage held by a trust company given upon the sale by it of its real estate is levied upon or on account of a mortgage within the meaning of such mort-

gage which provides for the payment by the mortgagor of taxes so levied.—Union Trust Co. v. Radford, 176 Mich. 50.

¶ 209a. A covenant in a mortgage that the mortgagor shall pay all such taxes and assessments as shall, by any lawful authority, be levied upon the mortgaged "premises," does not impose upon him the obligation of paying taxes which, by virtue of subsequent legislation, are assessed against the mortgagee's interest in the land as a separate taxable interest from that of the mortgagor.—Fuller v. Kane, 110 Mich. 549.

¶ 210. A personal tax assessment against the mortgagee on the mortgage debt is within the meaning of the contract and required to be paid by a mortgagor who agrees to pay all taxes left upon the property "or upon or on account of this mortgage or the indebtedness secured."—Green v. Grant, 134 Mich. 462.

¶ 211. Payment by a mortgagor of a tax levied on the debt owned by the mortgagee is not a payment to preserve the security but for the benefit of the mortgagee just as if he paid it to the mortgagee direct.—Green v. Grant, 134 Mich. 462.

¶ 212. A stipulation for insurance for a mortgagee's benefit was held in equity to be an adjunct to the mortgage, and as binding the mortgagor and all others in his place without notice.—Miller v. Aldrich, 31 Mich. 408.

§ 45. Conditions and stipulations.

For election to declare whole sum due on any default, see post § 46.

For ejectment and receivership on default, see post § 47.

Stipulation as to power of sale, see post § 48.

Stipulations for attorney fees, see post § 49.

Construction of mortgage providing obligation would become canceled on death of mortgagee if interest paid as stipulated, see Foreclosure ¶ 26.

¶ 213. The condition in a mortgage that the mortgagees shall have the use of a horse and buggy "whenever they or either of them may desire," etc., is joint and several, and either may have a separate cause of grievance for a failure to accommodate him individually.—Tucker v. Tucker, 24 Mich. 426.

¶ 214. Where a mortgage was given to an old person to secure the payment of a debt by boarding and supporting her for five years, the mortgagee was absolutely entitled to the support for the entire period, and the mortgagor was not at liberty to furnish the support or pay the money at his option.—Hawkins v. Clermont, 15 Mich. 511.

¶ 215. A court cannot make a decree in advance which shall limit below the actual damage sustained the amount of recovery for future violations of such a condition as one securing to mortgagees the use of a horse and buggy; damages from a failure to perform such a condition cannot be determined in advance, and whenever a complaint is made it must be determined on its own merits.—Tucker v. Tucker, 24 Mich. 426; Tucker v. Tucker, 27 Mich. 204.

¶ 216. J. gave a mortgage for $10,000, payable in several instalments. As further security for the first four instalments he gave a second mortgage on other premises, conditioned to pay said four instalments as they fell due. The second mortgage also contained a stipulation that whenever J. should build on the premises covered by the first mortgage, and cause the buildings to be insured for $2,000, and assign the policy to the mortgagee, and agree to keep the same so insured during the continuance of the first mortgage, then the mortgagee should discharge the second mortgage. J. built on the premises covered by the first mortgage, and caused the building to be insured, but did not assign the policy. The said four instalments of the first mortgage having become due, and three of them remaining unpaid, a bill was filed to foreclose the two mortgages. J. (who had become insolvent) now tendered an assignment of the policy of insurance, together with a written agreement to keep the building insured, which the holder of the mortgages declined to receive. It was held that under the second mortgage J. had his election to pay the said four instalments as they fell due, or to perform the stipulation therein with respect to building and insuring; that his right to elect terminated when the moneys fell due, and he had no right thereafter to a discharge of the second mortgage on tendering the policy of insurance and agreement to keep insured.—Chapin v. Jacobs, 10 Mich. 405.

¶ 217. Where a purchase-money mortgage contains a stipulation that it shall be "null and void" unless a certain other mortgage, already given by the vendor upon the same property, shall be discharged, the provision is for the benefit of the vendees who give the purchase-money mortgage, and if they do not insist upon it the mortgagee in the prior mortgage cannot.—Pool v. Horton, 45 Mich. 404.

§ 46. ——For election to declare whole sum due on any default.

¶ 218. The clause in a mortgage which provides that, upon default in payment of interest, the whole principal sum shall immediately fall due at the mortgagee's option, is in the nature of a forfeiture, and no advantage can be taken of it in cases where the mortgagor, in good faith and on reasonable grounds, denies, though erroneously, his liability to pay interest, or claims that it has been already paid.—Wilcox v. Allen, 36 Mich. 160.

§ 47. ——For ejectment and receivership on default.

Receivership for protection of security, see post § 65.

Law of ejectment in general, see Ejectment.

Foreclosure by ejectment, see Foreclosure § 16.

Appointment of receiver in foreclosure proceedings, see Foreclosure § 102.

Occasion for appointment and law governing receivership generally, see Receivers.

¶ 219. Any provision in a mortgage of lands which permits ejectment on a mere default in payment, or allows an ex parte order for a receiver of rents and profits, or destroys in advance the equity of redemption, is contrary to equity, and a court of chancery will not enforce it.—Hazeltine v. Granger, 44 Mich. 503.

§ 48. ——Stipulation as to power of sale.

Effect of assignment of mortgage to pass power of sale provided in mortgage, see post ¶ 434.

Foreclosure by advertisement under power of sale, see Foreclosure, II.

Power of sale in general, see Foreclosure, II, A.

¶ 220. The authority to sell is a special power and must be strictly pursued.—Niles v. Ransford, 1 Mich. 338.

¶ 221. The exercise of the power of sale by foreclosure by advertisement must comply substantially with statutory requirements.—Grover v. Fox, 36 Mich. 461; Miller v. Clark, 56 Mich. 337.

¶ 222. The statutory provisions as to the right to foreclose under a power of sale must be followed strictly.—Dohm v. Haskin, 88 Mich. 144.

¶ 223. Unreasonable restrictions and intendments against the power of sale should not be favored.—Gage v. Sanborn, 106 Mich. 269.

¶ 224. The proceeding under a power of sale being ex parte must conform in all matters to the conditions expressed by the legislature.—Lee v. Mason, 10 Mich. 403.

¶ 225. Foreclosures under power of sale are matters of contract authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law.—Lee v. Clary, 38 Mich. 223.

¶ 226. An error in a power of sale in a mortgage reciting that on nonpayment of the "said sum of one hundred" dollars, it really being to secure "two hundred," is clerical; and the mortgagee may, after default, disregard it, and foreclose for the sum actually due.—Damon v. Deeves, 62 Mich. 465.

¶ 227. A power of sale is no necessary part of a mortgage, and a defect in it does not affect the validity of the mortgage.—State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 228. Under the statute of April 19, 1833, the power of sale continued in force as a personal power, until completed by deed, in the person who acted when the property was struck off, passing, in case of his death, to his personal representatives, and not to any official successor.—Hoffman v. Harrington, 33 Mich. 392.

§ 49. ——Stipulations for attorney fees.

Right in foreclosure proceedings to attorney fees under stipulation in mortgage, see Foreclosure §§ 130, 131.

¶ 229. Where there is no statute allowing it a stipulation in a mortgage fixing in advance a gross allowance for the attorney's fee in the event of foreclosure at law is against public policy, and cannot be enforced.—Vosburgh v. Lay, 45 Mich. 455; Louder v. Burch, 47 Mich. 109; Millard v. Truax, 47 Mich. 251; Millard v. Truax, 50 Mich. 343; Kennedy v. Brown, 50 Mich. 336; Damon v. Deeves, 62 Mich. 465.

¶ 230. Since a stipulation in a mortgage for fixed attorney's fees in event of foreclosure has the effect of a penalty and is therefore invalid under the decisions of Michigan, it will be so treated in a federal equity court on a bill to foreclose.—Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482.

¶ 231. In the absence of statute the provision for an attorney's fee in a mortgage could not be enforced upon a statutory foreclosure unless an actual sale was made, if at all.—Myer v. Hart, 40 Mich. 517.

¶ 232. Provisions for attorney's and solicitor's fees in mortgages, except where expressly sanctioned by statute, are void.—Kittermaster v. Brossard, 105 Mich. 219.

¶ 233. A provision in a mortgage or deed of trust for an attorney fee in the event of foreclosure is against public policy and void, except when permitted by statute or rule of court.—Curtis v. Mueller, 184 Mich. 148.

¶ 234. A provision for an attorney fee does not invalidate a mortgage given by an administrator.—Griffin v. Johnson, 37 Mich. 87.

¶ 235. A stipulation for attorney fees in a mortgage executed in a foreign state and there valid is unenforceable in Michigan, being against public policy.—Curtis v. Mueller, 184 Mich. 148.

¶ 236. The allowance in a foreclosure decree in chancery of $75 as an attorney's fee on account of a clause in the power of sale providing for "a reasonable number of dol-

lars" as an attorney's fee in case of foreclosure, was held erroneous; the clause refers to a foreclosure under the power of sale, and not in chancery.—Hardwick v. Bassett, 29 Mich. 17.

¶ 237. A mortgage empowered the mortgagee in the usual manner to sell, "rendering the surplus moneys, if any there be, to the said mortgagor, after deducting the costs and charges of such vendue and sale aforesaid, and also [a sum specified] "as an attorney's fee, should any proceedings be taken to foreclose this indenture." It was held that the fee was limited to the case of a foreclosure under the power of sale; and could not be recovered on foreclosure in equity.—Sage v. Riggs, 12 Mich. 313; Van Marter v. McMillan, 39 Mich. 304; Botsford v. Botsford, 49 Mich. 29.

§ 50. Condition for perfection or warranty of title sold to mortgagor.

¶ 238. A purchase-money mortgage conditioned to become due on removal of certain specified defects of title is enforceable on performance of the condition, and is not defeasible because of other defects not specified in the condition.—Goodenow v. Curtis, 33 Mich. 505.

¶ 239. Where a mortgage contained a condition for the perfection of the title which the complainant mortgagee had undertaken to convey, but which then stood in a third person, an instrument from the latter disclaiming any present title, and quitclaiming all interest "unto whom it may concern," would be of no service in perfecting the title which complainant had undertaken to convey, unless it was shown that the title held by the third person had been previously conveyed either to complainant or to someone under whom complainant claimed.—Curtis v. Goodenow, 24 Mich. 18.

¶ 240. Where a mortgage for $2,000 upon premises described in it, and payable in two years, with annual interest, was in the usual form, but contained this clause, viz.: "The said $2,000 being for purchase money of the same, detained by the party of the first part as security for the perfection of the title to be made good by the party of the second part, to wit, a deed from Rice and wife (if any), or in chancery, or his legal representatives, to the party of the first part; also a mortgage to be discharged from record, made by one Joseph French, July 3, 1841, unless the same shall outlaw before the time of payment of this indenture; all to be arranged and completed on or before two years from this date, at which time this mortgage shall become due and be paid; but in case the title shall be made good as aforesaid, prior to the 9th day of September, 1867, the party of the second part shall give ninety days' notice to the parties of the first part of the arrangement of said title as aforesaid, the full term not to exceed two years from the date of this instrument," it was held that the proj construction of this clause is that the $2,(was kept back as security for the perfecti of the title in the two particulars mentior within two years, and that the stipulati for annual interest was to be operative o1 after the title had been perfected, and tl the term "outlaw," as here used, referred the time when by law the mortgage would presumed paid. Held, also, that there bel no stipulation in the nature of a forfeitu the mortgagee's rights could not be f feited on failure to comply by the day, if does so within a reasonable time afterwar —Curtis v. Goodenow, 24 Mich. 18.

§ 51. Effect of collateral agreements or dorsements.

Maturity of right under mortgage to secu conditional or collateral liability, s ante § 41.

Title and rights under preliminary and c lateral agreements, see post § 57.

Construction of several instruments as s gle contract, see Contracts § 150.

Disability to charge subsequent grantees incumbrancers of mortgaged premi with conditions of bond to which mo gage is collateral, see Notice and R ord of Title, II, C.

¶ 241. An agreement between a subseque purchaser and a mortgagee to pay ten p cent interest for forbearance was held to tach to the land, the rights of third perso not intervening.—Smith v. Graham, 34 Mi 302.

¶ 242. An agreement indorsed on a mo gage note to pay a higher rate of interest a mere personal undertaking and does n enlarge the mortgage.—Havens v. Jones, Mich. 253.

¶ 243. An indorsement upon a note, aft maturity, of an agreement by the mo gagor's grantees to pay ten per cent int est on lands thereafter, is but a persor undertaking, not secured by the mortga even as against the promisors, much less against subsequent purchasers.—Spear Hadden, 31 Mich. 265.

¶ 244. A note secured by mortgage was dorsed with an agreement to pay a high rate of interest. Held, that the indorseme was a mere personal agreement and did n enlarge the mortgage.—Havens v. Jones, Mich. 253.

¶ 245. A written agreement between subsequent purchaser and the mortgagee f the payment of an increased rate of int est after due, in consideration of an exte sion of time, was held to charge the la where there were no third parties having i tervening rights.—Smith v. Graham, 34 Mi 302.

¶ 246. A mortgagee has a right to stipulate for ten per cent interest as a condition to extending time of payment, and if paid and applied as interest, the application will not be disturbed.—Havens v. Jones, 45 Mich. 253.

¶ 247. Where, at a mortgagor's request, a mortgage creditor has already shown forbearance, on the faith of an oral promise to pay a higher rate of interest than that borne by the mortgage, and the mortgagor desires further extension without reference to any particular period, and executes a written agreement to pay such higher rate of interest from the date of the maturity of the mortgage until the principal shall be fully paid, without specifying any time of payment, it was held that such prior forbearance was a sufficient consideration for the promise to pay the additional interest up to the date of the agreement, and that any forbearance which took place after that on the faith of the agreement was a sufficient consideration for the promise to pay the additional interest till fully paid; also that, as between the mortgagor and the mortgagee or holder of the mortgage, such agreement would be valid and have the same effect as if the original bond and mortgage had provided for such rate of interest after maturity till fully paid.—Burchard v. Frazer, 23 Mich. 224.

¶ 248. Where, at the time an agreement was made for forbearance, and even before the maturity of the mortgage, the mortgagor had sold out all the land covered by the mortgage in separate parcels to various persons, it was held that as to these purchasers it was no more competent for the mortgagor to increase the mortgage debt by any such agreement than to affect them by an additional, subsequently executed mortgage for the increased sum, and that such agreement only bound the mortgagor personally, and that the lien of the mortgage upon the lands so sold was only for the amount of the principal, with interest, as provided in the original bond and mortgage.—Burchard v. Frazer, 23 Mich. 224.

¶ 249. Where those who have bought mortgaged premises from the mortgagors indorse upon the note secured by the mortgage, after its maturity, an agreement to pay ten per cent interest on it thereafter, it having borne only seven before, the agreement is only a personal undertaking, not secured by the mortgage, even as against the promisors, and much less as against a subsequent purchaser of the lands, who had not assented to the agreement.—Spear v. Hadden, 31 Mich. 265.

§ 52. Effect of the mortgage.

Mortgages amounting to common law assignments, see Assignment for Creditors § 12.

Necessity for recordation of instruments as between the parties, see Notice and Record of Title § 45.

¶ 250. The fact that one who has purchased undivided shares of certain property has mortgaged his interest as undivided shares does not hinder him from afterwards mortgaging the whole property when he has acquired the remaining shares.—Brown v. Phillips, 40 Mich. 264.

¶ 251. A mortgage executed to the mortgagees in lieu of their heirship interests in the mortgagor's estate, which is conditioned upon the payment of a specified sum to each, does not, at the common law, create an estate in joint tenancy, so as to permit the survivor to foreclose for the full amount.—Cooley v. Kinney, 109 Mich. 34.

¶ 251a. As between the parties a mortgage is just as effectual for all purposes without recording as it is with it.—Bacon v. Northwestern Mutual Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

§ 53. Defects and invalidities.

In title of mortgagor, see post § 54.

Effect of duress on mortgages, see Duress § 5.

Burden of proof of fraud as defense to mortgage, see Fraud § 29.

Fraud in mortgage implied from relations of the parties and nature of the transaction, see Fraud, II.

Procuring making of mortgages to becloud third person's title as fraud, see Fraud § 24.

Evidence of fraud in mortgages, see also Fraud § 52.

Fraudulency of mortgage by spendthrift forced by necessities, see Fraud § 71.

¶ 252. A mortgage by a tenant in common upon his interest for his individual debt is valid unless it appears that the real estate was purchased out of partnership funds and held for partnership purposes.—Ruppe v. Steinbach, 48 Mich. 465.

¶ 253. One who holds a power of attorney to sell and convey lands has no power to mortgage them, and a deed from him in form absolute, but given as a mere security for money loaned, will not sustain an ejectment. —Jeffrey v. Hursh, 49 Mich. 31; Jeffery v. Hursh, 58 Mich. 246.

¶ 254. A mortgage given by an infant feme covert to secure her husband's debt is absolutely void.—Chandler v. McKinney, 6 Mich. 217.

¶ 255. A void mortgage by one co-beneficiary under a trust, void because she had no title, is not ratified by the act of the other co-beneficiary taking a deed of the land with an assumption clause after having been a witness to the execution of the mortgage.— Weaver v. Van Akin, 71 Mich. 69.

§ 54. ——In title of mortgagor.

¶ 256. A mortgage is void where the mortgagor secured the record title to the prop-

erty covered by the mortgage by fraudulently inducing the owner to sign the deed to the real property in question, when under the impression that it was a duplicate of a lease that had been read to him.—McGinn v. Tobey, 62 Mich. 252.

§ 55. Estoppel and ratification.

Estoppel to deny that mortgage includes after-acquired lands, see also ante ¶ 172.
General principles of estoppel, see Estoppel.
Estoppel of mortgagor to dispute mortgage, persons bound as privies to estoppel, see Estoppel ¶ 235.
Ratification or avoidance of infant's mortgages, see Infants § 9.

¶ 257. Where a person files a bill in chancery to have a certain instrument construed as a mortgage, he cannot raise the question of the validity of such instrument.—Dalton v. Mertz, 173 Mich. 153.

¶ 258. The forging of a deed whereby the surviving husband receives title to the deceased's land and his subsequent transfer to one of five children who transfers to another in return for a mortgage back both having knowledge of the forgery makes the mortgage good as to the shares of the two children involved in the transaction.—Cline v. Wixson, 128 Mich. 255.

IV. TITLE AND RIGHTS OF PARTIES; POSSESSION AND USE.

§ 56. Rights of security or lien in general.

Preliminary and collateral agreements, see post § 57.
Title or estates of the parties, see post § 58.
Rights of possession, use and enjoyment, see post § 59.
Right to rents, issues and profits, see post §§ 60, 61.
Lease of the land as further security, see post § 62.
Insurance payable to mortgagee, see post § 63.
Taxes, insurance and interest charges, see post § 64.
Receivership or protection of security, see post § 65.
Conveyance to mortgagee or purchase of equity of redemption, see post § 66.
Acquiring or setting up adverse title, see post §§ 67-71.
Rights and titles under deed given as mortgage, see post §§ 72, 73.
Rights of mortgagee or assignee in possession, see post §§ 74-77.
Rights and liabilities under agreement for possession or purchase by mortgagor after foreclosure, see post § 78.
Rights against third persons injuring land or security, see post § 79.
Rights of junior mortgagees or lienors, see post §§ 80-83.
Redemption and accounting in general, see post, IX.
Injunction to prevent incumbrance of p erty, see Injunctions § 63.
Injunction to enforce contract secured mortgage, see Injunctions § 26.
Injunction against foreclosure and ficiency proceedings, see Injunct § 49.
Attachability of interests under mortgag of equity of redemption, see Attachr § 17.
When assumpsit or action for breacl proper on failure to make agreed l see also Contracts ¶ 1023.

¶ 259. A mortgagee has the right to whose security to meet the amount of mortgage encumbrance, and cannot be pelled to take a part.—High v. Fifth Bank, 97 Mich. 502; Webber v. Ramsey, Mich. 58.

¶ 260. A mortgagee is entitled to whole mortgaged property as security for debt, and has a right to have the w avails of such property applied in payn thereof.—In re Assignment of Scofield Bu Co., 89 Mich. 15.

§ 57. Preliminary and collateral agreemer

Maturity of right under mortgage to se conditional or collateral liability, ante § 41.
Construction and effect of collateral ag ment, see ante § 51.
Effect of collateral agreement waiving limiting right or equity of redemptior default, see post ¶ 746.
Merger of prior agreements in general, Contracts § 265.

¶ 261. A parol arrangement, existing the time a mortgage is given, conferrin power of sale earlier than that given in mortgage itself, is merged in the latter strument.—Oshkosh Nat. Bank v. First Bank, 100 Mich. 485.

§ 58. Title or estates of the parties.

Rights of possession, use and enjoyment, post § 59.
Right to rents, issues and profits, see §§ 60, 61.
Equity and right to redeem in general, post, IX.
Statutory limitation on right to sue for f closure, see Limitations § 73.
Existence of default and maturity of ri to foreclose, see Foreclosure § 3 et se
Effect of bar of action on the debt as bar foreclosure, see Foreclosure § 12.
Sufficiency of bill to enjoin sale of m gaged land, see Injunctions ¶ 387.
Dowress' right to mesne profits from m gaged lands, see Dower § 58.
Title of mortgagor's trustee in bankrup see Bankruptcy § 3.
Acts and declarations of party to mortg as admissions binding other party, Evidence § 417.

Necessity of making mortgagees parties respondent in street opening proceedings, see Highways ¶ 246.
Propriety of joining mortgagees as parties defendant, see Ejectment § 27, ¶ 105.
Insurable interest of mortgagors and mortgagees, see Insurance § 41.

¶ 262. The mortgagee's interest in the lands is not subject to attachment.—Columbia Bank v. Jacobs, 10 Mich. 349.

¶ 263. A mortgagee of one who has previously voluntarily conveyed the premises to another takes nothing.—Gale v. Gould, 40 Mich. 515.

§ 59. Rights of possession, use, and enjoyment.

Right of junior incumbrancer to possession after foreclosure, see post § 83.
Rights and liabilities under agreement for possession or purchase by mortgagor after foreclosure, see post § 78.
Rights of mortgagee or assignee in possession, see post §§ 74-77.
Accountability of mortgagee for rents, issues and profits during possession, see post § 75.
Expenditures by mortgagee for repairs, upkeep and improvements, see post § 76.
Right of mortgagee in possession to compensation for management of premises, see post § 77.
Right to redeem as affecting right to possession, see also post ¶ 754.
Injunction to prevent removal of mortgaged property and impairment of security, see also Injunctions § 77.
Restraining cutting of timber on mortgaged property, see Injunctions § 76.

¶ 264. The legal title to mortgaged land was, at the common law, in the mortgagee, who was entitled to possession, and who might, at any time after default, if not before, unless the mortgage should otherwise provide, put the mortgagor out by ejectment.—Stevens v. Brown, W. 41; Mundy v. Monroe, 1 Mich. 68; Hoffman v. Harrington, 33 Mich. 392; Albright v. Cobb, 34 Mich. 316.

¶ 265. The mortgagee at the common law was entitled to the possession of the land mortgaged, and the court of chancery would not prevent him from taking possession, or, if he was in possession, deprive him of it, so long as there was anything due on the mortgage.—Schwarz v. Sears, W. 170.

¶ 266. Under a mortgage executed in 1839 the mortgagee could take possession by way of security; but this was a mere right of entry that would be barred after twenty years.—Albright v. Cobb, 34 Mich. 316.

¶ 267. Under R. S. 1838 a mortgagee had a right of entry on default in the payment of the mortgage; but if he made no entry he could have no such possession as would enable him to enter within twenty-five years, or bring an action for the recovery of the land; and an entry without right by a stranger would not inure to his benefit so as to enable him to make his original entry or bring suit within twenty years from the origin of his right.—Van Vleet v. Blackwood, 39 Mich. 728.

¶ 268. By the operation of the statute of March 8, 1843, forbidding ejectment by mortgagees (see How. St. § 7847), they are not entitled to possession until after foreclosure. Baker v. Pierson, 5 Mich. 456; Caruthers v. Humphrey, 12 Mich. 270; Newton v. Sly, 15 Mich. 391; Hogsett v. Ellis, 17 Mich. 351; Newton v. McKay, 30 Mich. 380; Wagar v. Stone, 36 Mich. 364; Lee v. Clary, 38 Mich. 223; Hazeltine v. Granger, 44 Mich. 503; Morse v. Byam, 55 Mich. 594.

¶ 269. As between mortgagor and mortgagee of vacant lands possession is constructively in the former.—Albright v. Cobb, 34 Mich. 316.

¶ 270. A mortgagee until he has obtained title by foreclosure, cannot, even by stipulation in a mortgage, interfere with the mortgagor's right of possession.—Hardy v. Allegan Circuit Judge, 147 Mich. 594.

¶ 271. A mortgagee has only a lien upon mortgaged land to secure his indebtedness, and has no grievance as mortgagee for anything which does not impair its value as such security, though the mortgage contains covenants respecting trade on the premises.—Hardy v. Allegan Circuit Judge, 147 Mich. 594.

¶ 272. A stipulation in a mortgage limiting the sale of beer on the mortgaged premises to a named kind is only a personal contract between the mortgagor and mortgagee, though any damages resulting from a breach thereof may be a lien secured by a mortgage upon the property which has passed into the hands of a third party, and enforceable upon the foreclosure of the mortgage.—Hardy v. Allegan Circuit Judge, 147 Mich. 594.

¶ 273. The constructive possession of vacant land as between the mortgagor and mortgagee must be deemed to be in the mortgagor.—Albright v. Cobb, 34 Mich. 316.

¶ 274. A mortgagor of land is entitled to possession until foreclosure, and does not forfeit this right by failure to make payments as stipulated.—Ferris v. Wilcox, 51 Mich. 105.

¶ 275. The mortgagor now having a legal right to possession until the mortgage is foreclosed may make any arrangement for the use and enjoyment that any person might during his term.—Crippen v. Morrison, 13 Mich. 23.

¶ 276. Until a mortgagor's rights have been in some way foreclosed he is entitled

to recover possession.—Humphrey v. Hurd, 29 Mich. 44.

¶ 277. A mortgagor can bring ejectment against a mortgagee who has gone into possession without his consent.—Newton v. McKay, 30 Mich. 380.

¶ 278. The mortgagor is entitled to recover the possession from his mortgagee at any time before his rights have been foreclosed.—Humphrey v. Hurd, 29 Mich. 44.

¶ 279. When a mortgagor's administrator has parted with the title to the premises, his permission to the mortgagee to take possession of them is of no more force than if given by a stranger.—Newton v. McKay, 30 Mich. 380.

¶ 280. Consent of the mortgagor to the mortgagee's taking possession, which would be good until revoked, might be given without any writing, and as informally as possible.—Morse v. Byam, 55 Mich. 594.

§ 60. Right to rents, issues and profits.

Accountability of mortgagee for rents, issues and profits during his possession, see post § 75.

Assignment of rents for further security or application, see post § 61.

Assignment of rents of mortgaged property to mortgagee to be applied upon mortgage, see Landlord and Tenant ¶ 206.

¶ 281. The mortgagor, not the mortgagee, is entitled to the rents, issues and profits of the mortgaged premises until foreclosure becomes absolute.—Wagar v. Stone, 36 Mich. 364.

¶ 282. An assignment for a term of rents and profits by a mortgagor in trust to the trustee under several mortgages for different creditors, with a provision in the assignment that "the right to rents and income upon said property ceases" whenever any of the land should be sold to pay the mortgage debt or whenever the mortgages are paid, ceases by its own terms when the junior of the mortgages is foreclosed by the trustee, and is bought in by him for the creditors secured.—First National Bank v. Gillam, 123 Mich. 112.

§ 61. ——Assignment of rents for further security or application.

¶ 283. An assignment of rents of mortgaged property, to be received by the mortgagee and applied upon the mortgage, is valid.—Kelly v. Bowerman, 113 Mich. 446.

¶ 284. An agreement assigning rents and income to a trustee "until the interest and taxes now due and that shall have accrued are paid," and providing for their application to taxes, insurance and interest incumbering the premises and after that to interest on another mortgage, is not limited to taxes and interest due at the time it was made; wh the object was to prevent accumulating rearages of taxes and interest and so to tect the interests of all the parties.—Vicar v. Denison, 81 Mich. 348.

¶ 285. An agreement, assigning to a t tee the rents and income of certain prop "until the interest and taxes now due that shall have accrued are paid," and signed to protect all parties and secure o mortgages besides those on the property not terminated by the bringing of a for sure suit on the mortgages on the prop itself for the principal and taxes and inte then due and unpaid.—McVicar v. Deni 81 Mich. 348.

¶ 286. A mortgagor, in consideration the mortgagee's agreeing to accept pa payments on a certain mortgage and to partial releases thereof at any time wi three years, assigned to a trustee "until interest and taxes now due and that s have accrued are paid," the rents and inc of premises upon which were two past mortgages executed by him to the same n gagee, such rents and income to be app first, to the taxes and insurance on premises; second, to the interest on the mortgages on said premises; and third interest on the assignor's mortgage t third person. Under this arrangement parties acted for four years and until was begun to foreclose the two mortg Held, that the arrangement was valid, continued valid after the first-named n gage and the mortgage to the third pe were paid; that it was not limited to taxes and interest due at the time it made, nor did the foreclosure suit termi it; but that the trustee should pay to mortgagee rents which should become before the foreclosure sale so far as n sary to pay taxes and interest.—McVica Denison, 81 Mich. 348.

§ 62. Lease of the land as further security

Lease as mortgage, see ante § 25.

¶ 287. Where a paid-up lease for a tain period was given to mortgagees as ditional security, who had the option to over on paying a fair rental, held, whether or not they gave up possessio the date fixed, their mortgage security mained and they could enforce it if the was not duly paid; and that the mortg could pay the debt at any time after i came due and so extinguish the securi Dutton v. Merritt, 41 Mich. 537.

¶ 288. The foreclosure of the mort would not prevent the mortgagees fron sorting to any additional security they n have, and they would have a right to s the amount of rent due from them und lease held as further security and unpa satisfaction of their debt.—Storey v. Du 46 Mich. 539.

§ 63. Insurance payable to mortgagee.

Mortgagees of insured property as necessary parties to suit for insurance, see Insurance § 280.

Payment of insurance to mortgagee, see Insurance § 258.

Persons having insurable interest in mortgaged premises, see Insurance § 41.

Breach of warranties against mortgage incumbrance, see Insurance § 140.

¶ 289. An insurance policy taken out by the mortgagor, in which the insurance is stated to be for the benefit of the mortgagee, creates no contract relation between the latter and the insurer, and whatever defeats the mortgagor's right of recovery defeats any right of the mortgagee.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 290. Whoever sues upon an insurance policy must be able to enforce the whole of it; and persons named therein as payees to the extent of a partial interest only, such as mortgagees of a part of the property insured, cannot sue.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 291. An insurance policy which provides that in case of loss the insurance shall be paid to a mortgagee, therein named, as his mortgage interest may appear, which provision was inserted pursuant to an agreement of the mortgagor, under which the policy was to be delivered to and held by the mortgagee until the mortgage was paid, and he was authorized to effect such insurance in case of a failure on the part of the mortgagor so to do, gives the right of action in case of a loss to the mortgagor.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

§ 64. Taxes, insurance and interest charges.

Covenants for payment of taxes and insurance, see ante § 44.

Persons having insurable interest in mortgaged premises, see Insurance § 41.

¶ 292. As between the mortgagor and first and second mortgagees, the duty of paying taxes is primarily upon the mortgagor.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 293. A mortgagee can protect his mortgage interest against taxes that the mortgagor should have paid, and the amount he pays in doing so may be added to the charge upon the land.—Payne v. Avery, 21 Mich. 524; Vaughn v. Nims, 36 Mich. 297; Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 294. Payment of taxes by the mortgagee of land does not necessarily give him a right of action as against the mortgagor as for money paid to his use.—Raynsford v. Phelps, 43 Mich. 342.

¶ 295. A mortgagee owes no duty to the mortgagor or to a subsequent mortgagee to protect the land from tax-sales.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 296. On foreclosure for nonpayment of taxes as they fell due the mortgagee claimed to recover, as taxes paid by himself, certain sums paid by his agent in bidding in the property at tax-sales. Held, that such payments were not, in contemplation of law, payments of the taxes, and could not be included in the decree.—Maxfield v. Wiley, 46 Mich. 252.

¶ 297. Where a mortgagee has acquired a tax-title to protect the mortgage, a foreclosure decree may provide for the payment to him of the cost thereof on condition that he assign the certificate of purchase to the mortgagor.—Baker v. Clark, 52 Mich. 22.

¶ 298. If a mortgagee accepts a mortgage on lands already subject to returned taxes, the mortgage being silent as to taxes, and redeems soon after the tax-sale without giving the mortgagor an opportunity to do so instead, he cannot claim that his redemption certificate is a lien on the land as against a subsequent purchaser who has paid the mortgage in full without notice of the claim of lien.—Pond v. Drake, 50 Mich. 302.

¶ 299. Money paid by the holder of a mortgage to redeem the premises from a tax-sale does not constitute a lien apart from the mortgage, but is discharged when the mortgage is satisfied; and whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, there can be no subsequent or separate proceeding against the mortgagor to enforce its payment.—Vincent v. Moore, 51 Mich. 618.

¶ 300. A mortgage trustee who bought in at his own foreclosure sale for the creditors' benefit, and thereby extinguished his right to receive and apply rents under a collateral assignment from the mortgagor for better security of the creditors, should until instructed to the contrary by them continue to pay the taxes assessed to the mortgagor on the land, but after such instructions cannot make or be credited for payments of the taxes; though he was also trustee under a prior mortgage for another set of creditors who insist that the rents be applied to taxes for their benefit and protection.—First National Bank v. Gillam, 123 Mich. 112.

¶ 301. One occupying land thinking he was the owner thereof and who had assumed title with a mortgage thereon, which he had paid, but who after losing the land had obtained a lien on the property by subrogation to the mortgage, could not claim as a part of that lien sums he had paid as taxes during his occupancy of the land inasmuch as such a claim was allowable only as against a claim for use and occupation, which was not lit-

igated in his bill.—Taylor v. Roniger, 147 Mich. 99.

¶ 302. If, before foreclosure, a mortgagee pays taxes and insurance which the mortgagor ought to have paid, the sum paid may be included in the amount for which he forecloses, even though the insurance was taken for the full period allowed for redemption; but for such payments made after foreclosure sale the power of sale cannot again be asserted.—Walton v. Hollywood, 47 Mich. 385.

¶ 303. Where a covenant to insure is not kept by the mortgagor, the mortgagee may insure, and can add the premium, if fair and reasonable, to his debt.—Leland v. Collver, 34 Mich. 418.

¶ 304. As between the owners of the fee, and those of a life-estate in the same encumbered property, the life-estate is to keep down the interest, and the fee is charged with the principal. A dowress pays one-third of the interest. Interest due at the ancestor's death is treated as principal.—Campbell v. Campbell, 21 Mich. 438.

¶ 304a. A purchase by a second mortgagee at a tax sale operates as a payment of the tax at the option of the first mortgagee, but the latter must repay the cost if he adopts the payment.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 304b. It is a mortgagor's duty to pay taxes while he owns the property, and one who acquires his interest is bound to discharge the unpaid taxes standing against such property.—Fells v. Barbour, 58 Mich. 49.

¶ 304c. So far as a mortgagee or his assigns is concerned, the purchase, by one who has acquired by virtue of an execution sale the mortgagor's interest, of bids under sales made for taxes, operates as a payment of the taxes.—Fells v. Barbour, 58 Mich. 49.

§ 65. Receivership or protection of security.

Stipulation in mortgage for appointment of receiver, see ante § 47.

Law of receivership generally, see Receivers.

¶ 305. Land is presumed sufficient security for the mortgage until the contrary is shown.—Brown v. Chase, W. 43.

¶ 306. As it is not the policy of the law to divest a mortgagor of possession before foreclosure and the expiration of the period of redemption, a receiver will not be appointed to take possession of unforeclosed mortgage premises for the mortgagee unless the right is clearly given by the arrangement of parties.—Michigan Trust Co. v. Lansing Lumber Co., 103 Mich. 392.

§ 66. Conveyance to mortgagee or purchase equity of redemption.

¶ 307. There is no rule of law that pr vents a mortgagee from becoming in go faith the purchaser of the equity of redem tion.—Richardson v. Medbury, 107 Mich. 17

§ 67. Acquiring or setting up adverse title.

Buying in under senior mortgage or lien, s post § 68.

Buying in tax titles, see post § 69.

Mortgagees and junior incumbrancers, s post § 70.

Purchasers under land contracts, see pc § 80.

Effect of mortgagor securing patent confir ing his title after same has turned o invalid, see also post ¶ 378.

Rights gained by junior incumbrancer payment of prior charges, see post §

Payment of incumbrance or interest as a of adverse possession, see Adverse P session § 23.

Succession of mortgagee to adverse p sessory right of mortgagor, see Adve Possession § 39.

Claim of adverse possession by mortgag against mortgagee, see Adverse Poss sion § 8, ¶ 31.

Adverse possession by lender against pers in whose name mortgage was taken a to whom title was conveyed, see Adve Possession ¶ 63.

¶ 308. How far the rule that a mortgag holding by warranty deed and not ousted disturbed cannot set up an outstanding ti by way of defense to a foreclosure sho be applied, quære.—Powell v. Conant, Mich. 396.

¶ 309. Where both parties to a conveya of land that is mortgaged suppose that title in fee is being transferred, though fact it is not, and the grantor afterwa purchases the land at the foreclosure sale, is bound in equity to recognize the grant right to a perfected title. And if he furt becomes a party to an arrangement wher a third person takes a deed from the gran and gives back a mortgage that he, grantor, disposes of for his own purpo he is then estopped from disputing that original deed conveyed title and that foreclosure purchase related back to it.—Coss v. Wadsworth, 56 Mich. 421.

¶ 310. A debtor conveyed, under an or of the court, all of his real and perso property to a receiver, after which the l was sold for taxes. The purchaser m gaged the land, and before the foreclo of the mortgage secured a quitclaim d from a party who claimed under a deed f the heirs at law of the debtor, then ceased, and secured the purchase-money a second mortgage. Pending a suit by assignee to foreclose the first mortgage, assignee secured a deed of the land from receiver, after which the usual decree

order of sale were made in the foreclosure suit, but without prejudice to the rights of the second mortgagees. After the sale of the mortgaged premises to the assignee, and the execution and delivery to him of the usual commissioner's deed, he filed a bill to set aside the second mortgage, in which suit the validity of the tax-deeds was not assailed. Held, that the purchase by the mortgagor of the outstanding original title could not detract from the rights of the first mortgagee or of his assignee, and that the latter, therefore, so far as appears from the record, obtained a perfect title to the land.—Scherer v. Judson, 100 Mich. 539.

¶ 311. One who has sold mortgaged land with warranty and has covenanted to pay off the mortgage cannot make title in himself as against his grantee by allowing foreclosure and redeeming the land, and the equities may be protected by declaring a trust.—Huxley v. Rice, 40 Mich. 73.

§ 68. ——Buying in under senior mortgage or lien.

Rights gained by junior mortgagee by payment of prior charges, see post § 82.

¶ 312. A mortgagor whose personal liability for the mortgage debt has become extinguished is not disabled legally from obtaining title in good faith under the foreclosure of another mortgage which has legal priority. And where no fraud or collusion appeared, although charged, a bill to subject such foreclosure purchase to the subsequent mortgage was properly dismissed.—Burdick v. Wheelock, 48 Mich. 289.

¶ 313. Land was sold to A., subject to a mortgage to B., payment of which A. assumed. Unknown to both A. and B. there was a prior mortgage to C. on the same land, and on their discovering this, A. promised B. to pay it off. Held, that a subsequent foreclosure by C., at which A. became the purchaser, did not extinguish the lien of B.'s mortgage.—Manwaring v. Powell, 40 Mich. 371.

§ 69. ——Buying in tax titles.

Rights gained by junior mortgagee by payment of prior charges, see post § 82.

Right of purchasers under land contract to buy in tax title, see post ¶¶ 331, 332.

Right of mortgagee and junior incumbrancers to buy in tax titles, see post § 70.

Rights under tax titles in general, see Taxes, XII.

¶ 314. A mortgagor is estopped from cutting off his mortgagee's rights by acquiring tax titles.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 315. Neither a mortgagor nor his wife who has an interest in the fee can defeat the mortgage by setting up a tax title acquired by the purchase of the land under a sale for taxes assessed against the mortgagee's interest.—Chamberlain v. Forbes, 126 Mich. 86.

¶ 316. A mortgage on land containing covenants of warranty, and an undertaking to pay all taxes, was not defeated by the purchase of a tax title by the grantee of the land who took subject to the mortgage, and who obtained its extension.—Brown v. Avery, 119 Mich. 384.

¶ 317. Land covered by a mortgage signed by the owner and his wife was sold for taxes accruing after the giving of the mortgage. At the request of the wife her brother purchased the title from the grantee of the state for $75, and gave the wife a lease of the land with option to purchase it for $100 and interest. The husband paid him more than half that amount. In an action to foreclose the mortgage, held that the brother held the title in trust for the mortgagor.—Dorenberg v. Ockerman, 130 Mich. 23.

¶ 318. Where the owner of land gives a mortgage on his premises containing a warranty of title and also a warranty against previous incumbrances, and, upon foreclosure of the mortgage, the mortgagor fails to redeem, resulting in the divesting of his title, and he subsequently purchases such premises from the holder of a tax title for taxes which were a lien at the time of the giving of the mortgage, such repurchase by the mortgagor must in equity be construed as a redemption rather than a repurchase, and to thereby inure to the benefit of the mortgagee.—Napper v. Fitzpatrick, 194 Mich. 175.

¶ 319. One whose title is obtained from an execution purchaser is in such privity with the defendant in the execution that if the latter has mortgaged the land he cannot let it be sold for taxes and bid it in so as to cut off the mortgagee's rights; nor can he cut it off by taking tax leases.—Fells v. Barbour, 58 Mich. 49.

¶ 320. Equity will not grant relief to a mortgagee by declaring a repurchase by a mortgagor, whose title had been divested by foreclosure proceedings, from the holder of the tax title for taxes which were a lien prior to the giving of the mortgage, to be a redemption rather than a repurchase and to thereby inure to the mortgagee's benefit where the mortgagee had learned of the existence of the tax title at least a year before a writ of assistance was applied for by the holder of tax title, and had ample opportunity to adjust it, and refused to pay or recognize the tax title, although the mortgagor promised to repay the amount thereof if the time of redemption was extended, and chose to take the chance of the tax being declared invalid in the writ of assistance proceedings, and where it appeared also that

he had collected from the mortgagor usurious interest in a sum larger than the amount of the original tax.—Napper v. Fitzpatrick, 194 Mich. 175.

¶ 321. Tax deeds taken in another's name for the benefit of the owner of the equity places him at best in the position of a second mortgagee whose interest is cut off by foreclosure and sale under the mortgage.—Vreeland v. Monnier, 127 Mich. 304.

¶ 321a. A tax-title against which a mortgagee is indemnified cannot be set up against his foreclosure title by the party who indemnified him.—Wyman v. Baer, 46 Mich. 418.

¶ 321b. Where one has sold land with warranty, taking back a mortgage thereon for the purchase price, his devisees cannot, by purchasing at a sale for a tax that their devisor was bound to pay, being a lien on the land when he conveyed, use the tax-title to defeat the title of their devisor's grantee and mortgagor; nor would such tax-title cut off the mortgagor's equity of redemption so as to dispense with foreclosure.—Taylor v. Snyder, W. 490.

§ 70. ——Mortgagees and junior incumbrancers.

¶ 322. A mortgagee cannot acquire title to the mortgaged premises by purchase at a tax sale, the rule being that such purchase amounts to the payment of the tax, and inures to the benefit of the mortgagor.—Porter v. Corbin, 124 Mich. 201.

¶ 323. The purchase of tax leases by the attorney of the first mortgagee without any testimony that he was acting for the mortgagee other than his testimony that he did not know whether the purchase price paid out of his own money had been charged to the mortgagee, is not sufficient to show a purchase by the mortgagee unavailable against the owner.—Sherman v. Fisher, 138 Mich. 391.

¶ 324. Taxes accrued on land while subject to a mortgage. Later the mortgagee bought the land at the foreclosure sale. Thereafter the auditor general gave him a deed as tax purchaser. Held, the tax purchase was not void as being made by a mortgagee, since the relation of mortgagee had terminated.—Ensley v. Coolbaugh, 160 Mich. 299.

¶ 325. Taxes upon mortgaged lands are as much a lien upon the mortgaged interest as upon the equity of redemption; and where one having a second mortgage allows the land to be sold for taxes and obtains a tax-deed, he cannot use it adversely to the first mortgage.—Horton v. Ingersoll, 13 Mich. 409.

¶ 326. A second mortgagee who has purchased and bid in the premises can obtain a tax-title to them, and if it is allowed to become absolute he can use it in defending ejectment brought by the first mortgagee, unless the latter has tendered repayment.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 327. Where one having a second mortgage allows the land to be sold for taxes and obtains a tax-deed, he cannot use it adversely to the first mortgage.—Horton v. Ingersoll, 13 Mich. 409.

¶ 328. A second mortgagee who has foreclosed and bidden in the premises can obtain a tax-title to them, and if it is allowed to become absolute he has a right to use it as a defense to an action of ejectment brought by the first mortgagee, unless the latter tenders repayment.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 329. A second mortgagee is under no obligation to protect the lien of the first mortgagee by the payment of taxes or by purchasing the premises for his benefit at a tax-sale; but if he does pay or purchase, the act ipso facto constitutes a protection.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 330. Where a mortgagee instead of making payment of the taxes makes a purchase of the land at a tax sale either in his own name or in the name of any other person who has his money for the purpose, the mortgagor may have the purchase treated as a payment and may compel the cancellation of the certificate or deed on refunding the amount paid with interest.—Maxfield v. Willey, 46 Mich. 252.

¶ 330a. Where the holder of a tax-title having a second mortgage goes into possession under the mortgagee, the tax-title is no answer to a claim by the first mortgagee (whose mortgage was prior to 1843) that he should account for the rents and profits to be applied on their mortgage.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

§ 71. ——Purchasers under land contract.

Disability of grantees in possession to dispute grantor's title for purpose of defeating purchase money mortgage, see Vendor and Purchaser.

Time in which foreclosure purchaser may sue person claiming adversely to mortgagor, see Limitations ¶ 50.

¶ 331. A purchaser under a land contract of land subject to a mortgage cannot defeat the mortgagee's rights by disclaiming any right under the contract and claiming under the tax titles subsequently acquired.—Simons v. Rood, 129 Mich. 345.

¶ 332. A purchaser under a land contract providing for deferred payments and a postponed deed and subject to an existing mort-

gage cannot defeat the mortgagee's interest by the acquisition of a tax title based on taxes accrued prior to the purchase.—Simons v. Rood, 129 Mich. 345.

¶ 333. If two men give a mortgage for money borrowed by both, and one pays it, he is entitled to recover one-half the amount of the other, and the defendant is not entitled to reduce the recovery by showing that the money was in fact borrowed for the benefit of a partnership composed of themselves and a third person.—Goodrich v. Leland, 18 Mich. 110.

§ 72. Rights and titles under deed given as mortgage.

Rights and liabilities of subgrantees, see post § 73.

Absolute deed intended as mortgage in general, see ante, II, B.

Injunction by one holding deed intended as mortgage to restrain interference with the property, see Injunctions ¶ 72.

¶ 334. The statutory provision against ejectment by mortgagees is intended for the benefit of mortgagors, and they are not obliged to insist upon it. If in mortgaging their lands they give a deed that is in form absolute, they thereby convey the right to possession.—Bennett v. Robinson, 27 Mich. 26; Jeffery v. Hursh, 42 Mich. 563; Morse v. Byam, 55 Mich. 594.

¶ 335. Though a deed, absolute in form, but intended as a security, will leave in the grantor the right of a mortgagor to redeem, it does not follow that he would be entitled to maintain possession until foreclosure under How. St. § 7847.—Wetherbee v. Green, 22 Mich. 311.

¶ 336. A deed absolute given by way of security conveys no right of possession, if the papers show that the relation between the parties thereto is that of mortgagor and mortgagee, and that the mortgagor is left in possession under an arrangement which amounts to a defeasance of the deed.—Ferris v. Wilcox, 51 Mich. 105.

¶ 337. The grantees in possession under a deed absolute in form, but given by way of security merely, do not stand exactly in the same position in reference to an accounting for the rents and profits as ordinary mortgagees who have taken possession by way of enforcing their security; they are agents of the grantors as well as mortgagees, and are chargeable for any failure to obtain full rental value for the premises only on the same grounds as an agent thus put in possession.—Barnard v. Jennison, 27 Mich. 230.

¶ 338. In ejectment for lands conveyed by deed absolute under a power of attorney to sell, it is error to exclude evidence that the deed was meant to have the effect, merely, of a mortgage.—Jeffrey v. Hursh, 49 Mich. 31.

¶ 339. While it is true that a deed absolute in form but given as security for a loan is in fact a mortgage, a deed is required to revest title in the grantor.—McArthur v. Robinson, 104 Mich. 540.

¶ 340. A deed absolute, given as security, does not have the effect to divest the legal title subject to an equity to compel a reconveyance, upon redemption, enforceable only in a court of equity, but the legal title remains in the mortgagor, and is susceptible of recognition and protection by a court of law.—Flynn v. Holmes, 145 Mich. 606.

§ 73. ——Rights and liabilities of subgrantees.

¶ 341. Where the grantee in a deed absolute given as a security sells and conveys to one who has full notice of all the facts, such second grantee will take no greater interest that his grantor had in the premises, and he will hold them subject to be redeemed on payment of the amount due on the mortgage.—Wadsworth v. Loranger, II. 113; Emerson v. Atwater, 7 Mich. 12.

¶ 342. A deed given by a son to his mother as security for her indorsement of his personal note, with a land contract from the mother to the son, constituting a mortgage between the parties, continues to be such even as against one to whom the mother subsequently deeds the property.—Maginn v. Cashin, 196 Mich. 221.

¶ 343. A defendant in a bill to declare a deed a mortgage, who as a subsequent purchaser made improvements in good faith in reliance upon his title, was entitled to compensation and his rights were directed to be protected upon an accounting.—Carveth v. Winegar, 133 Mich. 34.

§ 74. Rights of mortgagee or assignee in possession.

Accountability for rents, issues and profits during possession, see post § 75.

Expenditures for repairs, upkeep and improvements, see post § 76.

Right to compensation for management of premises, see post § 77.

Rights of possession, use and enjoyment generally, see ante § 59.

Rights of assignee and mortgagee of school land certificate, see also Public Lands ¶ 241.

¶ 344. If a mortgagee has entered into possession as purchaser under defective foreclosure proceedings, the validity of his mortgage is not affected, and he can claim all the rights of a mortgagee in possession under his mortgage.—Todd v. Davis, 32 Mich. 160; Morse v. Byam, 55 Mich. 594.

¶ 345. A mortgagee put into possession before foreclosure by the mortgagor's consent has at least a tenancy at will which can-

not be destroyed without notice.—Byers v. Byers, 65 Mich. 598.

¶ 346. Where a mortgagee is deliberately and intentionally put in possession by the mortgagor, his possession is rightful, and ejectment cannot be brought against him without some action previously taken which will terminate his right and render his continuance in occupancy wrongful.—Reading v. Waterman, 46 Mich. 107.

¶ 347. A mortgagee agreed orally with the mortgagor's grantee that he should occupy one tract of the land and the grantee the other during her life. Subsequently he began a foreclosure, which the grantee treated as a repudiation of the contract, and accordingly replevied wheat raised by a tenant of the mortgagee on the latter's tract and delivered to him as rent. Held, that the foreclosure was not a repudiation of the contract, since it could not affect the grantee's equitable right to the existing possession definitely taken by her under the parol agreement.—Byers v. Byers, 65 Mich. 598.

§ 75. ——Accountability for rents, issues and profits during possession.

Right to rents, issues and profits, see ante § 60.

Accounting incident to redemption, see post § 176.

Accountability of mortgagee for amount realized on other security, see post ¶ 628.

Accountability of mortgagee in possession on redemption for rents collected, see also post ¶ 827.

¶ 348. A mortgagee in possession will be charged with the rental value of the land, minus reasonable expenditures for good husbandry.—Miller v. Peter, 158 Mich. 336.

¶ 349. Where the mortgagee has been in possession of the mortgaged premises, and the mortgagor comes with his money to redeem, the mortgagee must account for the profits of the mortgaged premises, of which the crops he may have appropriated or destroyed will be considered a part.—Stevens v. Brown, W. 41.

¶ 350. In a proceeding by a wife to foreclose a mortgage on her husband's farm, she will not be required to account for the proceeds therefrom while operated by her during the husband's absence, where she could not and did not accumulate any surplus beyond what she sent him from time to time.—Stevens v. Stevens, 181 Mich. 438.

§ 76. ——Expenditures for repairs, upkeep and improvements.

¶ 351. A mortgagee in possession is not entitled to recover for expenditures for repairs which were not necessary to preserve the estate from loss or injury.—Barnard v. Paterson, 137 Mich. 633.

§ 77. ——Right to compensation for mana ment of premises.

¶ 352. Where a mortgagee is in pos sion under the mortgage for the sole p pose of collecting and using the proce from the mortgaged property in payment the mortgage debt in the absence of an ag ment is not entitled to any pay or comm sions for services for his management of property.—Gilluly v. Shumway, 144 Mi 661.

¶ 353. A mortgagee in possession is entitled to commissions for collecting re for his own benefit, there being no agreem for such compensation and no evidence fr which such an agreement might be infer —Barnard v. Paterson, 137 Mich. 633.

§ 78. Rights and liabilities under agreem for possession or purchase by m gagor after foreclosure.

Rights to possession, use and enjoyment general, see ante § 59.

¶ 354. Where in consequence of a f closure and an agreement for retention possession of one of the parcels the lien the original mortgage was extinguished the parcel released, but because of an er in the proceedings a second foreclosure was necessary, the expense of the sec foreclosure cannot be charged to the origi mortgagor remaining in possession by vir of the agreement.—Clark v. Stilson, 36 M 482.

§ 79. Rights against third persons injur land or security.

Impairment of mortgage lien by conden tion of railroad right of way over m gaged land, see Eminent Domain ¶ 51

¶ 355. A mortgagee of an undivided interest in timber land can maintain a in equity to enjoin the removal of timbe Collins v. Rea, 127 Mich. 273.

¶ 356. Where one who by its record constructive notice of a mortgage wher bought standing timber constituting a uable part of the security, and who be cutting such timber had not only actual tice of the mortgage and of the mortga insolvency, but also advice that cut would injure the mortgagee, nevertheless tered on Sunday and cut part of the tim he is liable in suit by the mortgagee, aft foreclosure sale of the mortgaged prem has failed to satisfy the amount due, for value of the timber taken.—Webber v. F sey, 100 Mich. 58.

¶ 357. Where a mortgagee brings trea for the removal of a building from the n gaged land, counting upon the foreclo and sale of the mortgaged premises, and existence of a deficit thereunder, to sa the debt, he cannot recover unless he sh

a deficiency upon a regular and legal foreclosure and sale.—Taylor v. McConnell, 53 Mich. 587.

§ 80. Rights of junior mortgagees or lienors.

Junior mortgagee as purchaser of premises, see post § 81.

Payment of prior charges to protect interest, see post § 82.

Right to possession after foreclosure, see post § 83.

Effect of outstanding junior lien, see also post § 125.

Right of second mortgagee to redeem, see post ¶ 768.

Right to urge laches, junior grantee against senior mortgagee, see also Equity ¶ 209.

Limitation of action by junior mortgagee for waste impairing his security, see Limitations ¶ 259.

¶ 358. A second mortgagee takes subject to a prior unrecorded mortgage expressly referred to in, and excepted from, the deed to his mortgagor.—Baker v. Mather, 25 Mich. 51.

¶ 359. The maker and indorser of a note secured by a mortgage are not released from their obligation to pay it by the fact that it has been taken up by the holder of a second mortgage with whom they had no relations. Payment of a first mortgage by a second mortgagee makes him in equity an assignee of such first mortgage, and he may resort to all suitable remedies to enforce payment. —Mattison v. Marks, 31 Mich. 421.

¶ 360. A second mortgage on real estate given subject to a prior mortgage does not acquire priority over such first mortgage by the fact that the insolvent mortgagor, in fraud of creditors, furnished his daughter the money with which to secure the assignment to herself of such first mortgage.—Hatch v. Daugherty, 145 Mich. 569.

¶ 360a. The security of a second mortgage on real estate given subject to a prior mortgage is in no way impaired by the fact that the insolvent mortgagor, in fraud of creditors, furnished his daughter the money with which to secure the assignment to herself of the first mortgage on such property.—Hatch v. Daugherty, 145 Mich. 569.

¶ 361. A second mortgagee can take up the first mortgage, tack it to his own and foreclose for both.—Manwaring v. Powell, 40 Mich. 371.

¶ 362. A junior mortgagee on paying to the prior mortgagee the amount of the decree obtained by him upon foreclosure becomes an equitable assignee, and is entitled to be substituted as complainant (First C. C. Ch. Rule 125) although he was originally made a defendant therein, and although the decree has been enrolled.—Codd v. Wayne Circuit Judge, 109 Mich. 120.

¶ 363. A subsequent mortgagee has the right to require the assignment to himself of a prior mortgage after it has fallen due and before foreclosure, and may proceed to foreclose such prior mortgage at once, on assignment to him.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

§ 81. ——Junior mortgagee as purchaser of premises.

¶ 364. A second mortgagee who has foreclosed and bid in the property succeeds to the mortgagor's rights and can make any defense against the other mortgagee that the mortgagor could have made.—Thompson v. Jarvis, 39 Mich. 689.

¶ 365. Where a subsequent mortgagee pays the redemption money of the mortgaged premises to the purchaser under the foreclosure of a prior mortgage, he does not succeed to the rights of such purchaser, but stands in the place of the prior mortgagee; the only additional right which he acquires being the right to be reimbursed what he has paid, with interest, on foreclosing his own mortgage.—Johnson v. Johnson, W. 331.

¶ 366. On foreclosure of a prior mortgage by advertisement, a junior mortgagee may bid in the land at the sale with all the rights of such a purchaser.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

¶ 367. In the absence of peculiar and unusual equities, the holder of a second mortgage may purchase the equitable interest of the purchaser at a foreclosure sale under a prior mortgage, there being a distinction between redeeming as a matter of right from a sale under foreclosure and taking an assignment of such equitable interest, the latter being a matter of contract between the parties.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

¶ 368. On redemption from a prior mortgage a subsequent mortgagee may foreclose his lien against the owner and others whose interests are subordinate to that of such subsequent mortgagee.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

¶ 369. The owner of premises twice mortgaged conveyed them subject to the mortgages after the first had been foreclosed. Before the time of redemption had expired the grantee redeemed, and, having obtained a quitclaim to his wife from the first mortgagee, claimed that she held in her own right under a foreclosure from which the property had not been redeemed, and that the second mortgage was cut off. Held, that as her name was only used as a cover where her husband was the real party in interest, and as the transaction was probably understood by the mortgagee as substantially a redemption, no equity was made out in the wife's favor.—Wright v. Patterson, 45 Mich. 261.

§ 82. ——Payment of prior charges to protect interest.

¶ 370. Taxes being a lien upon land, the second mortgagee might make payment to protect his mortgage, and by doing so would succeed to the lien upon the land, which would take precedence over the first mortgage.—Noeker v. Howry, 119 Mich. 626.

§ 83. ——Right to possession after foreclosure.

Rights to possession in general, see ante § 59.

¶ 371. A second mortgagee who has foreclosed is, as against a prior mortgagee who has not made him a party to foreclosure proceedings instituted by such prior mortgagee, entitled to possession and rents until his rights are cut off by a proper foreclosure of the earlier mortgage.—Walker v. Fisher, 117 Mich. 72.

V. LIEN AND PRIORITIES.

§ 84. Lien and its extent in general.

Equitable liens, see post § 85.
Primary and secondary properties and debtors under lien, see post § 86.
Lien upon after-acquired property, see post § 87.
Priorities and marshalling of liens in general, see post § 88.
Priority between different mortgages, see post §§ 89-92.
Priorities between different debts or obligations under same mortgage, see post § 93.
Priorities between mortgagee and levying creditors, see post § 94.
Priority by reason of iniquity, fraud or sharp practice, see post § 95.
Estoppels or waiver of priority, see post § 96.
Presumption and evidence of priorities, see post § 97.
Redemption and accounting, see post, IX.
Reinstatement and revival of lien, see post § 162.
Statutory practice in deducting mortgage in ejectment for dower, see Dower § 43.
Deduction of mortgage in assigning dower interest, see Dower § 55.
Imposing lien on dower in favor of mortgagee who advanced money paid dowress for sale of her interest to mortgagor and received therefor void mortgage, see Dower § 31, ¶ 84.

¶ 372. If a mortgage debt were revived by a new and subsequent agreement, the obligation to pay, and the lien, would rest, not upon the old mortgage and note, but upon the new agreement, which alone would constitute the basis of the right to enforce payment or to foreclose, and must be pleaded in an action therefor. Evidence of such an agreement, or of subsequent dealings had in reference to reviving the lien, could not be admitted under a foreclosure bill relying upon the original note and mortgage.—McCabe v. Farnsworth, 27 Mich. 52.

§ 85. ——Equitable liens.

Priority between mortgages of equitable titl see post § 92.

¶ 373. A decree giving to one whose mor gage on land has been released by a forge instrument a lien for $452.83 as against subsequent mortgagee whose money was e pended in putting a building on such land i justified by evidence that the present valu of the land without the building is $25 that it was more valuable when the mortgag was given, and that about $200 had bee expended on the building before the secon mortgage was given.—Saginaw Building Loan Ass'n v. Tenant, 111 Mich. 515.

§ 86. Primary and secondary properties an debtors under lien.

¶ 374. In foreclosure proceedings coverin a homestead and other lands, the primar fund for the payment of the mortgage is th land other than the homestead.—Wolcott Tweddle, 133 Mich. 389.

¶ 375. Where a mortgagor was indebte to his son in a considerable amount, and th mortgage in question was given to secure note made by a firm of which the son was member, and indorsed by the father, and th latter subsequently agreed to pay the no upon the understanding that the son was repay any difference between the amount paid and the father's indebtedness to hi equity will not, at the instance of the mor gagor's creditors, compel the makers of th note to satisfy the mortgage, it being cle that the mortgaged property became, in pu suance of such agreement, the primary fur out of which the debt should be realized.- Webber v. Webber, 109 Mich. 147.

¶ 376. Where a husband and wife e ecuted a mortgage to secure the former note and later a second mortgage was e ecuted between the same parties but befo execution thereof the husband had qui claimed to his wife, she by joining in th mortgage mortgaged her separate property secure the payment of the husband's det As between the spouses he occupies the p sition of principal and she that of surety, th mortgage not being the primary fund as b tween them, but the primary obligation res upon the husband.—Scribner v. Malinowsl 148 Mich. 446.

§ 87. Lien upon after-acquired property.

¶ 377. Whether the prior mortgagee an executory land contract, whose mortga was given to secure an antecedent debt, h rights paramount to those of a subseque mortgagee under a mortgage after the a quisition of the legal title by the mortgag quære; the court being equally divided. Edwards v. McKernan, 55 Mich. 520.

¶ 378. Where, after foreclosure, the ti held by the mortgagor turns out to have be invalid, and he takes advantage of a curati

act and obtains a patent from the state confirming his title, the mortgagee is entitled to resort to equity for the purpose of re-establishing his lien and satisfying his claims.—Toms v. Boyes, 50 Mich. 352.

§ 88. Priorities and marshalling of liens in general.

[Note. The priorities under the recording acts and under the equitable doctrine protecting bona fide purchasers without notice are governed by principles that are common to all conveyances and incumbrances. They are therefore treated in the topic Notice and Record of Title, which see.]

Marshalling assets in general, see Marshalling Assets.

Priorities as between mechanics' and mortgage liens, see Mechanics' Liens § 31.

Priority of labor liens over other liens, see Liens § 11.

Priority between lis pendens notice and mortgage lien, see also Lis Pendens § 3.

General law of marshalling securities, see Marshalling Assets.

Requiring mortgagee to have primary recourse to other security, see Marshalling Assets.

Rank and priorities of creditors under assignment, see Assignments for Creditors § 23.

Effect of foreclosure proceedings on priorities of mortgages, see Foreclosure ¶¶ 542-543.

Between chattel mortgage or conditional sale of fixed machinery and land mortgage, see also Fixtures § 27.

Inferiority of dedication to lien of mortgage where mortgagee does not join in dedication, see Dedication § 4.

Priority of antenuptial mortgages over wife's dower, see Dower § 33.

Priority between dower and husband's sole assignment of land certificate as security, see Dower § 35, ¶ 91.

Priority between dower and mortgage by husband alone given for purpose of raising alimony for wife, see Dower § 35, ¶ 92.

Persons bound by decree adjudging priority, see Former Adjudication, V, and especially ¶ 381.

Priority of mechanics' liens, see Comp. L. 1915, § 14804.

¶ 379. Where there are several notes secured by a mortgage, neither has priority over the other because maturing earlier, but all have an equal claim to be paid ratably out of the land.—Jennings v. Moore, 83 Mich. 231.

¶ 380. Delivery of a mortgage to a creditor so as to give him a prior lien over a deed cannot be compelled even though so intended, when the parties entered into an escrow agreement whereby it was agreed that the consent of a debtor must be obtained before the mortgage placed in escrow could be delivered.—Belding Sav. Bank v. Moore, 118 Mich. 150.

¶ 381. Where a mortgagee, with knowledge of a subsequent mortgage on a part of the premises mortgaged to him, releases a part or the whole of the premises not covered by the subsequent mortgage, and the remaining property is not sufficient to pay both, equity will postpone the payment of the first mortgage out of the proceeds of a sale of the remaining property to the extent of the injury done the subsequent mortgagee by the release.—James v. Brown, 11 Mich. 25.

§ 89. Priority between different mortgages.

See also post ¶ 703.

Concurrent mortgages, see post § 90.

Purchase-price mortgages, see post § 91.

Mortgages of equitable title, see post § 92.

Priority between different debts or obligations under same mortgage, see post § 93.

Lien and priorities on foreclosure of simultaneous mortgages, see Foreclosure ¶ 502.

Rating and rank of mortgage liens on foreclosure, see Foreclosure § 123.

¶ 382. The English doctrine of tacking securities is not recognized in Michigan.—Wing v. McDowell, W. 175; Ladue v. Detroit & M. R. Co., 13 Mich. 380.

¶ 383. Indorsers of corporate obligations who took for security a mortgage covering real and personal property, and who realized on the personalty, and who took for further security at a later time a bond of another issue secured by a prior mortgage of the same land after they had denied that they knew of the prior mortgage, cannot claim to pro rate in the foreclosure of the prior mortgage, where it is evident that they did not rely on it as security and parted with nothing on the strength of it, and that it was not intended to cover the debt for which they indorsed.—Woodin v. Sparta Furniture Co., 59 Mich. 58.

¶ 384. Equity will not permit beneficiaries under a later mortgage to obtain priority over the beneficiaries under a prior mortgage merely because their acceptance of certain conditions was made later than the acceptance of the terms of the later mortgage by the beneficiaries thereunder, particularly where the later mortgage was by its terms made subject to the conditions of the prior mortgage, and the amount of indebtedness given priority was known.—Gillam v. Barnes, 123 Mich. 119.

¶ 385. A mortgage given in consideration of the mortgagor's release from liability as endorser on his son's notes, and to secure the substituted unendorsed notes of the son, will not lose its priority over a later mortgage, merely because an insolvent beneficiary in the first mortgage, which beneficiary was in the hands of a receiver, had negotiated the indorsed notes and was unable to make immediate surrender of all of them, and where the return of all the notes was not made a condition precedent to the mortgage

taking effect and it was agreed that they should be taken care of by the receiver and returned to the mortgagor; but the decree of foreclosure should make provision for the surrender and return of the notes to the mortgagor.—Gillam v. Barnes, 123 Mich. 119.

§ 90. ——Concurrent mortgages.

¶ 386. Where two mortgages on the same property have the same date, the fact that the one recorded last was acknowledged first does not show that it was meant to be the first security.—Van Aken v. Gleason, 34 Mich. 477.

¶ 387. Of two mortgages of even date, one by agreement was to have priority over the other, the first mortgagee agreeing to pay the interest and principal of the second mortgage in case the common mortgagor failed to do so; but by the conduct of the second mortgagee the first mortgage was deprived of all the benefit of his priority. Upon foreclosure of the first mortgage it was held that the proceeds of sale should be divided between the two mortgagees in a certain proportion, the first mortgagee to be released from his suretyship.—Grunert v. Becker, 100 Mich. 50.

§ 91. ——Purchase price mortgages.

See also post ¶ 708.

Priority of purchase money mortgage over dower, see Dower § 34.

¶ 388. The purchase money being the first lien on land held under a land-contract, a mortgage given as security for money advanced to pay such purchase price takes precedence of a prior recorded mortgage of said property.—Balen v. Mercier, 75 Mich. 42.

§ 92. ——Mortgages of equitable title.

Equitable mortgages, see ante, II, C.

¶ 389. Where there were two mortgages of an equitable title to lands, that which was prior in time was allowed to prevail; nor would a subsequent obtaining of the legal title in right of another and not in one's own right, or with knowledge of the prior mortgage, aid the holder of the other.—Wing v. McDowell, W. 175.

§ 93. Priorities between different debts or obligations under same mortgage.

See also ante ¶ 379.

Priority of assignee of part of mortgage debt over part held by his assignor, see also post ¶ 428.

Lien and priorities where several notes are secured by same mortgage, see Foreclosure ¶ 501.

¶ 390. A corporation executed a trust mortgage to secure bonds for $12,000, or such part thereof as it should borrow, and bonds were issued for about $6,500 borrowed. To a foreclosure of said mortgage parties whom a second mortgage on the same pr erty had been given to secure them from l bility as indorsers of the corporation's n for $10,000 were made parties as subsequ incumbrancers, and pending foreclosure bond for $5,500 was delivered to them. He upon a cross-bill filed by such indorsers, t the corporation officers had no power to is this bond of which the effect was to les the security of the original bondholders, secure indorsers upon a note not intended be secured by bonds when given; and t the lien of such indorsers was subordin to that of the original bondholders.—Woo v. Sparta Furniture Co., 59 Mich. 58.

§ 94. Priorities between mortgagee and levy creditors.

Rights of execution purchaser as agai mortgagees, see Executions § 71.

Leviability of respective interests under mortgage, see Executions § 24.

Rights acquired by levy subject to mortga see Executions § 49.

Priority of execution lien over deed wh creditor was without notice, see also ecutions ¶ 78.

Attachability of interests under mortgage of equity of redemption, see Attachm § 17.

Attachment of property subject to mortga see Jud. Act, chap. XXVI, § 34; Co L. 1915, § 13061.

¶ 391. A prior unrecorded defeasa holds as against an attachment lien.—Col bia Bank v. Jacobs, 10 Mich. 349.

¶ 392. Execution creditors of a mortga are entitled to priority over the mortga as to moneys advanced by the latter s sequent to their levies.—Dummer v. Smed 110 Mich. 466.

¶ 393. A second mortgagee is entitled a lien for money advanced to pay delinqu interest upon the prior mortgage in orde prevent foreclosure, superior to that of c itors under levies subsequent to the mortg but prior to the payment.—Dummer v. Sm ley, 110 Mich. 466.

¶ 394. A mortgage given to secure porate bonds which as the mortgagee k had never been sold, but were turned o to him without authority as security for private debts of the company's treasurer, postponed to a subsequent levy.—McKee Grand Rapids & R. L. S. R. Co., 41 M 274.

¶ 395. It seems that a mortgagee need resort to another mortgage on foreign la to relieve judgment creditors of the m gagor, who have levied upon all of the p erty covered by the mortgage.—Farwell Bigelow, 112 Mich. 285.

§ 95. Priority by reason of inequity, fraud or sharp practice.

Estoppel or waiver of priority, see post § 96.
Disability of person giving mortgage to be sold for fraudulent purpose to assert fraud as defense to mortgage in hands of bona fide purchaser, see Notice and Record of Title, I.
Subordination of fraudulent taker or mortgagee to bona flue taker without notice, see Notice and Record of Title, I.

¶ 396. Anything done by a first mortgagee to the prejudice of a second, with a knowledge of the second mortgage, should, to the extent of such injury, postpone the first to the second mortgage.—Bailey v. Gould, W. 478; James v. Brown, 11 Mich. 25.

¶ 397. A mortgage which omitted certain property by mistake is prior to one which the mortgagee's agent, entrusted to effect a correction of the mistake, took to himself by including all of the property and cancelling the original mortgage note, where he had no authority to do so and his offer to give his principal an interest in the mortgage taken by himself was declined.—Hunt v. Hunt, 38 Mich. 161.

¶ 398. A vendee of land gave to the vendor a purchase-money mortgage before delivery of the deed to him, and afterwards, at the time the deed was actually delivered, he mortgaged the premises to a third person in whose presence the delivery was made and who had no notice of the prior mortgage. Held, that the second mortgagee was entitled to priority.—Heffron v. Flanigan, 37 Mich. 274.

¶ 399. Where one mortgage was substituted for another, and by a corrupt arrangement with the mortgagor, a third person, knowing the facts, procured and took advantage of an interval between the discharge of the original mortgage and the recording of the substitute to record a mortgage which he obtained meanwhile for himself, and did this with the fraudulent purpose of securing priority, his mortgage was postponed to the other.—Waldo v. Richmond, 40 Mich. 380.

¶ 400. The parties to a mortgage agreed that a new one should be substituted with a clear title. Upon the same day on which this was done, and without the knowledge of the mortgagees, another mortgage was given to the mortgagor's father-in-law, who had advanced considerable money to the mortgagor's wife without asking repayment. The testimony indicated that the mortgage was made to him without his participation, and with the fraudulent purpose of giving it priority. Held, that it must be postponed to the other mortgage, since even if he were an honest mortgagee, his mortgage, if made first, was on premises already encumbered, and he had no equities which would make it anything but a second mortgage; and if the original mortgage was exchanged under a false pretense that the title was to be cleared, he was in no position to object to the restoration of the old security in behalf of the original mortgagees.—Eggeman v. Eggeman, 37 Mich. 436.

¶ 401. The grantee of a mortgagor quitclaimed to him in satisfaction of his foreclosure decree, and the mortgagor then recorded a later mortgage from the grantee to himself before the quitclaim deed could be recorded. Held, that the later mortgage should be set aside and the quitclaim deed permitted to stand by reason of the fraud.—Corey v. Alderman, 46 Mich. 540.

§ 96. Estoppels or waiver of priority.

General principles of estoppel, see Estoppel.

¶ 402. Where a mortgage is expressly made subject to prior mortgages their validity cannot be denied by the mortgagor or his assignee in bankruptcy.—Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

¶ 403. The holder of a mortgage who recognizes prior mortgage encumbrances is estopped, in foreclosing the mortgage, from denying the validity of such mortgages.—Gow v. Collin & Parker L. Co., 109 Mich. 45.

§ 97. Presumption and evidence of priorities.

Presumption as to equality of interest of several co-mortgagees, see ante ¶ 158.
General law of evidence, see Evidence.

¶ 404. Priority of one note over another secured by a mortgage cannot be shown by parol.—Jennings v. Moore, 83 Mich. 231.

¶ 405. Where a mortgagor testifies in general terms that he gave the mortgage at a specified time, and is not questioned as to the particulars of delivery, this testimony must be regarded as showing delivery at that time.—Matteson v. Blackmer, 46 Mich. 393.

¶ 406. A complainant in foreclosure desired to show that the mortgage held by him was delivered and recorded before another one of previous date held by a person who had died before the suit was begun; and he sought to show it by the testimony of a witness who claimed the decedent had told him his mortgage was neither acknowledged nor delivered until the other was put on record. The witness had lived five or six miles from decedent, and was not shown to have been his confidant. Complainant had a mortgage on the lands of the witness. Held, a suspicious circumstance that he had never mentioned his conversation with decedent in the latter's lifetime, nor until after complainant's suit had been pending seven years, and until complainant had called upon him, just before he was sworn, to know if he was possessed of valuable information.—Matteson v. Blackmer, 46 Mich. 393.

¶ 407. A claim of priority set up by a foreclosure defendant in behalf of a mortgage on the same premises and of the same date with the one in suit, but not recorded until two days later, was held not to be sustained by the proofs.—Clark v. Johnson, 32 Mich. 203.

VI. ASSIGNMENT OR TRANSFER OF DEBT, LIEN, OR INTEREST OF MORTGAGEE.

§ 98. In general.

See also post ¶ 632.
Requisites, mode and sufficiency, see post §§ 99-102.
Transfer of debt as transfer of mortgage, see post §§ 103, 104.
Right and authority to assign or to receive assignment, see post § 105.
Operation and effect and rights transferred, see post §§ 106-109.
Assignment as indemnity or security and rights thereunder, see post § 110.
Tender to assignee of mortgage, see post ¶ 581.
Satisfaction of mortgage by assignment, see post § 146.
Assignment of rents for further security or application thereof, see ante § 61.
Nature of lien in general, see ante, V.
Transfer of mortgagor's title or estate and assumption of debt, see post, VII.
Assumption of liability by grantee of mortgagor's title, see post, VII, B.
Redemption and accounting in general, see post, IX.
Burden of proof of damages for breach of warranty that stated amount was due on assigned mortgage, see Damages ¶ 1081.
Transfers by way of gift, see Gifts.
Assignment by gift to person in meretricious relation with assignor, see Gifts § 29.
Sufficiency of delivered or assignment as gift, see Gifts, III.
Admissibility of proof of parol assignment of debt, see also Evidence ¶ 653.
Assignability as personalty of deed taken as mortgage, see also Assignments ¶ 6.

¶ 408. A creditor named in a trust mortgage as one to be secured thereby if certain conditions were met, among them the substitution of new notes for outstanding indebtedness so as to consolidate it, having refused to accept the provisions of the mortgage has no interest therein which may be the subject of assignment.—Gillam v. Barnes, 123 Mich. 119; per Moore, J., others concurring in the result.

§ 99. Requisites, mode and sufficiency.

Deed of conveyance as an assignment, see post § 100.
Necessity and sufficiency of delivery, see post § 101.
Necessity and sufficiency of notice to mortgagor, see post § 102.
Right and authority to assign and receive assignment, see post § 105.
Formal requisites of execution, see Execution of Instruments.
Necessity for recordation of assignment and effect of failure to record, see Notice and Record of Title, II, A.
Necessity that assignment or transfer of mortgage be in writing, see Frauds, Statute of, § 47.
Effect of recording assignment of mortgage on right to pay mortgagee, see Comp. L. 1915, § 11724.

¶ 409. An assignment of a mortgage is not a conveyance of real estate and may be made without executing a deed or other instrument in writing where the statute does not require the transfer to be so made.—Dougherty v. Randall, 3 Mich. 581; Young v. McKee, 13 Mich. 552.

¶ 410. Mortgages are chattel interests, and may be transferred without writing.—Nims v. Sherman, 43 Mich. 45.

¶ 411. A mortgagee's rights may be transferred either by a legal or by an equitable assignment or conveyance.—Hoffman v. Harrington, 33 Mich. 392.

¶ 412. The right of a mortgagee may be transferred either by a legal or an equitable assignment.—Densmore v. Savage, 110 Mich. 27.

¶ 413. An assignment of a mortgage, though not witnessed, or with but one witness, is competent proof as well in law as equity to show a transfer of the entire interest of the mortgagee in the mortgage.—Dougherty v. Randall, 3 Mich. 581.

¶ 414. The acknowledgment of an assignment of a mortgage is no part of the assignment.—Livingston v. Jones, H. 165.

¶ 415. The assignee of a mortgage is entitled, if he is the real owner, to demand and receive payment on the notes secured by it whether indorsed or not, and the formal assignment, duly recorded and acknowledged, is the best possible evidence of ownership.—Pease v. Warren, 29 Mich. 9.

¶ 416. An assignee of a mortgage is not estopped from foreclosing by the act of his agent in withholding the assignment from record for the purpose of escaping taxation.—Terry v. Durand Land Co., 112 Mich. 665.

¶ 417. Where an assignment of a mortgage was procured by threatening the mortgagee, a timid and ignorant man, with a prosecution for slander, it was held to be without consideration, and a reassignment was decreed.—Tate v. Whitney, H. 145.

§ 100. ——Deed of conveyance as an assignment.

¶ 418. A deed by a mortgagee of the land covered by the mortgage may operate as an assignment.—Niles v. Ransford, 1 Mich. 338; Thayer v. McGee, 20 Mich. 195.

¶ 419. A deed to defendant from her mother of premises to which the mother held title by a deed which was in fact a mortgage given to secure the mother as indorser on the grantor's note given to defendant for a loan, held to be an assignment of such security.—Maginn v. Cashin, 196 Mich. 221.

§ 101. ——Necessity and sufficiency of delivery.

Delivery effected through escrow, see Escrows.

Sufficiency of delivery of instruments in general, see Execution of Instruments, III.

¶ 420. A mortgage left with a third party, to be delivered when a prior mortgage had been discharged and other conditions performed, was assigned by the mortgagee named in it, to the depositary, before they had been fulfilled. It was afterward assigned to another party before it fell due, and the assignee sought to foreclose it. Held, that there had been no delivery.—Cressinger v. Dessenburg, 42 Mich. 580.

¶ 421. A man executed an assignment of a mortgage security held by him in order that he might use it, if necessary, to secure himself and personal creditors in case of the failure of a manufacturing concern in which he was interested; but he never did use it, and he continued to collect money on it as his own, and used the money for his own purposes. Held, that this did not show that any effective assignment was intended or made out.—Hutton v. Cuthbert, 51 Mich. 229.

§ 102. ——Necessity and sufficiency of notice to mortgagor.

Necessity for recordation of assignment and effect of failure to record, see Notice and Record of Title, II, A.

¶ 422. Until actual or constructive notice of assignment, the mortgagor is entitled to deal with the mortgagee or his personal representative on the supposition that no transfer has been made (unless the mortgage was given to secure negotiable paper and was transferred before due), and the assignee will be bound by such dealings.—Jones v. Smith, 22 Mich. 360.

¶ 423. Comp. L. § 4235 (How. St. § 5687, providing that recording the assignment of a mortgage shall not be such notice of the assignment as to invalidate payments made by the mortgagor to the mortgagee, applies where the payment, though not actually made by the mortgagor, is so made as to release him from liability, as by an arrangement between all parties that he should deed the land to the person making the payment.—Goodale v. Patterson, 51 Mich. 532.

§ 103. Transfer of debt as transfer of mortgage.

Assignment of part of debt, see post § 104.

¶ 424. The assignment of a debt secured by a mortgage carries with it the mortgage, as an incident to the debt, although there is no mention made of the mortgage in the assignment.—Cooper v. Ulmann, W. 251; Dougherty v. Randall, 3 Mich. 581; Martin v. McReynolds, 6 Mich. 70.

¶ 425. Anything which transfers the debt (though by parol or mere delivery) transfers the mortgage with it.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

¶ 426. An equitable assignee of a debt secured by mortgage is entitled to have the mortgage follow the debt.—Briggs v. Hannowald, 35 Mich. 474.

§ 104. ——Assignment of part of debt.

¶ 427. The assignment of a part of a debt, or of one of several notes secured by a mortgage, carries with it a proportional interest in the mortgage unless it is otherwise agreed between the parties at the time.—Cooper v. Ulmann, W. 251.

¶ 428. Where a mortgagee assigns part of a mortgage debt, or one of several notes secured by a mortgage, the law gives the assignee no priority of payment where there is no understanding or agreement to that effect; but the assignor may, if he sees fit, give the assignee such priority.—Cooper v. Ulmann, W. 251.

§ 105. Right and authority to assign or to receive assignment.

¶ 429. The validity of an assignment of a mortgage is not impaired by a showing, merely, that the assignor's interest was but a life estate, if it does not also appear that the transfer operated to diminish the bulk of the estate at the death of the life tenant.—Sutphen v. Ellis, 35 Mich. 446.

¶ 430. A power of attorney to sell and convey lands and to borrow money by mortgage upon lands gives the attorney no authority to assign a mortgage, certainly not to assign to himself.—Post v. Springsted, 49 Mich. 90.

¶ 431. To sustain a foreclosure in equity by an assignee of a mortgage it need not be shown that the mortgagee's agent who assigned the mortgage had written authority, delivery by the agent in pursuance of the mortgagee's instructions being sufficient to transfer title to the mortgage and to enable complainant to foreclose in equity.—Moreland v. Houghton, 94 Mich. 548.

¶ 432. A wife's dower and homestead rights in land mortgaged by her husband entitle her not only to redeem from statutory foreclosure sale, but to receive, on paying the amount bid with interest, an assignment of the mortgage.—Moore v. Smith, 95 Mich. 71.

¶ 433. In a suit by the treasurer of the state of New Jersey to foreclose a mortgage of Michigan land which mortgage had been

assigned to his predecessor in office and to his successors as a guaranty to the policyholders of the mortgagee, a New Jersey insurance company, the mortgagors cannot raise the question whether there is or is not a statute in New Jersey authorizing the securing of policyholders in the manner provided in the assignment. None by those who are interested in the distribution of the money can raise that question.—Gray v. Waldron, 101 Mich. 612.

¶ 433a. Where one who holds a deed of lands as security for the payment of a note transfers the note, he retains no further interest in the lands beyond the naked trust, which is subservient to the debt; and such transfer being to a national bank, the latter, if it could lawfully take such a security, would become in legal effect mortgagee, and if not, then the deed would cease to be operative for any purpose, and the grantee would be bound to reconvey when required.—Briggs v. Hannowald, 35 Mich. 474.

§ 106. Operation and effect; rights transferred.

Outstanding defenses and existing equities, see post § 107.

Notice of equities and defenses, see post § 108.

Covenants of title and right to assign, see post § 109.

Priorities between different mortgages, see ante §§ 89-92.

Person to whom payment or tender may be made after assignment, see post § 132.

What constitutes parting with value without notice and in good faith, see Notice and Record of Title, I, C.

General doctrine of notice and bona fide purchaser respecting record title, see Notice and Record of Title, I.

Effect of assignment of mortgage on pending foreclosure, see Foreclosure § 14.

¶ 434. An assignment of a mortgage passes the power of sale.—Niles v. Ransford, 1 Mich. 338.

¶ 435. An assignment of a mortgage carries with it an assignment of the mortgage debt.—Hilton v. Woodman's Estate, 124 Mich. 326.

¶ 436. The assignment of a mortgage includes and carries with it the notes to which it is collateral.—Loveridge v. Shurtz, 111 Mich. 618.

¶ 437. An assignment of the mortgage without the debt is a mere nullity.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

¶ 438. The assignment of a mortgage that appoints the assignee attorney, with full authority to have, use and take all lawful ways and means, in his assignor's name or otherwise, for the recovery of the money due thereon, transfers to such assignee all of the assignor's collateral rights, including a claim against a previous assignor to himself, for a breach of the covenant that such previous assignor had lawful authority to transfer.—Briggs v. Hannowald, 35 Mich. 474.

¶ 439. An assignment of a mortgage does not transfer undelivered collateral securities unless the parties so intend and a consideration is paid.—Fletcher v. Carpenter, 37 Mich. 412.

¶ 440. Assignments of mortgages by trustees are at most only nominal, and no assignment is necessary of a mortgage note payable to bearer.—Laprad v. Sherwood, 79 Mich. 520.

¶ 441. An assignee of a mortgage given to secure the payment of a negotiable note is entitled to the same protection that he would have as assignee of the note without the mortgage.—Helmer v. Krolick, 36 Mich. 371.

¶ 442. The assignee of a mortgage cannot at law sue in his own name upon the negotiable notes securing it, unless they are indorsed to him.—Pease v. Warren, 29 Mich. 9.

¶ 443. Where the assignee of certain notes secured by mortgage is induced to postpone foreclosure by representations made by an assignee of other notes maturing earlier and also secured by the mortgage, he does not become entitled to advantages, if any, over the latter, where he has not been damaged by relying on his statements.—Burhans v. Mitchell, 42 Mich. 417.

¶ 444. Where the vestry of a church duly authorized has borrowed money and given its note therefor secured by a trust deed of its rectory, it is liable for any deficiency upon foreclosure, and the fact that a new note, not authorized, has been given for the debt does not relieve the church from such liability to an assignee of the mortgage, since, if the note is void, equity will treat the transaction as an assignment of the debt and security.—Miller v. Childs, 120 Mich. 639.

¶ 445. The assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who would hold it subject to the will and disposal of the creditor.—Bailey v. Gould, W. 478.

¶ 446. Where a deed was given as a mortgage to secure the grantee as indorser on the grantor's note with a return contract of sale and defeasance of the premises by the grantee to the grantor for the amount of the note, and the grantee thereafter conveyed the premises for a nominal consideration to the holder of the note, held that such holder as assignee of the mortgage could not foreclose same by merely declaring the contract forfeited.—Maginn v. Cashin, 196 Mich. 221.

§ 107. ——Outstanding defenses and existing equities.

Measure of damages for fraud in misrepresenting amount to accrue on mortgage assigned, see Damages § 123.

Invalidity of assignment of mortgage as defense against assignee bringing foreclosure, see Foreclosure ¶ 38.

¶ 447. The assignee of a mortgage takes it subject to all equities existing between the parties to it at the time of the assignment.—Russell v. Waite, W. 31; Dutton v. Ives, 5 Mich. 515; Nichols v. Lee, 10 Mich. 526; Bloomer v. Henderson, 8 Mich. 395.

¶ 448. The assignee of a past-due note and mortgage takes it subject to any perfected equitable rights existing in the mortgagor to set off claims against it, even though he has no actual notice of such claims. His position is precisely that of his assignor.—McKenna v. Kirkwood, 50 Mich. 544.

¶ 449. The bona fide assignee of a mortgage, not charged in the bill with knowledge of the complainant's equities against the assignor in respect to the mortgage, will not be held affected with those equities.—Cicotte v. Gagniere, 2 Mich. 381.

¶ 450. The assignee does not take the mortgage subject to any equities which any third person may have against the mortgagor. Where he has purchased the mortgage in good faith, it is not subject in his hands to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land.—Bloomer v. Henderson, 8 Mich. 395.

¶ 451. Where a mortgage was given accompanying a negotiable promissory note, and they were assigned before due to a bona fide indorsee, held that he was not affected by any equities existing between the original parties.—Reeves v. Scully, W. 248; Dutton v. Ives, 5 Mich. 515.

¶ 452. A second assignee, to whom the note and the mortgage are sold and assigned by the mortgagee with notice of the guaranty, has the right to pay the balance due the first assignees, and, on receiving an assignment from them of the securities, will be subrogated to their rights as a bona fide holder to the amount paid, but no further.—Anderson v. Northern Nat. Bank, 98 Mich. 543.

¶ 453. The purchaser of a promissory note before due, in good faith, for a full consideration, and in reliance upon the validity of a trust mortgage as it then read, given to secure the payment of said note and of other indebtedness of the mortgagor, with a preference in favor of said note, cannot be deprived of such priority by the reformation of the mortgage so as to eliminate all preferences therefrom.—Dunham v. Steele Packing & Provision Co., 100 Mich. 75.

¶ 454. One who takes an assignment of a mortgage securing a series of notes of which the first has matured and is unpaid is put upon the inquiry and takes subject to equities between the mortgagor and mortgagee as to all of the notes.—Abele v. McGuigan, 78 Mich. 415.

¶ 455. An assignment of a mortgage to a third person, without notice of a prior mortgage, cannot give the assignee a priority which his assignor did not have.—Wing v. McDowell, W. 175.

¶ 456. Where a mortgage has been assigned any equities between the assignee and the mortgagor affect the mortgage in the hands of any subsequent assignee.—Nichols v. Lee, 10 Mich. 526.

¶ 457. Where a non-negotiable bond has been given secured by a mortgage, its assignment before maturity is made subject to equities existing between the parties.—Reeves v. Scully, W. 248.

¶ 458. At the time of conveying land and taking back a mortgage for the price with a promise to pay contained in the mortgage but without a note the vendor represented the land to be free from all encumbrances, though he knew of two prior mortgages. In foreclosure of the purchase-money mortgage by a bona fide assignee, held, that such mortgage was subject to all equities between mortgagor and mortgagee.—Cooley v. Harris, 92 Mich. 126.

¶ 459. In foreclosure by assignee of the mortgage against the mortgagor, it is no defense that the assignment was made in payment of a gaming debt due the assignee from the assignor.—Reed v. Bond, 96 Mich. 134.

¶ 460. Where a mortgagee, under a pretended claim of right, wrongfully got possession of the securities from the bailee of his assignee, and then received payment on the mortgage from the grantee of the equity of redemption, it was held that the mortgagor, who had paid nothing, had no equities as against the assignee.—Chase v. Brown, 32 Mich. 225.

¶ 461. An assignee of a renewal mortgage securing non-negotiable paper acquires no valid claim against the mortgagor, where, without the latter's knowledge, the original mortgage had been previously transferred to a third person, in whose hands it is still outstanding.—Brooke v. Struthers, 110 Mich. 562.

¶ 462. When mortgaged lands which had been sold by the mortgagor in parcels were subject to two mortgages, and the proceeds of the last parcel sold were applied upon the first of the mortgages, and as a part of the same arrangement the mortgagee in the second, who was mortgagor in the first

and under obligations to pay it, assigned the second to a party who was to hold it for the protection of the fee against another specified claim, but this party afterwards sold it for value to one who took it in good faith, held, that under the rule that the proceeds must be applied to the satisfaction of the mortgage in the inverse order of alienation the mortgage was to be deemed satisfied in the first arrangement; and the second assignment, not being with consent of the owner of the fee, the assignee took nothing thereby.—McVeigh v. Sherwood, 47 Mich. 545.

¶ 463. Whether assignee of a mortgage seeking foreclosure is or is not a bona fide purchaser is not material where defenses of alteration since execution and partial failure of consideration are not sustained by evidence.—Detroit Sav. Bank v. Galvin, 99 Mich. 55.

¶ 463a. The fact that a junior mortgagee took in good faith after an earlier mortgage had been apparently discharged by a forged discharge does not avail the junior mortgagee.—Keller v. Hannah, 52 Mich. 535.

¶ 463b. A forged mortgage is not valid in the hands even of a bona fide holder unless he came into possession of it under circumstances creating an equity in his favor against the nominal mortgagor.—Camp v. Carpenter, 52 Mich. 375.

§ 108. ——Notice of equities and defenses.

Effect of actual notice or knowledge on rights of purchaser in general, see Notice and Record of Title, I, A.

Recitals, possession or other facts calling for inquiry as to status of record title, see Notice and Record of Title, I, B.

¶ 464. Nondelivery of the securities with the assignment of a mortgage should put a purchaser upon inquiry as to whether the nominal assignee holds the evidences of title before he deals with him as owner.—Fletcher v. Carpenter, 37 Mich. 412.

¶ 465. As a general rule an assignee of a mortgage takes the instrument subject to existing equities, and no purchaser can safely rely on inquiry made of his assignor alone, but if inquiry becomes necessary resort must usually be had to the debtor also. —Cooper v. Smith, 75 Mich. 247.

¶ 466. Where it is understood between a mortgagor and mortgagees that the mortgagor shall convey to such person as one of the mortgagees shall designate, an assignment by the other mortgagee will not affect a purchaser who, in good faith, takes conveyance from the mortgagor, without notice or knowledge of such assignment; the assignee is subject to the same equities as the assignor, and if the assignor afterwards gives a discharge of the mortgage to the purchaser the latter is entitled to rega it as a regular and valid release thereof. Goodale v. Patterson, 51 Mich. 532.

¶ 467. Where a mortgage was given secure a non-negotiable bond, any subseque assignee of the mortgage is bound to ta notice—and is therefore conclusively pr sumed to have notice—of every defect the right of the mortgagee as between t mortgagee and mortgagor, and such assign succeeds only to the mortgagee's rights. Terry v. Tuttle, 24 Mich. 206.

¶ 468. A. gave to B. a note, not neg tiable, secured by a mortgage, as securi for the performance of an agreement. took an assignment of the mortgage a attempted to foreclose. Held, that C. w chargeable with notice of the equities t tween A. and B., and that A., on perfor ing the agreement, could maintain agai C. a cross-suit for the cancellation of t note and mortgage.—Humphrey v. Bec with, 48 Mich. 151.

¶ 469. Facts communicated to the seco assignee at the time of the assignmer amounting to notice of the guaranty, are effective as if the guaranty had appear on the face of the mortgage.—Anderson Northern Nat. Bank, 98 Mich. 543.

§ 109. ——Covenants of title and right assign.

¶ 470. The covenant in an assignment mortgage that the assignor has good rig and lawful authority to grant, bargain a sell the same, means that he has author to convey it as a valid, existing lien on t land according to its terms; and this co nant is broken by a previous secret relea of much of the security, destroying or i pairing the validity of the mortgage. Th the assignment was made in good faith no defense.—Byles v. Lawrence, 35 Mich. 4

¶ 471. It is no defense against an acti for a breach of a covenant as to validity a mortgage assigned that the defendant act in good faith in making the contract and referring the other party to sources of formation as to securities involved in t transaction.—Byles v. Lawrence, 35 Mi 458.

§ 110. Assignment as indemnity or secur and rights thereunder.

General law of pledge, see Pledges.

Parol evidence that assignment was for curity, see Evidence § 180.

Assignment of lease as security, see La lord and Tenant § 84.

¶ 472. An assignment of a mortgage or the right to a particular payment descrit therein, may be shown not to be absolute, l to have been designed as a security.—Hill

Goodrich, 39 Mich. 439; Hyler v. Nolan, 45 Mich. 357.

¶ 473. An assignment of a mortgage of lands for the purpose of securing the assignor's debt constitutes a mortgage of a mortgage.—Graydon v. Church, 7 Mich. 36; Wallace v. Finnegan, 14 Mich. 170.

¶ 474. A transfer of a mortgage to furnish security to the assignees for their indorsements of the assignor's notes must be regarded as carrying a beneficial interest to the assignee even though it does not in terms purport to convey any right in or title to the debt or notes.—Moreland v. Houghton, 94 Mich. 548.

¶ 475. Where complainant, a married woman, made an unconditional assignment of a mortgage to defendant, and delivered it to her husband, who delivered it over to defendant, and the latter gave the husband a receipt stating that the mortgage was received of the husband as collateral security for a debt owing by him to defendant, and there was no evidence of any negotiations between complainant and defendant, or of any understanding on her part that the transfer of the mortgage was to be upon any condition, or of any instructions by her in reference to it, it was held that the court could not say, from these facts, that the assignment was intended by complainant as security only, and not to be absolutely passed to defendant.—Durfee v. McClurg, 6 Mich. 223.

¶ 476. Where it is doubtful whether an assignment of a mortgage is a sale of the security or only a mortgage of it, if the consideration was much less than the amount due upon it, the court will incline to consider it a mortgage.—McKinney v. Miller, 19 Mich. 142.

¶ 477. One who has hypothecated a mortgage may at any time recall it and require a retransfer upon satisfying the secured debt.—Cooper v. Smith, 75 Mich. 247.

¶ 478. Where one pays a mortgage as the agent and with the funds of the mortgagor, and instead of having it discharged causes it to be assigned as security for a debt owing by himself, the assignee cannot hold the mortgage as against the mortgagor or his heirs.—Nichols v. Lee, 10 Mich. 526.

¶ 479. The cost to which the assignee of a second mortgage is put to redeem from the foreclosure of the first is a necessary outlay in aid of the assigned security, and the assignee is entitled to hold the assignment as security for it, but not to make it a personal charge against the assignor.—Wendell v. Highstone, 52 Mich. 552.

¶ 480. Where the owner of a mortgage on which nothing was to become due for several years assigned the mortgage to secure a debt of his own to an amount less than the mortgage, and the assignment was upon condition that if the assignor could pay his indebtedness to the assignee on or before the first day of May following, then the assignment was to be void, but if not, and the assignee should collect the moneys, he should, after retaining the amount of his debt, interest and charges, pay over the surplus to the assignor, held, that the assignor, or those claiming under him, would be entitled to this surplus from the assignee or any person claiming through him, at whatever period in the future it might be collected.—Graydon v. Church, 7 Mich. 36, overruling Graydon v. Church, 4 Mich. 646.

¶ 481. Where a subsequent assignee of the mortgage, which was assigned as security, took a deed of the mortgaged premises from the original mortgagor to himself, this deed had the effect to foreclose the mortgage as to the mortgagor so deeding; the land now represented the mortgage, and the mortgagor of the mortgage, or one claiming under him, might file his bill in chancery and have decree that the amount of the mortgage, less the sum it was assigned to secure, be paid to him, and in default thereof the premises be sold to satisfy, first the sum the mortgage was assigned to secure, and next to pay him the amount of the mortgage less such sum.—Graydon v. Church, 7 Mich. 36, overruling Graydon v. Church, 4 Mich. 646.

¶ 482. Where a mortgage was assigned as security and later the assignees took a deed from the mortgagor and assumed possession under such deed, and the original mortgagee having been remiss in asserting his rights, whereby he might have induced his assignees to treat the property as their own, discharged of the lien of the mortgage, he was held not entitled to an account of the rents and profits of the premises as against defendants.—Graydon v. Church, 7 Mich. 36.

¶ 483. Where a note and a mortgage, given to secure the payment of part of the purchase price of a tract of pine land, are assigned as collateral security for a lesser debt, without notice to the assignees of a guaranty by the mortgagee that the land will cut a certain amount of timber, and of his agreement to refund a stated sum per thousand feet for all shortage, the assignees will be protected as bona fide holders of the securities, against any claim under the guaranty, to the amount of their debt only.—Anderson v. Northern Nat. Bank, 98 Mich. 543.

¶ 484. A manufacturer made a collusive contract with a contractor, who was under agreement to build a power plant for a railway, by which the former, with a purpose to defraud the railway, agreed to rebate to the latter a certain amount from the stated price for engines supplied the power plant. The manufacturer took certain bonds se-

cured by the trust mortgage as security for the engines furnished. Held, that by its fraud the manufacturer did not lose the right to participate in the security of the mortgage to the extent of what was equitably due it.—Detroit Trust Co. v. Detroit, F. & S. Ry., 159 Mich. 442.

VII. TRANSFER OF MORTGAGOR'S TITLE OR ESTATE, AND ASSUMPTION OF DEBT.

A. IN GENERAL.

§ 111. Transfers by mortgagor in general.

Order of recourse to alienated parcels, see post § 112.
Transfer of debt as transfer of mortgage, see ante § 103.
Suits to establish or enforce liability assumed by grantee, see post § 119.
Assignment or transfer of debt, lien or interest of mortgagee, see ante, VI.
Liability of grantee in general, see post, VII, B.
Transfers or conveyances of parts or parcels under mortgage, see post, VII, C.
Conveyance or release to mortgagee by mortgagor, see post, VII, D.
Estate passed by mortgagee's deed, see Deeds § 30.
Doctrine of lis pendens and rights of transferees of the property affected, see Lis Pendens.
Novation by assumption of mortgage debt, see Novation § 1.

¶ 485. Where one joint tenant of mortgaged premises assigned his equitable interest to the other tenant, and a contract was entered into providing that, in consideration of such assignment, the other tenant should plat and market the property, pay the indebtedness to the mortgagee, pay the expenses of platting the property and marketing it, deduct the assignor's indebtedness to the assignee out of the assignor's share of the property and that the balance should be equally divided, held that it was the intention of the assignor in executing the assignment to convert the incumbered title interest into a contract right for participation in the profits.—Detroit Cavalry v. Ranney, 193 Mich. 472.

§ 112. Order of recourse to alienated parcels.

¶ 486. Where a part of mortgaged premises is conveyed by the mortgagor subject to the payment of the whole of the mortgage, that part becomes the preliminary fund for its satisfaction, and the land retained by the mortgagor becomes the secondary fund.—Mason v. Payne, W. 459; Berry v. Whitney, 40 Mich. 65; Michigan State Ins. Co. v. Soule, 51 Mich. 312.

¶ 487. Covenants of warranty in a deed by a mortgagor of a part of the mortgaged premises indicate his intent to charge first the unsold portion with the payment of the mortgage.—J. I. Case Threshing Machine v. Mitchell, 74 Mich. 679.

¶ 488. In a suit by an assignee of mortgagee and vendor to foreclose m gages and land contracts a purchaser of mortgaged tract under an agreement by mortgagor to pay the mortgage is enti to have the debt enforced against the ot mortgages and land contracts prior to but cannot require the complainant to haust all personal remedies against all o mortgagors and vendors.—Holliday v. Sn 129 Mich. 494.

¶ 489. Where the holder of a mortg released a note that was given with it, serving at the same time his right to f close the mortgage on the land, and a ond mortgagee, with notice of the first m gage, had, prior to the release, foreclosed own mortgage at law, and purchased premises, the latter was held to stand in place of a purchaser of the equity of demption, subject to the first mortgage, the premises in his hands, as such purch with notice, to be the primary fund for payment of the first mortgage.—Bailey Gould, W. 478.

B. LIABILITY OF GRANTEE; CO NANTS TO ASSUME DEBT.

§ 113. Assumption of liability by grantee general.

Purchase "subject to mortgage," see § 114.
Covenant to assume debt, see post § 115.
Covenants or agreements by strangers mortgage, see post § 116.
Nature of assumed liability, see post § 11
Estoppel of purchaser to contest mortg see post § 118.
Suits to establish or enforce liability, post § 119.
Subrogation of mortgagee to rights of m gagor against assuming grantee, see § 120.
Presumptions and evidence, see post § 12
Assignment or transfer of lien or interes mortgagee, see ante, VI.
Personal liability of mortgagor's gra after assumption of debt, see Foreclo ¶¶ 697-699.

¶ 490. The acceptance by a grantee deed conveying lands subject to a spec mortgage, and providing that he shall ass and pay the mortgage, binds him, and provision inures to the benefit of the m gagee, who may enforce it in equity.—C ford v. Edwards, 33 Mich. 354; Mille Thompson, 34 Mich. 10; Taylor v. Whitn 35 Mich. 97; Carley v. Fox, 38 Mich. Unger v. Smith, 44 Mich. 22.

¶ 491. When defendants accept a conveying premises to themselves subje certain specified incumbrances, with an press provision in the deed that they assume and pay the same, they are b

as effectually as though they had signed the instrument; after they accept the deed the provision becomes an agreement on their part to assume and pay, and a subsequent conveyance by them of the property to other parties does not operate to relieve them of the obligation.—Kollen v. Sooy, 172 Mich. 214.

¶ 492. An agreement made with a grantor of realty to assume and pay incumbrances inures to the benefit of one having a mortgage upon it; the mortgagee may treat both the buyer and the seller as his debtors and enforce the agreement in a bill of foreclosure. —Kollen v. Sooy, 172 Mich. 214.

¶ 493. A provision in a deed of mortgaged land, warranting the premises except as to the mortgage, which the grantee "assumes," renders the grantee personally liable for the mortgage debt.—Jehle v. Brooks, 112 Mich. 131.

¶ 494. A creditor attached lands subject to a mortgage, which mortgage he afterwards agreed to purchase, and on appeal from a decree holding him liable for any deficiency on foreclosure sale, it was held that in order to hold him his contract must have been to pay the mortgage debt.—Winsor v. Ludington, 77 Mich. 215.

¶ 495. A purchaser of real property subject to a mortgage does not ratify a clause assuming the payment of the mortgage, inserted in his deed by fraud or mistake, by offering for the purpose of procuring an extension of time, to pay an instalment due on the mortgage, and the interest, after he has recorded an instrument repudiating the assumption clause.—Bogart v. Phillips, 112 Mich. 697.

§ 114. ——Purchase "subject to mortgage."

¶ 496. A grantee purchasing mortgaged premises subject to the encumbrance does not become personally responsible for the debt, and only loses the premises in case of foreclosure; but a grantee who assumes the encumbrance is presumably responsible for the debt.—Winans v. Wilkie, 41 Mich. 264.

¶ 497. Whether on mortgage foreclosure a personal liability can be enforced against one who is not a party to the mortgage but has bought the land subject thereto, and without making anything more than a parol agreement with the grantor to pay it, quære. —Gage v. Jenkinson, 58 Mich. 169.

¶ 498. One who has only purchased mortgaged land subject to the encumbrance is not personally liable, though, if he has promised to pay the mortgage, he may be made a defendant in foreclosure if he can be found in the jurisdiction, and a decree may be rendered against him for any deficiency after sale.—Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 499. The statement in a deed from an intermediate holder of mortgaged premises that the grant is subject to the mortgage does not, in the absence of language expressing or implying an assumption by the grantee of such mortgage, or an intention that the interest granted should be charged with the whole amount of the mortgage, make the mortgage a specific charge upon such interest so as to influence the equities between second and third mortgagees as to other portions of the premises.—Slater v. Breese, 36 Mich. 77.

¶ 500. Where a purchaser buys mortgaged premises from the mortgagor subject to the mortgage and agreeing to pay it as part of the purchase price, and his deed is expressly made subject to it, though it does not in terms bind him to pay it, he is to be treated, as between himself and the mortgagor, as having assumed the mortgage, and is personally liable for whatever deficiency there may be after foreclosure sale.—Canfield v. Shear, 49 Mich. 313.

¶ 501. A deed containing a covenant of warranty "against all lawful claims whatsoever subject to a certain mortgage given by the parties of the first part for one thousand dollars" merely leaves the title subject to be defeated by a failure to pay the mortgage debt, but does not bind the grantee to pay it. And the exception is not such a written contract as will exclude evidence to show that, in addition to the consideration expressed, the grantee had also agreed to pay off the mortgage. The exception and the agreement are distinct.—Strohauer v. Voltz, 42 Mich. 444.

§ 115. Covenant to assume debt.

See also ante ¶ 493.

Construction and effect of covenants in mortgage in general, see ante § 42.

Suits to establish or enforce liability, see post § 119.

¶ 502. One who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage if his deed expressly binds him to pay it (How. St. § 6704); but a covenant to do so cannot be implied by either deed or mortgage (How. St. § 5655).—Gage v. Jenkinson, 58 Mich. 169.

¶ 503. The right to recover upon a grantee's covenant to pay a mortgage given by his grantor is not affected by the subsequent value of the land or of an oil-well upon it, and evidence as to such facts would be irrelevant and inadmissible in an action to establish a claim under such covenant against the grantee's estate.—Comstock v. Smith, 26 Mich. 306.

§ 116. Covenants or agreements by strangers to mortgage.

Construction, validity and effect of covenants in mortgage in general, see ante § 42.

¶ 504. A mortgagee of land cannot avail himself of an agreement made with a third

party by a mere owner of the equity of redemption to pay the mortgage, where such owner was not a party to the mortgage nor in any way liable for the debt secured by it.—Stuart v. Worden, 42 Mich. 154.

§ 117. Nature of assumed liability.

Effect of retransfer after assumption of liability, see ante ¶ 491.

¶ 505. Where a portion of mortgaged property is transferred to one, subject to the entire mortgage debt, the grantee assuming the mortgage as a part of the consideration, the grantee becomes the principal debtor as to the grantor, and the grantor becomes his surety.—Pease v. Warner, 153 Mich. 140.

§ 118. Estoppel of purchaser to contest mortgage.

General principles of estoppel, see Estoppel.

Inurement of title to benefit of mortgagee which accrues to assuming transferree of land after transfer, see Estoppel § 20, ¶ 49.

¶ 506. The purchaser of lands who has covenanted as part of the purchase price to pay a mortgage given by his grantor cannot avoid his liability by showing that the mortgage was not enforceable against such grantor by reason of a personal disability to execute a valid and binding mortgage.—Comstock v. Smith, 26 Mich. 306.

¶ 507. Where a grantee has assumed a mortgage made by the grantor, and the amount thereof has been deducted from the purchase price, he cannot dispute the legal execution of the mortgage or its amount as specified in the deed; and after he has paid interest on the mortgage for eighteen months without complaint he cannot be heard to complain that the clause subjecting his deed to the mortgage was fraudulently inserted.—Miller v. Thompson, 34 Mich. 10.

¶ 508. One who has bought lands subject to a mortgage, and has subsequently expressly recognized it by an agreement with the mortgagee for forbearance, cannot thereafter dispute its existence or validity.—Smith v. Graham, 34 Mich. 302.

¶ 509. One who buys land and receives a conveyance subject to a mortgage thereon cannot afterwards contest the validity of the mortgage on the ground of defect in the formalities of execution.—Disbrow v. Jones, H. 48.

¶ 510. The purchaser of an equity of redemption who has gone into possession under his purchase is estopped, when proceedings are taken to foreclose the mortgage, from denying the title of the mortgagor.—Wanzer v. Blanchard, 3 Mich. 11.

¶ 511. One who purchases a parcel of land subject to a mortgage upon that and other property, and with full record notice of a conveyance of the other property, gets no greater rights by virtue of such purchase than his grantor had; and in a suit for the foreclosure of the prior mortgage, and to marshal the securities, he is not in a position to attack such deed for want of consideration.—Cooper v. Bigly, 13 Mich. 463.

¶ 512. The vendee of an equity of redemption stands in the place of the mortgagor, and holds the property subject to all encumbrances; and where there were two mortgages, and the mortgaged premises had been sold on foreclosure at law of the first mortgage, it was held that the vendee of the equity of redemption could not, by paying the redemption money, and taking an assignment from the purchaser of all his interest in the land, claim the rights of such purchaser for the purpose of defeating the second mortgage.—Johnson v. Johnson, W. 331.

¶ 513. Where a grantee has assumed a mortgage made by the grantor, and the amount thereof has been deducted from the purchase price, he cannot dispute the legal execution of the mortgage or its amount as specified in the deed; and after he has paid interest on the mortgage for eighteen months without complaint he cannot be heard to complain that the clause subjecting his deed to the mortgage was fraudulently inserted.—Miller v. Thompson, 34 Mich. 10.

¶ 514. A grantee who assumes and agrees to pay a mortgage upon the property conveyed waives all defenses except payment, and cannot set up against an assignee of the mortgage that the assignment was without consideration.—Terry v. Durand Land Co., 112 Mich. 665.

¶ 515. One who accepts a deed assuming to pay a mortgage cannot resist the mortgage by showing that it was without consideration, or that by reason of a mistake in the description he acquired no legal title, where he obtained possession under his deed of the proper premises, and the right to have the mistake corrected.—Crawford v. Edwards, 33 Mich. 354.

§ 119. Suits to establish or enforce liability.

¶ 516. The mortgagee of land cannot sue on a promise made to the mortgagor by the latter's grantee to pay the mortgage, because it is a promise to a third person.—Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 517. Defendants accepted a deed of realty which provided that the grantee should assume and pay specified incumbrances. Defendants conveyed the property to complainant. Defendants failed to pay off the incumbrance and complainant, to avoid a foreclosure, paid the same and took an assignment from the mortgagee. Complainant filed a bill in equity to have defendants declared a trustee of the amount of the mortgage but did not ask foreclosure. Comp. L. 1897, § 519, provides that where

the mortgage is secured by the obligation of any other person besides the mortgagor, the complainant may make such person a party to the foreclosure bill and the courts may decree payment against such person for any deficiency. Held, complainant could not maintain his bill.—Kollen v. Sooy, 172 Mich. 214.

§ 120. Subrogation of mortgagee to rights of mortgagor against assuming grantee.

Subrogation to mortgage lien on redemption, payment or discharge, see post §§ 155-158.

General principles of subrogation, see Subrogation.

¶ 518. A mortgagee may, on foreclosure, be so far subrogated to the mortgagor as to have the benefit of a subsequent grantee's obligation to pay the mortgage assumed by such grantee's deed.—Hicks v. McGarry, 38 Mich. 667.

§ 121. Presumptions and evidence.

General law of evidence, see Evidence.

Proof of agreement to assume mortgage debt by parol, see Evidence § 161, ¶ 851.

¶ 519. It may be shown by parol that as part of the consideration for a deed, the grantee agreed to pay an existing incumbrance.—Swarthout v. Shields, 185 Mich. 427.

¶ 520. Where it is doubtful whether a deed of mortgaged premises binds the grantee to pay existing encumbrances, evidence of the value of the premises or of the agreed consideration for them, and as to whether the grantee retained any of the consideration to pay the debt, is admissible to aid in construing the deed.—Winans v. Wilkie, 41 Mich. 264.

¶ 521. Assumption denied by a quitclaim grantee is not shown by a statement by him that he would "settle with" the mortgagor, where it appears that already the mortgagors had made a quitclaim deed of the lands to the mortgagees with an understanding that it should not be recorded for a time during which mortgagors might redeem and if not redeemed the mortgage should be discharged, where the later quitclaim grantee knew of this arrangement and that the mortgagors could not redeem and the land was not worth as much as the incumbrances, and the evident purpose of the later deeds was to enable the grantee to redeem by a compromise if he could negotiate one.—Grover v. Bishop, 138 Mich. 505.

¶ 522. The grantee of land could not be required to pay complainant's mortgage, of which such grantee had no actual knowledge and which he never assumed; where, in an action to foreclose such mortgage, it appeared that complainant had discharged of record such mortgage by reason of a misunderstanding, and that subsequently such grantee acquired title to the land by a clear warranty deed; and that subsequently thereto, grantee obtained of complainant a loan, giving as security therefor a mortgage on such land, at which time an abstract of title was furnished at the request of complainant, who thereupon declared the title to be good; and that defendant used the money so obtained to pay the balance of the purchase price to his grantor.—Mesmore v. Maerz, 149 Mich. 331.

¶ 523. Where a grantee of land agreed to pay a mortgage on it, but did not do so, and the land was sold for less than the mortgage debt, the fact that the foreclosure decree does not show how much was due as principal and how much as interest is immaterial in an action against the grantee for damages resulting from his failure to pay the debt. He is liable for what he agreed to pay and no more, and evidence of the foreclosure is only important as showing that the land, which was a fund in his hands from which the mortgage might have been paid, had been exhausted without satisfying the debt.—Strohauer v. Voltz, 42 Mich. 444.

¶ 524. A decree discharging a mortgage is erroneous and the mortgage should be enforced where the evidence is conflicting as to whether or not the defendant in exchanging his property with the complainant for mortgaged premises assumed the mortgage or merely took the property subject to the mortgage and the question of whether the mortgage in suit was given by the complainant on the property he received, to secure the defendant for back taxes and interest on the mortgage on the property the defendant received, which taxes and interest the defendant failed to pay, or given to cover the difference in the trading value of the equities, where the evidence shows that the complainant knew the difference between a deed subject to a mortgage and one assuming a mortgage, but took one subject to a mortgage only, where subsequently the complainant loaned his abstract to the defendant to enable him to sell the mortgage now desired to be discharged, and other evidence indicates that the trade was made without the defendant's assuming the mortgage.—Waters v. Gillies, 128 Mich. 608.

C. CONVEYANCE OF PARCELS AND COVENANTS TO RELEASE THEM.

§ 122. In general.

Partial or pro tanto discharge or release of lien, see post § 149.

Covenants for release of parcels, see post § 151.

Partial satisfaction of debt by release of parcel, see post § 141.

Effect of release of one parcel from mortgage on statutory foreclosure of other parcels, see Foreclosure ¶ 90.

¶ 525. Where a mortgage covering several lots provides that the mortgagee will release

from the lien of the mortgage, without consideration, a certain number of the lots as fast as sold, and "at such time or times as" the mortgagor may request, the latter is entitled to the release of lots that are within the terms of the stipulation upon making demand therefor at any time.—Commercial Bank v. Hiller, 106 Mich. 118.

¶ 526. A mortgagee who releases several parcels of land from the mortgage does not thereby release a parcel sold by the mortgagor prior to such releases but of which sale the mortgagee has no notice.—Balen v. Lewis, 130 Mich. 567.

§ 123. Agreements with grantee for extension or release.

¶ 527. Mortgagor held to have assented to an agreement between mortgagee and subsequent grantee for extending time of payment and releasing part of premises.—Griffin v. Walter, 74 Mich. 1.

D. CONVEYANCE OR RELEASE TO MORTGAGEE AND MERGER OF MORTGAGE.

§ 124. In general.

See also post ¶ 610.
Effect of outstanding claims and junior liens, see post § 125.
Merger in tax title, see post § 126.
Estoppel to deny or question merger, see post § 127.
Assignment after merger, see post § 128.
Merger in general, see Real Property.

¶ 527a. A mortgagor may release to the mortgagee the equity of redemption for a valuable consideration, when it is done voluntarily and there is no fraud, and no undue influence is brought to bear upon him for that purpose by the creditor.—Batty v. Snook, 5 Mich. 231.

¶ 528. A mortgagee cannot remain so after acquiring the fee unless the mortgage needs to be kept alive to protect his rights.—Jackson v. Evans, 44 Mich. 510.

¶ 529. It may be stated as a general rule that merger does not take place when there is none in fact by a union in the same person of the title and the mortgage interest.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494.

¶ 530. A mortgagee's equitable title is merged in the legal title, if he acquires it, unless he intends otherwise, or unless his acceptance of the legal title is brought about by fraud or deceit; and his intent is a question of fact.—Ann Arbor Sav. Bank v. Webb, 56 Mich. 377.

¶ 531. In determining whether a mortgage is merged in the fee when the mortgagor deeds to the mortgagee the intent controls; and if it is for the interest of him in whom the estates are united to keep the mortga alive, the law will not imply an intent merge.—Cook v. Foster, 96 Mich. 610.

¶ 532. A quitclaim deed from a mortgag to his mortgagee does not cause a merger the mortgage so as to deprive the mortgag of his right of priority, where the intenti and the mortgagee's interests are otherwi —Tower v. Devine, 37 Mich. 443.

¶ 533. It may be stated as a general r that merger does not take place when the terest of the mortgagee does not require and when there is no intent that the should be a merger.—Ten Eyck v. Ponti O. & P. A. R. Co., 114 Mich. 494.

¶ 534. It is the rule in equity that a mo gage is not merged by a purchase by t mortgagee of the equity of redemption wh the interest of the mortgagee requires t titles to be kept separate.—Quick v. R mond, 116 Mich. 15.

¶ 535. The holder of a mortgage loses substantial rights by becoming owner of t equity of redemption.—Snyder v. Snyder, Mich. 470.

¶ 536. The conveyance of the equity redemption to the assignee of the mortga is such a merger as authorizes him to sta in the position of an assignee of the mo gagor satisfying it, under Comp. L. 18 § 2777, How. St. § 5738; and such merg does not give any greater rights of dower the widow of the mortgagor.—Snyder v. S der, 6 Mich. 470.

¶ 537. A mortgagor and his grantees h ing deeded the mortgaged premises and ot property to the mortgagee and others, in c sideration of the mortgage debt and ot debts, and taken back a contract for rec veyance on certain specified conditions, t mortgage debt was held to be thereby ext guished.—McCabe v. Farnsworth, 27 Mi 52.

¶ 538. Where a sale is made subject t mortgage and the mortgage is owned by t purchaser at the sale, the mortgage is, effect, cancelled.—Lynch v. Kirby, 36 Mi 238.

¶ 539. A woman mortgaged land to l mother, and afterwards deeded it to a ba to secure loans made by the latter to her s In order to obtain a first lien for the ba and get rid of the prior lien held by t mother, the daughter and the bank ga simultaneous warranty deeds to the moth the bank at the same time taking from l her personal note and mortgage to secure t debt to it. The mother did not know t the effect of this, if so intended, would be merge her equitable title and destroy h prior lien, and was left to think that it wo not affect such lien. She had no counsel, a the only lawyer who took part in the tra

action acted in the bank's interest, whether employed by it or not. Held, that equity would not permit the merger, and that if the bank sought to avoid the prior lien it should have required the mother, in giving her mortgage to it, to discharge the former mortgage.—Ann Arbor Sav. Bank v. Webb, 56 Mich. 377.

¶ 540. Where one, by purchasing at an invalid foreclosure sale, becomes the owner of a mortgage while also owning the land from which it should be satisfied, his purchase is to be deemed a payment and satisfaction of the mortgage if the land is sufficient for the purpose.—Carley v. Fox, 38 Mich. 387.

¶ 541. An accommodation indorser, who was secured by mortgage, was called upon by a bank at which the note had been discounted for its payment. He paid the amount due, and received from the bank an assignment of whatever rights it had acquired as purchaser of the mortgaged premises at a sale made under an execution issued on a judgment rendered against the maker in a suit on the note, and then filed a bill to foreclose his mortgage. Held, that the assignment did not affect the mortgage, there being nothing to indicate such an intention, and that the law does not require the application of the doctrine of merger.—Burt v. Gamble, 98 Mich. 402.

¶ 542. Where a guardian's sale is made subject to a mortgage, and the mortgage is owned by the purchaser at the sale, the mortgage is in effect cancelled.—Lynch v. Kirby, 36 Mich. 238.

¶ 543. If a mortgagee bids in the premises on foreclosure sale for an instalment due, and afterwards gives a warranty deed of the land, the warranty deed discharges the mortgage and releases indorsers of such notes as may be secured by subsequent instalments thereof.—Bridgman v. Johnson, 44 Mich. 491.

§ 125. Effect of outstanding claims and junior liens.

¶ 544. The purchase, by a mortgagee, of the equity of redemption will not merge the mortgage where there are intermediate rights, or the interest of the mortgagee requires that the titles should be kept separate.—Cooper v. Bigly, 13 Mich. 463.

¶ 545. Where one owning the equity of redemption of lands which are subject to two mortgages buys in the first, and takes an assignment thereof to himself, such mortgage is not thereby merged in the fee.—Dutton v. Ives, 5 Mich. 515.

¶ 546. Where, upon the purchase by a mortgagee of the equity of redemption, it is agreed between mortgagor and mortgagee that the latter shall retain possession of the note and mortgage for the purpose of cutting off by foreclosure a subsequent levy made upon the mortgaged premises, equity will treat the estates as separate, and after foreclosure, will, at the mortgagee's suit, set aside said levy and a sale made thereunder as a cloud upon his title.—Gibbs v. Johnson, 104 Mich. 120.

¶ 547. No merger took place to extinguish the interest of an assignee of a fourth instalment payable on a mortgage given by a grantee of the assignor where the grantee reconveyed the mortgaged premises to the assignor although the assignment was not of record at the date of the reconveyance.—Pritchard v. Kalamazoo College, 82 Mich. 587.

§ 126. Merger in tax title.

Assignment after merger, see post § 128.

¶ 548. A mortgage is not merged in a tax title acquired by the mortgagee after the mortgage was given and for the purpose of protecting it.—Baker v. Clark, 52 Mich. 22.

¶ 549. A man after giving a mortgage upon certain described lands agreed to get a tax-deed thereto from the state to the mortgagee, whose name was Hurst, and who was to reconvey on the repayment of moneys advanced by him to the mortgagor. The tax-deed was accordingly obtained, but as it was made out in the name of Hunt, the mortgagee quitclaimed to the mortgagor under that name, and the latter gave him back a warranty deed, this being done to save the expense of a foreclosure. Held, that this transaction should be treated as intended to confirm the mortgage title and not destroy it: and that the mortgage was to be regarded as continuing for purposes of security, and open to foreclosure.—Hurst v. Beaver, 50 Mich. 612.

¶ 549a. A tax-title that inures to a mortgagee's benefit is no consideration for abating the mortgage debt.—Baird v. Randall, 58 Mich. 175.

§ 127. Estoppel to deny or question merger.

General principles of estoppel, see Estoppel.

¶ 550. A second mortgagee, who was the grantee in a deed executed by his mortgagor, and which includes, by the grantor's fraud, a provision that the grantee shall assume a first mortgage and also a third mortgage of which she knows nothing, is not estopped, where such deed is not delivered but is put on record by the grantor, from denying merger, as against an assignment of the third mortgage, where his own mortgage appears of record undischarged.—Cook v. Foster, 96 Mich. 610.

¶ 551. Where the owner of lands treats a mortgage thereon that has been assigned to him as a valid instrument, and transfers it

as such, he is estopped from insisting, as against his assignee, or anyone claiming under him, that in his hands it had merged and disappeared in the fee. And after he has recorded the assignment a purchaser from him is also estopped from insisting on such merger.—Powell v. Smith, 30 Mich. 451.

§ 128. Assignment after merger.

¶ 552. If a grantee of mortgaged premises assumes the encumbrance and afterwards takes an assignment of the mortgage, he extinguishes the debt, and cannot afterwards give any right to foreclose the mortgage by assigning it.—Winans v. Wilkie, 41 Mich. 264.

VIII. PAYMENT, RELEASE AND SATISFACTION; SUBROGATION.

§ 129. Payment in general.

See also ante ¶ 541.

Payment in services or otherwise than in money, see post § 130.

Persons to whom payment or tender may be made, see post §§ 131, 132.

Proper persons to pay or tender, see post § 133.

Application of payments, see post § 134.

Tender, see post §§ 135, 136.

Refusal of tender as discharge, see post § 137.

Treating payment in full as partial payment, see post § 138.

Estoppel to deny payment or tender, see post § 139.

Discharge of personal liability or debt, see post § 140.

Partial satisfaction of debt by release of parcel, see post § 141.

Satisfaction and discharge of mortgage, see post §§ 142-151.

Burden of proof and presumptions as to payment and discharge, see post §§ 152, 153.

Evidence as to payment, application, tender and discharge, see post § 154.

Subrogation to mortgage lien on redemption, payment or discharge, see post §§ 155-158.

Penalties for failure to discharge, see post § 159.

Suit to compel discharge or declare debt satisfied, see post §§ 160, 161.

Reinstatement and revival of lien, see post § 162.

Amount of payment necessary to redeem, see post § 168.

Remedy of person fraudulently prevented from raising money necessary for payment of mortgage, see post ¶ 709.

Redemption and bills to redeem, see post, IX.

Mode and sufficiency of payment or tender in general, see Payment, I.

Application of payments in general, see Payment, III.

Pleading and proof of payment or tender, see Payment, V.

Payments and indorsements on the note to toll limitations, see Limitations § 92.

Payment or indorsement of credit from which time runs against foreclosure suit, see Limitations § 73.

Payment of incumbrance or interest as act of adverse possession, see Adverse Possession § 23.

Subrogation of payer of mortgage to let him in prior to dower, see Dower ¶ 89.

Allowance of costs as offset against mortgage debt, see Costs ¶ 587.

Money turned over as gift rather than part of mortgage debt, see Gifts ¶ 1.

Excuse for nonpayment of principal as excuse for relief from payment of accrued interest on mortgage, see Interest ¶¶ 50, 51.

Estoppel by contract or covenant as to amount due to assert that more is due, see also Estoppel ¶ 203.

Necessity for payment or tender on suit to redeem, see post § 171.

Part payment as nugatory consideration for release of personal liability, see Contracts § 123, ¶ 539.

Payment of mortgage by execution purchaser or redemption purchaser under execution on the equity of redemption, see Jud. Act, chap. XXIII, § 122; Comp. L. 1915, § 12937.

¶ 553. Payment at any time before a foreclosure becomes absolute, with the legal costs, if any, will discharge the mortgage, and no conveyance is necessary.—Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Kanouse, 13 Mich. 303.

§ 130. Payment in services or otherwise than in money.

Persons to whom payment or tender may be made, see post §§ 131, 132.

Proper persons to pay or tender, see post § 133.

Application of payments, see post § 134.

¶ 554. Where it is agreed between the mortgagor and the mortgagee that the mortgagee is to board with the mortgagor and allow the value of such services to be applied upon the mortgage debt, a claim for services of the mortgagor's wife in nursing and otherwise caring for the mortgagee cannot be applied against the mortgage debt in the hands of a third person assignee.—Wright v. Hubbard, 126 Mich. 239.

§ 131. Persons to whom payment or tender may be made.

After assignment of mortgage, see post § 132.

Presumptive authority of attorney to collect note and mortgage in his possession, see Attorneys § 24.

Ratification of unauthorized collections, see Agency § 58.

Liability for wrong or dishonesty of agents in collecting and accounting, see Agency, II, B.

Scope of collecting or financial agent's authority, see Agency § 36.

Agencies to receive payment of principal, see Agency §§ 6, 36.

¶ 555. The maker of a negotiable note secured by mortgage cannot discharge his liability by payment to one not the holder, or authorized by the holder to receive payment.—Wilson v. Campbell, 110 Mich. 580.

¶ 556. Voluntary payment of a mortgage to one not entitled to collect it, after notice from the real owner not to do so, and after suit brought by such owner to foreclose the mortgage, is no protection to anyone.—Chase v. Brown, 32 Mich. 225.

¶ 557. Payment of an intestate's mortgage, if made by the mortgagor in good faith to the person to whom the administrator tells him it belongs, is good.—Reynolds v. Smith, 57 Mich. 194.

¶ 558. A mortgagor in a mortgage securing negotiable paper is not justified in dealing with the mortgagee upon the assumption that he is still the owner of the securities, unless he produces them.—Brooke v. Struthers, 110 Mich. 562.

¶ 559. One who pays a mortgage should ascertain who has the note secured by it, as he is chargeable with notice that the note may have been transferred, and may belong to another than the mortgagee, although there is no assignment of the mortgage on record.—Babcock v. Young, 117 Mich. 155.

¶ 560. Upon a bill to compel the discharge of a mortgage if the note and mortgage are shown to be, and to have been, in the hands of a person other than the mortgagor, that this person has collected the interest from time to time, and the mortgagee has accepted from him money so collected without ever questioning his authority, then such person should be regarded as having had authority from the mortgagee to collect it, and on its being further shown that the indebtedness has been fully collected by this person, the mortgage should be released.—Donaldson v. Wilson, 79 Mich. 181.

§ 132. ——After assignment of mortgage.

Assignment of mortgage debt or interest of mortgagee, see ante, VI.

¶ 561. How. St. § 5687, which provides that the recording of an assignment of a mortgage shall not, in itself, be deemed notice to the mortgagor so as to invalidate any payment made by him to the mortgagee, is construed to mean that the mortgagor shall not be required to search the records before making payment to one prima facie entitled to receive it, who, in case of negotiable securities, is the holder alone.—Williams v. Keyes, 90 Mich. 290.

¶ 562. Where a mortgagee assigned the mortgage and accompanying negotiable note by delivery, and before maturity, as collateral security to his note, and where the mortgagor, in ignorance of such assignment, paid the mortgage debt to the administrators of the mortgagee, who did not produce or have in their possession the note or mortgage, such payment was held no defense to the foreclosure of the mortgage by the holder of the securities.—Williams v. Keyes, 90 Mich. 290.

¶ 563. A mortgagor who, without knowledge that the mortgage has been assigned, pays the debt to the mortgagee is entitled to have the mortgage cancelled.—Ingalls v. Bond, 66 Mich. 338.

¶ 564. Where a mortgagor pays the mortgage to one who has never held the legal title thereto, either as mortgagee or assignee, and who does not have the mortgage papers in his possession, it is immaterial, in a suit brought by an assignee to foreclose the mortgage, that the mortgagor, at the time of such payment, had no notice of the assignment.—Joy v. Vance, 104 Mich. 97.

¶ 565. Where a mortgage given to secure a note made payable at a bank has been assigned without the indorsement of the payee upon the note, the officers of the bank holding the mortgagor's money for payment of the mortgage are not justified, when the note and mortgage and the assignment are presented by the assignee for payment, in declining payment upon the objection that the note is not indorsed by the payee; the formal assignment, duly acknowledged and recorded, would be the best possible evidence of ownership, and the real owner would be entitled to demand and receive payment whether the note is indorsed or not.—Pease v. Warren, 29 Mich. 9.

¶ 566. Notwithstanding the fact that a mortgagor has no actual knowledge of the transfer of the mortgage, payment of the mortgage will not be good, made to a person not in possession of the securities, unless there is an agency in fact to receive the payment, or such facts as estop the assignee from denying the authority of such person to receive the payment.—Bromley v. Lathrop, 105 Mich. 492.

§ 133. Proper persons to pay or tender.

Right of life tenant to pay incumbrance and have contribution therefor from remainderman or reversioner, see Life Estates § 14.

¶ 567. A mortgagee has a right to refuse any tender of the amount due on the mortgage if made by one who, as between the mortgagor and mortgagee, is a stranger to their dealings, and therefore has no right of redemption; so held where tender was made by one who was neither mortgagor nor mortgagor's grantee, and who did not act in the interest or at the request of the mortgagor and had himself no interest in the equity of redemption, but only held some tax-titles which were not subject to the mortgage.—Sinclair v. Learned, 51 Mich. 335.

§ 134. Application of payments.

Application of payments in general, see Payment, III.

¶ 568. A mortgagor owing other debts to the mortgagee may direct the application of a payment.—Van Sceiver v. King, 176 Mich. 605.

¶ 569. The application of payments upon a mortgage will be as justice and equity require, where no agreement controls, or where an agreement is unlawful. Scattering payments permitted by the mortgagee should, if not otherwise agreed, be applied (1) to the extinguishment of interest due; (2) to the payment of principal.—Morgan v. Michigan Air Line R. Co., 57 Mich. 490.

¶ 570. Where a mortgagor and mortgagee agree that certain mortgaged property shall be sold and its proceeds applied on the general indebtedness after satisfying other claims, they still have power to make a different disposition of the proceeds, and may be bound thereby, if third persons interested in the premises do not insist that the proceeds shall be applied in reduction of the debt.—Perrin v. Kellogg, 38 Mich. 720.

¶ 571. Where a mortgagor gave a note for the whole amount of his debt, including sums for which he had become indebted before the mortgage was given and which were not secured by it, and the mortgagee applied payments made to him upon the note generally, it was equivalent to an application upon the new and old indebtedness pro rata, and a different application could not be made where it did not satisfactorily appear to have been directed or to have been for the interest of the parties.—Shelden v. Bennett, 44 Mich. 634.

¶ 572. A mortgagor who has paid interest upon ten per cent interest, when behind in his payments, is entitled to have it allowed on the principal, as ten per cent is the statutory maximum of interest that may be taken in Michigan.—Havens v. Jones, 45 Mich. 253.

¶ 573. A mortgagor paid a sum of money in settlement of a dispute which had arisen from the cutting of timber on the mortgaged land. The settlement left a large amount of timber on his hands ready for working up, and the settlement took account of the fact that it was cut without expense to him. Held, that in the absence of evidence of any understanding with the mortgagee that the amount paid might be applied upon his mortgage, it would not be assumed that the mortgagee had agreed to such an application of payments, nor would such application be decreed.—Hart v. Carpenter, 36 Mich. 402.

¶ 574. A creditor of a corporation, who held its bonds as collateral security, guaranteed its performance of a contract, and the corporation contracted with him to carry on its business and apply the proceeds to that purpose and to its current working capital, and agreed that any surplus might be applied to the payment of current indebtedness. The bonds were secured by mortgage. Held, that this did not fix the character of his possession of the corporate property as that of the mortgagee, and that the proceeds received by him did not apply as payment on the mortgage, and could only be so applied as set-off.—Beecher v. Marquette & P. Rolling Mill Co., 45 Mich. 103.

¶ 575. Where a mortgagor pays money to the administrator of the mortgagee, with distinct reference to the ownership of the mortgage by the estate, and in the expectation and understanding on both sides that on the settlement the sums of money paid are to be taken into account against the mortgage, either as payment or by way of set-off, it is not important that they should have been regarded as payments at the time they were made; nor will it necessarily affect the right of the mortgagor to have them so applied that he took, from time to time, as evidence of the sums of money paid, notes reserving annual interest.—Jones v. Smith, 22 Mich. 360.

¶ 576. Where the evidence fails to show that a mortgagee has applied a payment on any of several secured and unsecured obligations of the mortgagor, and the mortgage being foreclosed is the only remaining secured loan owing, equity will apply the payment on the mortgage.—Van Sceiver v. King, 176 Mich. 605.

¶ 577. Insurance policies upon mortgaged property were assigned by the mortgagor to the mortgagee as additional security, and it was agreed that in case of loss the proceeds should be applied in payment of the mortgage indebtedness. Held, that the money collected upon them by the assignee should have been so applied, unless such a disposition of it would be contrary to the rights of a creditor of the assignee to whom the latter had assigned the notes and mortgage to which the policy was collateral; and if such creditor knew of the assignment of the policies and did not object, he was bound by the agreement, especially if he joined in notifying the assignor to pay the whole mortgage debt to the assignee.—Wilcox v. Allen, 36 Mich. 160.

¶ 578. The general rule of equity that the proceeds of a mortgage given to secure several items of indebtedness are to be applied to the debt, or part of the debt, first maturing, will not be applied where the effect would work injustice by depriving complainant of additional security. So held, where, after default in the payment of interest upon bonds, but before the maturity of the principal, a bill was filed in behalf of the bondholders to foreclose the mortgage securing the bonds, under a provision in such mortgage declaring that the principal should be-

come due immediately upon default in payment of interest, and where guarantors of the payment of both interest and principal of the bonds, sought, having been made defendants, to have the proceeds of the sale applied to the interest before being applied to the principal.—Union Trust Co. v. Detroit Motor Co., 117 Mich. 631.

§ 135. Tender.

Keeping tender good, see post § 136.
Refusal of tender as discharge, see post § 137.
Treating payment tendered in full as partial payment, see post § 138.
Estoppel to deny tender, see post § 139.
Persons to whom tender may be made, see ante § 131.
Pleading and proof of tender, see Payment, V.

¶ 579. One who seeks to obtain the discharge of a mortgage lien, or an assignment of the mortgage, or subrogation to the mortgagee's rights, must tender not only the amount due on the mortgage but the necessary expenses already incurred in taking steps to enforce the security.—Shutes v. Woodard, 57 Mich. 213.

¶ 580. Where a mortgagee has taken no steps to entitle him to an attorney fee, if such a fee is recoverable at all, he is bound to accept such a tender as would be sufficient without it.—Canfield v. Conkling, 41 Mich. 371.

¶ 581. A tender by a mortgagor to an assignee of the mortgage, on condition that the latter, besides discharging the mortgage, should execute and deliver to him a quit-claim deed of the land described therein, is not such an unconditional tender as will cut off the mortgage lien.—Dodge v. Brewer, 31 Mich. 227.

¶ 582. An absolute tender by a subsequent mortgagee will discharge the lien of a prior mortgage; but a tender coupled with a claim of an allowance not lawfully demandable will not.—Sager v. Tupper, 35 Mich. 134.

¶ 583. Where a mortgagee refused a tender of an award and a sum of money simply on the ground that he was not bound to receive the award, an accidental deficiency in the amount of money offered, caused by an erroneous computation of interest, was held not to prejudice the mortgagor when the award had been held good on a bill to redeem.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 584. A mortgagor, by way of tender, made repeated offers of money to the mortgagee while they were riding together on the public highway. He involved it with other matters of dealing between them, and the settlement was interrupted by a quarrel, but before any costs were incurred the mortgagee offered to receive the amount due. Held, that no tender had been made that would discharge the mortgage lien.—Parks v. Allen, 42 Mich. 482.

¶ 585. The owner of the equity of redemption in property covered by successive mortgages, who was not made a party to proceedings foreclosing a first mortgage, but in which the subsequent mortgagees were made parties, could not profit by such proceeding to the extent of being relieved from all mortgages except such first, and could not discharge the property of all liens by a tender of the amount due on the first mortgage.—Walsh v. Robinson, 135 Mich. 16.

¶ 586. The holder of a mortgage to whom a tender is proposed is entitled to a reasonable opportunity to look over the mortgage and accompanying papers to calculate and ascertain the amount due, and if such papers are not present, he must be allowed a reasonable time in which to get them and make the calculation; he is not bound, at the risk of losing his entire debt, to carry in his head at all times the precise amount due on any particular day.—Potts v. Plaisted, 30 Mich. 149.

¶ 586a. A tender of payment of a mortgage should be absolute and unconditional, not dependent on the mortgagee's first executing a receipt or discharge.—Potts v. Plaisted, 30 Mich. 149.

¶ 586b. Complainant in a suit to redeem, being unable to find defendant, tendered to his son in the presence of his solicitor the amount due. The son was authorized to inform complainant that his father would not execute a deed until he had received a receipt in full of all demands, and such statement was made in the presence of defendant's solicitor. Held, that the tender was sufficient to excuse complainant from paying interest upon the amount after that date.—Crawford v. Osmun, 94 Mich. 533.

¶ 586c. Where the discharge of a mortgage is demanded on the ground of a tender, it should be fair and distinct, without mystery or ambiguity, and should not be so made as to lead the mortgagee to believe that the purpose is to buy up the security.—Proctor v. Robinson, 35 Mich. 284.

¶ 586d. Tender of the full amount due discharges a lessor's lien for rent stipulated under a mortgage clause in the lease.—Gordon v. Constantine Hydraulic Co., 117 Mich. 620.

¶ 586e. Where a tender of the amount due on a purchase-money mortgage was refused because it did not include the amount of an attorney fee claimed to be due, but afterwards the party waived such fee and offered a discharge which was accepted, the mortgagor saying he would take his own time to pay in, held, that this was a recognition of the mortgagee's right to payment, and that

the amount was recoverable under the common counts.—Fry v. Russell, 35 Mich. 229.

¶ 586f. Tender of performance of an agreement will not operate to extinguish the lien by which the agreement is secured if it is not unequivocal and reasonably capable of being understood by the other party as a bona fide tender of the requisite thing, act or service; and the offer itself should be accompanied by circumstances fairly implying control of the necessary means, and possession of the necessary ability to fulfill it.—Selby v. Hurd, 51 Mich. 1.

§ 136. ——Keeping tender good.

Effect of failure to keep tender good on suit to redeem, see post ¶ 806.

¶ 587. There is no equity in seeking to avoid both lien and debt. One who attacks a mortgage lien on the ground that it was discharged by tender must pay or offer to pay the debt.—Waldron v. Murphy, 40 Mich. 668.

¶ 588. A tender was abruptly made upon the street to the owner of some overdue mortgages, and who was known to be sick and nearly blind, and who declined to transact the business until the next morning. The next morning he offered to receive the money, but reliance was then had on the tender and it was not paid. Held, that the tender did not discharge the lien of the mortgage.—Waldron v. Murphy, 40 Mich. 668.

¶ 589. A tender of the amount due upon a mortgage, if made so that the holder of the mortgage understands it at the time as a present, absolute and unconditional tender thereof, operates ipso facto to discharge the lien of the mortgage, though the tender itself be not thereafter kept good.—Potts v. Plaisted, 30 Mich. 149.

¶ 589a. A sufficient tender of the amount due upon a mortgage having been made, it need not be kept good in order to discharge the mortgage and to defeat foreclosure.—Caruthers v. Humphrey, 12 Mich. 270: Van Husan v. Kanouse, 13 Mich. 303; Potts v. Plaisted, 30 Mich. 149.

¶ 589b. Where a second mortgagee on seeking to redeem from a prior mortgage tendered the proper amount on demanding an assignment of the mortgage, and renewed the tender when the senior mortgagee began foreclosure proceedings, it was held that he was not justly chargeable with costs for omitting to keep good the tender in a bill to enforce his right to redeem.—Lamb v. Jeffrey, 41 Mich. 719; Lamb v. Jeffrey, 47 Mich. 28.

§ 137. Refusal of tender as discharge.

Necessity of keeping tender good to effect discharge thereby, see ante § 136.

What constitutes discharge generally, see post §§ 142-147.

¶ 590. Where a mortgagor, after the mortgage has become due, but before foreclosure, tenders to the holder the full amount due, which the latter refuses to receive, the lien of the mortgage is thereby discharged, and if a bill is afterwards filed by the holder to foreclose it is not necessary for the mortgagor to bring the tender into court or to show that it has been kept good.—Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Kanouse, 13 Mich. 303.

¶ 591. A tender of the full amount due upon a mortgage will operate to discharge its lien if the tender is refused without adequate excuse.—Renard v. Clink, 91 Mich. 1.

¶ 592. The refusal, by the assignee of a mortgage, who has foreclosed by advertisement before recording the assignment, to accept a tender of the amount due without costs does not disable him, if the refusal was based on a belief in his right, from proceeding to foreclose in equity, the lien not having been discharged.—Renard v. Clink, 91 Mich. 1.

¶ 593. Where tender and refusal are set up as a defense to foreclosure they must be very clearly proved. One who means to make a fair offer of the amount due on a mortgage by way of tender and payment, and with the purpose of insisting, if such tender is refused, that the lien is discharged, is bound to be straightforward and disclose his purpose and give the holder of the mortgage a reasonable chance to act intelligently.—Proctor v. Robinson, 35 Mich. 284.

¶ 594. Where tender is made to the holder of a mortgage there should be clear evidence that it was made in good faith and was understood by the holder to be a present absolute tender, intended to be in full payment and extinguishment of the mortgage without any condition.—Potts v. Plaisted, 30 Mich. 149.

¶ 595. Where the discharge of a mortgage is demanded on the ground of a tender the evidence of tender must be clear and put defendant plainly in the wrong, especially where demand is made for the statutory penalty.—Engle v. Hall, 45 Mich. 57.

¶ 596. A tender of the amount due on a mortgage must be open, fair and reasonable, and made at the right time and place, and to the proper person; and the refusal of such a tender must be without justifiable excuse to warrant the forfeiture of the mortgage security.—Post v. Springsted, 49 Mich. 90.

¶ 597. A mortgagee loses his lien by his evading tender of payment.—Ferguson v. Popp, 42 Mich. 115.

¶ 598. Unless refused in bad faith, a tender of the amount due on a mortgage will not discharge the lien thereof.—Hayward v. Chase, 181 Mich. 614.

¶ 599. Courts will hesitate to enforce the forfeiture of mortgage security for the refusal of a tender when its apparent purpose is to force the mortgagee to accept with no opportunity of determining whether it is the proper amount.—Post v. Springsted, 49 Mich. 90.

¶ 599a. A tender of the amount due on a mortgage is properly refused if made by one who is a stranger to the transaction between the parties, who has no rights therein and who does not act in the interest or at the request of the debtor or obligor.—Sinclair v. Learned, 51 Mich. 335.

¶ 599b. A mortgagee may refuse a tender made by one who merely holds by a tax-deed not subject to the mortgage.—Sinclair v. Learned, 51 Mich. 335.

§ 138. Treating payment tendered in full as partial payment.

¶ 600. After accepting a tender made by a mortgagor in full satisfaction of the mortgage debt, interest and accrued costs of a pending statutory foreclosure as understood by the parties at the time of such acceptance, the mortgagee cannot treat the transaction as a partial payment and proceed with his foreclosure; and a sale made thereunder will be treated as absolutely void.—Fisher v. Holden, 84 Mich. 494.

§ 139. Estoppel to deny payment or tender.

General principles of estoppel, see Estoppel.

¶ 601. A mortgagee under an unrecorded mortgage is estopped to assert its existence where she had stated, to one who advanced money upon the strength of such statement, that she had no claim upon the property and that the mortgage was paid and also testified in a subsequent creditor's suit, that it was paid, though she now swears that nothing was ever paid on it.—Peirson v. Peirson, 137 Mich. 180.

§ 140. Discharge of personal liability or debt.

Effect of discharge of junior mortgage on right to enforce lien for redemption money paid on foreclosure of prior mortgage, see Foreclosure ¶ 799.

¶ 602. A quitclaim deed of mortgaged premises executed by a mortgagor to the mortgagee's brother, held to have been made in consideration of the mortgagor's discharge from personal liability for the debt, rather than in consideration of an agreement between mortgagor and mortgagee that the mortgage debt should thereby be paid and the mortgage discharged.—Slayton v. Slayton, 99 Mich. 35.

§ 141. Partial satisfaction of debt by release of parcel.

Conveyance of parcels and covenants to release them from lien, see ante, VII, C.

¶ 603. Where mortgaged property has been wrongfully released to the prejudice of subsequent purchasers and the value of the parcel paid to the mortgagor, the purchasers are equitably entitled on foreclosure to have the amount for which the parcel was released deducted from the mortgage debt before their parcel is sold.—Hall v. Edwards, 43 Mich. 473.

¶ 604. Where a mortgagee at the time the mortgage was given owed certain open accounts which he subsequently requested the mortgagor to pay, and agreed to allow the amounts so paid on the mortgage, and the accounts were paid by the mortgagor, who took assignments of the same in his own name, which assigned accounts he tendered to the assignee of the mortgage,—who took it subject to all existing equities,—and offered to pay him any balance due for principal and interest on the mortgage, which was refused, the amount of the accounts should be applied as payment pro tanto on the mortgage.—Castle v. Castle, 78 Mich. 298.

§ 142. Satisfaction and discharge of mortgage.

By quitclaim or other deed from mortgagee to owner of equity, see post § 143.
By alteration or destruction of paper evidence of lien, see post § 144.
By extinguishment of debt, see post § 145.
By renewal, assignment or change in form of debt or parties, see post § 146.
By resort to chattel mortgage or pledge for same debt, see post § 147.
Discharge of collateral or indemnity mortgage by release or recourse to principal security, see post § 148.
Partial or pro tanto discharge and release of lien, see post § 149.
Agreements to discharge, see post § 150.
Covenants for release of parcels, see post § 151.
Burden of proof and presumptions as to discharge, see post §§ 152, 153.
Evidence as to discharge, see post § 154.
Penalty for failure to discharge, see post § 159.
Suits to compel discharge, see post §§ 160, 161.
Reinstatement and revival of lien, see post § 162.
Refusal of tender as discharge, see ante § 137.
Satisfaction and discharge of mortgage by merger, see ante, VII, D.
Effect of forged discharge, see Notice and Record of Title, II.
Duty to discharge in performance of accord and satisfaction, see Accord and Satisfaction ¶ 70.
Release of part of mortgaged lands at instance of mortgagor as defense to foreclosure, see Foreclosure ¶ 40.
Effect of redemption to release and satisfy mortgage, see Foreclosure § 189, ¶¶ 793, 796.
Parties to suit to enjoin foreclosure of mortgage and discharge lien of record, see Injunctions ¶ 373.
Discharge as relating back to time of payment, see also Contracts ¶ 1016.

Necessity for consideration for agreement to forbear and release mortgages, see Contracts, V.

Release by margin entry, see Comp. L. 1915, § 11742.

¶ 605. By the discharge of a mortgage—as the term is commonly understood—something that relieves the land from the apparent lien is intended; not a mere payment.—Blackwood v. Brown, 29 Mich. 483.

¶ 606. Mortgages may be paid and extinguished without making use of any writing.—Nims v. Sherman, 43 Mich. 45.

¶ 607. The lien of a mortgage is not discharged as to a purchaser of the mortgaged premises by the mortgagee's ineffectual attempt to release the mortgagor.—Johnson v. Bratton, 112 Mich. 319.

¶ 608. One who releases a mortgage so far as it relates to land that is primarily liable for the debt, and which at the time of the discharge is worth more than enough to pay it, loses his lien altogether, and cannot enforce it against other lands.—Webb v. Rowe, 35 Mich. 58.

¶ 609. A husband and wife executed a mortgage to secure the former's note. Later a second mortgage was executed between the same parties but before execution the husband quitclaimed his interest to the wife for an expressed consideration equal to the amount of the note, and she later died. In an action to foreclose by the assignor of the two mortgages to foreclose it appeared that the original mortgagees assigned the mortgages to K. with a covenant that there was $450.00 due with interest. Thereafter the husband paid K. the principal and interest with the understanding that K. would return the money to him on the mortgages if he so desired. Later the husband reassigned them to K., who returned the money. Subsequently K. assigned the mortgages to complainant. Under these facts, the transactions between the mortgagor and K. cannot as a matter of law have the effect of discharging the mortgages where it appears that there was no such intention. The payment and taking the assignment did not discharge the first mortgage. The effect of the quitclaim was to convey the property to the wife subject to the mortgage, there being no obligation as between the spouses for the husband to pay the mortgage and he had a right to purchase the mortgage and compel the land to discharge the mortgage.—Scribner v. Malinowski, 148 Mich. 446.

§ 143. ——By quitclaim or other deed from mortgagee to owner of equity.

Conveyance to mortgagee of mortgaged premises as satisfaction of mortgage, see Foreclosure ¶ 694.

Effect of reconveyance to husband and wife on satisfaction of debt secured by his deed, she joining, see Deeds ¶ 96.

¶ 610. Where the holder of a mortgage executes a quitclaim deed of the premises to one who has received a deed thereof, under an agreement that he shall pay the mortgage, the effect is to discharge the lien of the mortgage; and a subsequent assignment of the mortgage to a third person will not entitle the latter to enforce it.—Jerome v. Seymour, H. 357.

¶ 611. A deed by a mortgagee may operate as a release at the option of the grantee, and if the interest of the grantor is such as to require a deed of bargain and sale to convey it as a reversion, that effect will be given to the quitclaim under How. St. § 5653.—Thayer v. McGee, 20 Mich. 195.

¶ 612. Where a lot of land was conveyed by complainant, subject to the payment of a mortgage on certain other lands, and proceedings were had in chancery to foreclose the mortgage, and the decree became the property of one of the defendants, who also purchased the lot on which payment was charged, it was held that such purchase amounted to a satisfaction of the mortgage to the value of the lot so purchased.—Mason v. Payne, W. 459.

¶ 613. A quitclaim obtained by the mortgagor from the mortgagee of premises, for the purpose of perfecting title by redeeming from a sale on partial foreclosure, cannot be construed as discharging the entire mortgage.—Mable v. Hatinger, 48 Mich. 341.

§ 144. ——By alteration or destruction of paper evidence of lien.

Alterations in papers and effect thereof, see Alteration of Instruments.

¶ 614. A lien holds if not discharged, surrendered, waived or extinguished; the destruction of the paper evidence of it, which in this case was an unrecorded purchase-price mortgage, does not annihilate it so far as the parties and all persons claiming with notice are concerned.—Sloan v. Holcomb, 29 Mich. 153.

¶ 615. A debtor cannot be relieved in equity of a mortgage debt he honestly owes by reason of his creditor having made such an alteration in the note as may prevent his enforcing it according to its terms.—Goodenow v. Curtis, 33 Mich. 505.

§ 145. ——By extinguishment of debt.

¶ 616. Payment, release, or anything that extinguishes the debt, ipso facto extinguishes the mortgage.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

¶ 617. A mortgage cannot survive the debt secured by it where that debt has been paid by the debtor to the holder of the mortgage.—Byles v. Kellogg, 67 Mich. 318.

¶ 618. Two judgment creditors hold mortgages to secure their respective judgments,

and the debtors then executed a third mortgage to a trustee for the creditors conditioned for the payment of the two judgments, but the judgments remaining unpaid, one who had acquired an interest in the lands covered by the mortgage given to the trustee and in certain parcels covered by the others, negotiated with the judgment creditors for the release of certain described land of the trustee's mortgage and paid them the amount agreed upon. The release which was drawn purported to discharge the lands from the two first mortgages only, the interested person being assured that it was sufficient to release the land which he thought was being released and mortgaged under the trustee's mortgage. Held that the judgment creditors who later obtained an assignment of the trustee's mortgage cannot maintain an action to foreclose the mortgage, inasmuch as the release by the trustee was good in equity, and the mortgage was discharged.—McBride v. Wright, 46 Mich. 265.

§ 146. ——By renewal, assignment or change in form of debt or parties.

Subrogation on substitution of mortgages or obligations, see post § 157.

Effect of extension to assuming party as a discharge of mortgagor, see also Contracts ¶ 1089.

¶ 619. A mortgage sought to be foreclosed was held to have been satisfied by the assignment and subsequent payment of another mortgage.—Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398.

¶ 620. Mortgagor's liability held not to have been released by agreement or understanding substituting for him one to whom he had assigned certain collateral interests.—Wineman v. Phillips, 93 Mich. 223.

¶ 621. Where a mortgagor's debtor had agreed with him to pay the mortgage, an arrangement between the debtor and the mortgagee by which the time of payment was extended from time to time for twenty years—the debtor paying interest and the mortgagor supposing the mortgage to have been paid—was held to have discharged the mortgage lien and to have released the mortgagor's personal liability.—Dedrick v. Den-Bleyker, 85 Mich. 475.

¶ 622. A. assigned to B. a mortgage for $150 on lands of which A. owned the title, and guaranteed the payment thereof. Subsequently B. agreed for the sum of $250, payable in instalments, to reassign the mortgage, and to convey another parcel of the land. A. paid $200 on the contract, and the last-mentioned parcel of land was, by his consent, sold by B. for $500. Held to be a payment and that a subsequent agreement, obtained from A. without consideration, to relinquish his rights, and to pay the mortgage, was inequitable and could not be enforced.—Wing v. Bailey, 14 Mich. 83.

¶ 623. A wife lent money and had the note and mortgage made to her husband, who afterward cancelled and surrendered the mortgage, and a new mortgage was executed to the wife, no change being made in the note. The wife dying, the husband sued her executor for the conversion of the note, claiming that the note was a gift to him, and that the change in the mortgage was made in order that the mortgagor, a married woman who had signed by her maiden name, might sign properly. Held, that the note was not extinguished by the discharge of the first mortgage for such purpose, and that plaintiff might recover.—Oldenberg v. Miller, 82 Mich. 650.

¶ 624. A mortgage was taken which, by mistake, omitted certain property it was intended to cover. A third person authorized to procure its correction secured for himself a mortgage upon the whole, cancelling the original mortgage note, and offered the original mortgagee an interest in this mortgage to the amount of the former one. The offer was declined. Held, that the original mortgage remained in force and a decree was made rectifying and foreclosing it.—Hunt v. Hunt, 38 Mich. 161.

¶ 625. Where assignees advanced to a partnership association the money to pay for certain mortgages, under an agreement that they should be secured by an assignment from the mortgagees, the legal force and effect of the mortgages purchased and assigned under this agreement was not impaired.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

§ 147. ——By resort to chattel mortgage or pledge for same debt.

Exhaustion of chattel security before recourse to wife's mortgage to pay husband's debt, see Marshalling Assets ¶ 6.

¶ 626. A mortgagee whose mortgage covers real and personal property, forecloses it by advertisement, as to the real estate, and bids in the property for a sum sufficient to pay the entire mortgage debt. A judgment creditor of the mortgagor has, at the time, a lien upon the property, subject to the mortgage lien. Later, during the period of redemption, the mortgagee forecloses his lien on the personal property, bids for it a sum sufficient to pay the entire mortgage debt, takes possession, and disposes of the property. Held, that the bidding in of the personal property for a sum sufficient to pay the entire debt was equivalent to a payment of the debt by the mortgagor, and that the lien of the judgment creditor remained a first lien on the real estate.—Webster v. Ypsilanti Canning Co., 149 Mich. 489.

§ 148. Discharge of collateral or indemnity mortgage by release or recourse to principal security.

¶ 627. Where notes of three persons are given in payment and a mortgage is also

given as security, the mortgagor is to be held for payment upon the mortgage only and under its conditions. And if the mortgagee, without the mortgagor's consent, extends the time for payment of a note, the mortgage lien is discharged.—Metz v. Todd, 36 Mich. 473.

¶ 628. Where a vendor appropriates and sells the chattels without regularly foreclosing a mortgage thereon executed to him to secure the purchase price, his rights under a land mortgage given by a third person as collateral security are not extinguished, but he is accountable to such third person for the value of the chattels.—Drayton v. Chandler, 93 Mich. 383.

¶ 629. Where a mortgage was given to secure the payment of a promissory note, and to indemnify the mortgagee as accommodation indorser, and at the maturity of the note the mortgagor procured the mortgagee's indorsement to a second note for a larger amount, with a portion of the proceeds of which the first note was retired, and which itself was met at maturity by renewal by a third note with the same indorsement, it was held that the mortgagee, having, as indorser, been compelled to pay the third note after protest, the mortgage was not in equity satisfied as between the parties, it having been given to secure not the particular note only, but the debt itself.—Boxheimer v. Gunn, 24 Mich. 372.

§ 149. Partial or pro tanto discharge and release of lien.

Covenants for release of parcels, see post § 151.

Notice to mortgagee of outstanding equities and effect of record of subsequent titles and incumbrances, see Notice and Record of Title.

¶ 630. A mortgage cannot be discharged piecemeal on the record.—Collar v. Harrison, 28 Mich. 518.

¶ 631. Where a cotenant, whose duty it is to pay his share of a mortgage debt, purchases the mortgage, he discharges the land from the mortgage pro tanto.—Damm v. Damm, 91 Mich. 424.

¶ 632. A. bought from B. a piece of land which B. had mortgaged to C. to secure a note for $500. C. owed $450 to D., to whom he assigned B.'s note and mortgage to secure that debt. A. then paid D. the amount of C.'s debt, took an assignment of B.'s note and mortgage, and claimed that he had thereby discharged the mortgage and cleared the land of any lien. C., however, still claimed an interest in the mortgage to the extent of the surplus over his own debt, and assigned such interest to E., who assigned it to F., and F. proceeded to foreclose against A. Before the period of redemption ran out A. filed a bill against C., E. and F. to annul the foreclosure proceedings. Held, that A.'s payment to D. discharged the lien of the mortgage only pro tanto, and that A. thereafter held the mortgage in trust for C.'s assignee for the balance secured by it; also, that a lien remained upon the land for the amount of such balance.—Olcott v. Crittenden, 68 Mich. 230.

¶ 633. Under a mortgage upon two pieces of land, one of which is a homestead, providing that upon payment of the three first notes in a series of eight the homestead should be released, the mortgagee is entitled to the whole mortgaged property as security and upon foreclosure the homestead does not stand released if the amount of the first three notes is realized at a sale of the other property leaving the others unpaid.—Stephens v. Leonard, 122 Mich. 125.

§ 150. Agreements to discharge.

Covenants for release of parcels, see post § 151.

Penalty for failure to discharge, see post § 159.

¶ 634. A provision in a contract that a party shall discharge his mortgage "at the expense" of the mortgagor imports, in the absence of explanation, that he is to do it on being reimbursed the expense attending the drawing, execution and recording of the discharge, and not that he is to do it only on being paid the amount called for by the mortgage, as well as being reimbursed such expense.—Vary v. Shea, 36 Mich. 388.

¶ 635. One holding such a lien as a purchase-price mortgage can contract to release the lien and hold only the personal security to which it is collateral, and such an arrangement may be proved by circumstantial evidence, but not by careless expressions and dim inference.—Sloan v. Holcomb, 29 Mich. 153.

¶ 636. Where a mortgage was given to secure a loan and there was no agreement that it was not to be paid according to its terms, evidence of subsequent statements by the mortgagee that he did not expect the mortgagor to pay the principal secured and that the mortgagor would be his heir and have the money after his death, and that he would make a will to that effect, does not show a valid agreement not to enforce the mortgage and to release it at death of the mortgagee, since even if such promise was made it was without consideration.—Trombly v. Klersy, 139 Mich. 209.

¶ 637. Damages for failure to perform a contract to procure the discharge of a mortgage cannot be claimed if it does not appear that the mortgage was foreclosed or the claimant damnified.—Rose v. Jackson, 40 Mich. 30.

§ 151. Covenants for release of parcels.

Construction and effect of covenants in mortgage in general, see ante § 42.

¶ 638. An agreement executed on the same day with a mortgage, and providing for partial release on payment of proportionate value, is a part of the mortgage and must be construed with it.—People's Savings Bank v. Nebel, 92 Mich. 348.

¶ 639. An agreement to release from the operation of a mortgage a parcel of land described therein upon payment at any time of a sum equal to such parcel's value means the value at the time of the release.—People's Savings Bank v. Nebel, 92 Mich. 348.

¶ 640. Under a stipulation in a mortgage that the mortgagee will, "on demand," release from the lien of the mortgage a certain number of the lots covered thereby, "upon the payment" of a specified sum for each lot so to be released, the same to be applied upon the indebtedness secured, payment and demand must be concurrent, and the mortgagor, having made merely the payments that he was bound to make by the terms of the mortgage, cannot afterwards demand the release of a proportionate number of lots.—Commercial Bank v. Hiller, 106 Mich. 118.

¶ 641. The holder of a mortgage covering two parcels agreed in writing that when he should obtain deeds of them, i. e., on foreclosure, he would convey one of them to the mortgagor's wife; the mortgagor was to continue in possession of the other parcel until the mortgage-holder should sell it, and should meanwhile pay ten per cent interest on the face of the whole mortgage. Held, that this amounted to an agreement that in consideration of the change in security the first parcel should be released from the mortgage lien.—Clark v. Stilson, 36 Mich. 482.

¶ 642. A mortgage for $3,000 covering various property contained a stipulation that when $2,000 should be paid the mortgagee was to release a certain portion of the premises mortgaged; $1,000 was paid and nearly all the rest of the premises was released, but it afterwards became necessary to foreclose. Held, that the foreclosure could not be limited to $1,000, as the security on the premises that had not been released had not been confined to $2,000, nor had the mortgage provided for a release in any case in which it would be necessary to foreclose.—Vary v. Chatterton, 50 Mich. 541.

§ 152. Burden of proof and presumptions as to discharge or payment.

Presumptions from lapse of time, see post § 153.

¶ 643. In an action on the mortgage debt where there was some evidence tending to show that certain property had been sold under foreclosure it devolves upon plaintiff to show that there had been no such sale.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 644. The burden of proving payment of a mortgage and notes is upon a complainant seeking redemption in equity proceedings.—Millard v. Truax, 73 Mich. 381.

¶ 645. In a foreclosure case involving the amount due upon a note and mortgage, the burden of showing payments is upon defendant, and if, as claimed, the mortgagee's books would have shown such payments, defendant should have compelled their production.—Coon v. Bouchard, 74 Mich. 486.

¶ 646. A mortgage debt may be deemed not to have been settled where it appears that the mortgagee always claimed it as an existing obligation, as the mortgagor well understood; that, although years had elapsed, no steps had been taken to procure its surrender or cancellation; and that the mortgagor had recognized its existence.—Lyon v. McDonald, 51 Mich. 435.

¶ 647. Where a note accompanying a mortgage is not produced or accounted for, it must be presumed paid, as against the party setting up the mortgage.—Bassett v. Hathaway, 9 Mich. 28.

¶ 648. Where a mortgage was long overdue at the time of payment and there is no direct proof as to an agreement to extend it, the presumption exists that payment was demanded and was not a voluntary payment by a life tenant for the benefit of the remainder man, a grandson, by way of a gift in reduction of the incumbrance.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 648a. Land was mortgaged to secure three notes payable at different times. The mortgagee foreclosed to obtain payment of the first two notes and sold the land subject to the third note not yet due. Held, that it is a conclusive presumption in such a case that the price obtained is less by the amount of the remaining encumbrance than it would otherwise have been.—Shermer v. Merrill, 33 Mich. 284.

¶ 649. In a suit to remove the cloud upon complainants' title to one of several mortgaged lots, caused by the record of the mortgage, the administrator of the estate of the mortgagee, in his answer, claimed the benefit of a cross-bill, and prayed for a decree of foreclosure of the mortgage. On the hearing the mortgage, which contained a stipulation for the release of the lots as sold by the mortgagor, was put in evidence. Several of the lots had been sold, and the indorsements upon the mortgage related to said lots, and the balance of the mortgage debt was claimed by defendant to be a lien upon complainants' lot. The mortgage bond was

not produced, and defendant's counsel stated to the court that it was lost. Held, that the law would presume, in the absence of proof to the contrary by the production of the bond, or other evidence repelling such presumption if the bond could not be produced, that the debt was paid when due.—Ward v. Munson, 105 Mich. 647.

§ 153. ——Presumption from lapse of time.

¶ 650. Twenty years from maturity a mortgage will be presumed paid.—Curtis v. Goodenow, 24 Mich. 18.

¶ 651. Payment of a mortgage debt is not conclusively presumed from the lapse of many years, but there must be decisive proof that it is an existing lien to warrant a decree of foreclosure.—Cowie v. Fisher, 45 Mich. 629.

¶ 652. A mortgage is not necessarily presumed paid, from lapse of time, if the mortgagee asserted his right to foreclose in due season, and there does not appear to be any adverse holding under the mortgagor; the purchaser must be understood as claiming under the sale ever since it was made.—Baldwin v. Cullen, 51 Mich. 33.

¶ 653. June 18, 1789, defendants' ancestor gave a mortgage payable Aug. 28, 1790. The mortgagee died in 1790, but administration on his estate was not granted until 1835, and the year following a bill was filed to foreclose the mortgage. Held, that the presumption of payment arising from the lapse of time was overthrown by the fact that there was no one from the death of the mortgagee until the granting of administration, who could receive payment of the money and discharge the mortgage.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

¶ 654. When a creditor by mortgage receives from his debtor property to near the amount of his claim, and surrenders the obligations, and the evidence leaves it in doubt whether it was the understanding of the parties that the property should be received in payment, it will be presumed in favor of a subsequent purchaser of the property mortgaged that such was the intent.—Ormsby v. Barr, 21 Mich. 474.

¶ 655. Payments upon a mortgage are presumed, in the absence of a finding, to have been made at or near the time they fell due.—Albright v. Cobb, 34 Mich. 316.

§ 154. Evidence as to payment, application, tender, and discharge.

Parol evidence as to details of obligation or payment, see Evidence, V, A.

¶ 656. A discharge upon the record of a mortgage is not an absolute bar to a foreclosure, unless there has been actual satisfaction. The facts may still be investigated. Such discharge is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the person setting up the discharged mortgage shows some accident, mistake or fraud; and this must be shown satisfactorily, and, if not, the discharge is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection.—Ferguson v. Glassford, 68 Mich. 36, and see Saginaw Building & Loan Ass'n v. Tennant, 111 Mich. 515.

¶¶ 657, 658. A bill to enjoin a foreclosure at law and to compel a discharge of the mortgage was sustained where the weight of evidence tended to show that the mortgage debt had been satisfied by offsetting it against a counterclaim, and that written evidence of this fact was destroyed by fire, the mortgagors being afterwards left to deal with the mortgaged premises undisturbed for years during which the lands were being sold and built upon.—Green v. Engelmann, 39 Mich. 460.

¶ 659. The presumption that interest on a mortgage was paid is overcome by proof of numerous borrowings by mortgagor from mortgagee about the time it was due.—Morris v. Anderson, 142 Mich. 279.

¶ 660. The deed to the person through whom complainants derived their title was a full warranty deed, except as against the mortgage sought to be foreclosed, which was excepted from the operation of the covenants of warranty. The grantee and his family occupied the premises under said deed up to the time of his death, a period of sixteen years, after which, and up to the time of the commencement of suit, complainants remained in actual and open possession. No proof was offered to show that the grantee, or any of his family, were ever called upon, during all of that time, to pay said mortgage. Held, that, while the exception in the deed was evidence that the mortgage was not paid at the time the deed was executed, and that the grantee took the propery subject to it, yet taken in connection with the facts above stated, the presumption of payment of the mortgage arising from the nonproduction of the bond was not rebutted.—Ward v. Munson, 105 Mich. 647.

¶ 661. On a cross-bill to foreclose in a quiet title suit, the nonproduction of the mortgage bond was not sufficiently explained by the testimony of one of the counsel for defendant administrator that the witness advised said administrator, as also the executor in his lifetime, and his son after his death, to make a search for the bond, it not appearing that such search was ever made.—Ward v. Munson, 105 Mich. 647.

¶ 661a. Negotiations were had during the lifetime of the grantee for a compromise of the claim under the mortgage, and at one time the parties agreed upon the amount to be paid when the proper papers were executed,

but did not agree upon what the nature of the papers should be, the grantee or his wife, one of the complainants, insisting that an administrator de bonis non should be appointed, and a conveyance made by him. Such administrator was appointed, and a contention then arose over the question of costs of those proceedings, the grantee and his wife refusing to pay the same, and the negotiations came to an end. Held, that they had a right to buy their peace, and did not thereby recognize an existing and unpaid lien.—Ward v. Munson, 105 Mich. 647.

¶ 662. A finding of payment of the earlier of two mortgage debts cannot be sustained on evidence that there were two mortgages, one for $1000 evidenced by five notes and one for two later notes of $361 and $775, and that there were payments enough to discharge more than was due on the earlier; where it appears that defendant husband, a codebtor with his wife the other mortgagee, had received possession of the $361 and the $775 notes with indorsement of full payment on the smaller and indorsements of all but the last payment on the larger, that the signatures were cut from these two notes and they were filed with his papers, that he was methodical and a man of some business though neither he nor his wife could read or write English except their own names; and where also most of the payments were made in merchandise or produce of which no regular book accounts were kept, though mortgagor's husband testified to making indorsements about the time of payment on the later mortgage at mortgagors' direction, to controvert all which mortgagors denied in an unsatisfactory way that they had ever made the later mortgage.—Wood v. Genett, 120 Mich. 222.

¶ 663. Testimony of the plaintiff's husband, her son and the son's wife that a mortgage was paid in 1890 by inclusion in a new mortgage on the land is overcome by an indorsement in 1896 on the former mortgage signed by the husband, then owner of the land, admitting that a sum was due thereon and a similar indorsement on the other mortgage acknowledging a different amount then due on it, though the husband testified that these indorsements were not read to him and that he signed them supposing that they related to the new mortgage, the holder of them having been plaintiff's brother who died in 1894.—York v. West, 147 Mich. 549.

¶ 664. That a mortgage did not include one for smaller amount and supplant it appears from proof of mortgagor's having borrowed various sums of the mortgagee during time prior to date of the mortgage nearly sufficient in addition to the face of the smaller one to make up the amount of the larger one.—Morris v. Anderson, 142 Mich. 279.

¶ 665. The only question in a foreclosure proceeding was whether the date of a receipt had been changed from April 1, 1874, to Sept. 23, 1871, and it was determined from inspection and from facts bearing upon the probabilities that the date had not been so changed, and that a payment had been made at the apparent date of the receipt which ought to have been credited upon the mortgage.—Hazen v. Phillips, 39 Mich. 667.

¶ 666. Evidence respecting a mortgage held by defendant under assignment held sufficient to show that he paid it as part of the consideration for a deed by complainant to him expressing a nominal consideration, they being son and father respectively and the deed having been made on agreement that it should be paid out of the receipts from working two parcels of land together, though defendant's son claimed that he was driven away and not allowed to work the land as agreed.—Flynn v. Flynn, 68 Mich. 20.

¶ 667. Upon the evidence under a bill for foreclosure it was held that the note and mortgage had been paid, though the holder denied that an indorsement of payment was by him, where if he was believed perjury must be imputed to four other witnesses and forgery to some one.—Baird v. Abbey, 73 Mich. 347.

¶ 668. A mortgage made by the owner's father and sheriff's deed on foreclosure thereof decreed cancelled on the ground as shown by the evidence, in addition to other reasons, that the obligation had been paid by a conveyance of land to the mortgagee.—Fyfe v. English, 116 Mich. 21.

¶ 669. A decree dismissing a foreclosure bill, on the ground that defendants had established their claim of payment, was affirmed upon a review of the evidence in which defendant's overbalanced plaintiff's.—Uhl v. Faas, 115 Mich. 377.

¶ 670. Evidence held sufficient to support a decree canceling and discharging a mortgage from record.—Williams v. Hammond, 182 Mich. 285.

¶ 671. Settlement and compromise of a mortgage held on the evidence to have been satisfied by the mortgagee for less than face in consideration of costs incurred in bringing a foreclosure suit unseasonably.—Gemberling v. Spaulding, 104 Mich. 217.

¶ 672. An alleged settlement of the debts secured by the mortgages sought to be foreclosed was not shown where a writing was introduced, signed by both parties, stating that all differences had been settled in full between them, and all claims and counterclaims of every kind and description, the same as if therein particularly described and mentioned, but where complainant and the attorneys for both parties testified that such mortgages were not embraced in such settlement, and produced a memorandum of items entirely apart from such mortgages, which they testified was the basis of such settle-

ment, and where a note of defendants held by complainant was surrendered, but defendants did not receive such mortgages and the bonds they secured, nor demand them or their discharge.—People's Savings Bank v. Galvin, 81 Mich. 11.

¶ 673. Where a mortgage securing the sum of $1,500 bearing the condition that it was to stand discharged when the mortgagor's indebtedness to the mortgagee was reduced to a sum less than $3,500, the evidence was held to show that at no time had the mortgagor's indebtedness been reduced below that sum.—Commercial State Savings Bank v. Stevens, 180 Mich. 35.

¶ 674. On a bill by a father against his son to cancel two mortgages which were given by the father to procure funds for the defense of the son, who was charged with murder, and to procure his release, and which were, some time after the pardon of the son, bought by the son with money earned by working the mortgaged farm of the father, evidence held sufficient to sustain a finding that a contract was made pursuant to which the son agreed, in consideration of his being allowed to work the farm for his own benefit, out of the proceeds thereof to pay and secure the discharge of the mortgages.—Swartz v. Swartz, 194 Mich. 617.

¶ 675. Complainant alleged in her bill that she went to a notary's office to execute a power of attorney to defendant to enable him to collect a certain mortgage debt for her; that she held two mortgages against defendant; that he fraudulently presented at the notary's a discharge of the two mortgages, and an assignment of another; and that complainant, being without her glasses, executed these papers, thinking they were the power of attorney. Defendant, the notary and his son, and one Annis, who was present at the time, denied the truth of these allegations, and stated that the transaction was one in which defendant was paying off the two mortgages and taking an assignment of the third. Held, that complainant had failed to establish her allegations, and the bill should be dismissed.—Watrous v. Kenyon, 156 Mich. 404.

¶ 676. In the foreclosure of a mortgage by the mortgagee's administrator the evidence showed that a part of the payments made by the mortgagor were indorsed on the note; that the mortgagor held receipts for some payments not so indorsed; and that there remained some seven hundred dollars due as shown by such indorsements and receipts. The last receipt given for one hundred dollars purported on its face to be for payment in full. The ten-year-old boy of the mortgagor testified that he was present at said last payment and the mortgagee agreed to hunt up the papers and have the mortgage discharged. Held, the evidence was not sufficient to prove payment by defendant of the full mortgage debt.—Chamberlain v. O'Leary, 161 Mich. 670.

¶ 677. Evidence held not to show that a tender sufficient to discharge the lien of mortgage had been made; where it was always conditioned on having a title clear of tax liens and was made prior to another suit which did not claim it.—McLelland v. Cook, 94 Mich. 528.

¶ 678. In a particular case it is proper to decide upon the evidence that a loan made by complainant to the owner of land under and agreement that it should be applied on a mortgage upon the land was so applied, rather than that a part was in fact applied on a chattel mortgage held by the same mortgagee, if the latter contention be supported by evidence no stronger than hearsay.—Lewis v. Noble, 93 Mich. 345.

¶ 678a. The evidence in support of a tender should be very clear and satisfactory, and should place the other party distinctly in the wrong where the discharge of a mortgage is demanded on the ground thereof.—Potts v. Plaisted, 30 Mich. 149; Engle v. Hall, 45 Mich. 57.

§ 155. Subrogation to mortgage lien on redemption, payment, or discharge.

See also post ¶ 743.
On redemption or payment by junior lienor, see post § 156.
On substitution of mortgages or obligations, see post § 157.
To relieve person prevented from redeeming, see post § 158.
Subrogation of mortgagee to rights of mortgagor against assuming grantee, see ante § 120.
Enforcement and protection of right of subrogation, see Subrogation, II.
Persons entitled to subrogation in general, see Subrogation, I.
Subrogation of stockholder whose property has been mortgaged for corporation's debt to rights of mortgagee, see also Corporations ¶ 812.
Judgment in ejectment as bar to suit in equity to establish a lien on the land, see Former Adjudication ¶ 59.
General law of subrogation, see Subrogation.
Subrogation of mortgage parties to liens other than mortgages, see Subrogation; Taxes, VIII et seq.
Decreeing invalidity of foreclosure as incident to bill to subrogate payer to earlier discharged mortgage, see Subrogation.
Conduct or want of equity as bar to subrogation, see Subrogation § 4.

¶ 679. One who, being entitled to do so, redeems from a statutory foreclosure sale, is entitled to be subrogated to the mortgagee's rights in the premises, with a lien thereunder to the extent of the mortgage interest.—Moore v. Smith, 95 Mich. 71.

¶ 680. Persons equitably entitled to land on paying a mortgage taken in good faith by another should be subrogated to the mortgagee's rights against the mortgagor.—Warner v. Hall, 53 Mich. 371.

¶ 681. A court of equity will not subrogate to the rights of a mortgagee one who, having no title or interest in the premises, has voluntarily paid the mortgage.—Smith v. Austin, 9 Mich. 465.

¶ 682. A stranger to the title cannot become subrogated to the mortgagee's rights by paying the whole or any part of the mortgage.—Desot v. Ross, 95 Mich. 81.

¶ 683. Where, as between two mortgagors of joint property, it is the duty of one to pay it, but the other pays on condition that it shall inure to his benefit, the latter is entitled to indemnity through the mortgage.—Laylin v. Knox, 41 Mich. 40.

¶ 684. Whether a mortgagor who has conveyed by a full covenant warranty deed can, upon paying his mortgage debt and taking an assignment, become subrogated to the rights of the mortgagee by reason of an alleged equity in the premises, quære.—McCarn v. Wilcox, 106 Mich. 64.

¶ 685. Defendants accepted a deed of premises which recited that the grantee should assume and pay specified incumbrances. They conveyed the premises to complainant. Defendants failed to pay the mortgages and complainant, to prevent foreclosure, paid them off and took an assignment from the mortgagee. Held, complainant had the benefit of the mortgages and could enforce them within the scope of the powers which they gave to his assignor.—Kollen v. Sooy, 172 Mich. 214.

¶ 686. Where, in order to save costs, a mortgage was released as to some land already encumbered to more than its value and under foreclosure, it can hardly be said that the security of those who claimed subrogation was decreased.—Perrett v. Yardsdorfer, 37 Mich. 596.

¶ 687. Complainant's husband bought a lot from defendant's wife and assumed payment of a mortgage thereon securing a note endorsed by defendant. Upon foreclosure of the mortgage a deficiency was reported and a few days thereafter complainant's husband conveyed to her another lot and later they gave a mortgage thereon to secure the deficiency upon the first foreclosure and $700 used to pay off an existing mortgage on the lot. Upon foreclosure of this mortgage, defendant became the purchaser and the sale was duly confirmed. Complainant brought action to redeem by paying the $700 borrowed, on the ground that by the foreclosure sale defendant's debt was paid by her and hence she was entitled to be subrogated to the rights of the mortgagee for reimbursement. Held, that the claim showed want of equity since she was surety for her husband who had assumed to pay the debt.—Dunning v. Gaige, 137 Mich. 122.

¶ 688. Where A. is fraudulently persuaded by B. to advance money to him to discharge a mortgage by the promise to give security upon the land for the loan, which promise is not fulfilled, A. is subrogated to the mortgagee's rights.—White v. Newhall, 68 Mich. 641.

¶ 689. Complainant was fraudulently induced to advance money to defendant upon certain worthless land as security and the money was used to pay off a mortgage upon land received by the mortgagor in exchange for the land mortgaged. Held that complainant was subrogated to the rights of the mortgagee in the mortgage discharged by the money so received.—Coulter v. Minion, 139 Mich. 200.

¶ 690. The purchaser during the pendency of a suit in aid of execution, of the exempt homestead interest in the premises in question, who redeemed from a mortgage foreclosure against the entire premises and paid the full amount, was entitled to subrogation to the extent of the amount so paid, as against a purchaser at the execution sale.—Wolcott v. Tweddle, 133 Mich. 389.

¶ 691. Parties who, acting in good faith and under color of authority, have lent money to an estate, under security that turns out to be invalid, for the purpose of paying a mortgage binding the estate, may be subrogated to such mortgage as if it were in force and assigned to them.—Detroit Fire & Marine Ins. Co. v. Aspinwall, 48 Mich. 238; Detroit Fire & Marine Ins. Co. v. Aspinwall, 45 Mich. 330.

¶ 692. Where a person purchased mortgaged land to which he thought he was obtaining a good title, but which was in truth defective, after he had paid the mortgage he became the equitable owner thereof and could enforce it as a lien on the land, when ejected.—Taylor v. Roniger, 147 Mich. 99.

¶ 693. The fact that a mortgagee had foreclosed his mortgage did not affect his right to subrogation, to a mortgage paid off by the loan he made and prior by operation of estoppel to a first mortgage where such action was taken in the belief that the first mortgage had been paid, induced by misrepresentation of the mortgagor.—Palmer v. Sharp, 112 Mich. 420.

¶ 694. A mortgagor who had been secretly married, and whose wife did not join in the mortgage, used part of the proceeds to pay off mortgages existing before the marriage. In an action to determine the rights of the wife, the mortgagor having died, held that the mortgagee was subrogated to the rights under the former mortgages and that she

was entitled to dower in the surplus arising after the amount of such prior mortgages had been paid.—Hall v. Marshall, 139 Mich. 123.

¶ 695. Where third persons pay mortgages against an estate and certain legacies which are a charge thereon and receive certain conveyances to portions of the estate through an innocent misunderstanding by all the parties as to the condition of titles, it being the belief that the land was held in fee by those who made the conveyances when they were only life tenants, such persons may be subrogated to the amount of the liens against the estate which they paid, less the value of benefits received therefrom, but the subrogation must be in lieu of what was received through the mistake.—Stroh v. O'Hearn, 176 Mich. 164.

¶ 696. A life tenant, who makes a payment out of her own money on an overdue mortgage given by the testator, under the erroneous belief that she is the holder of the fee, is entitled to be subrogated to the rights of the original mortgagee, to the extent of the payment, deducting interest for the duration of the life tenancy, as against the remaindermen, since the latter would have been bound to pay the mortgage to protect their estate.—Detroit & North Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 697. Where a mortgagee takes a mortgage in ignorance of the fact that the mortgagor is only a life tenant and not the owner of the fee, and part of the proceeds of the loan are used in paying an earlier mortgage, the mortgagee is entitled, as against the remaindermen, to be subrogated to the rights of the original mortgagee to the extent of the amount of the loan used to satisfy the mortgage, there being no intervening incumbrances or equities.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 698. Where land is deeded to secure the repayment of money borrowed from the grantee to pay off existing encumbrances, and it is applied to that purpose, the grantee, if the deed is adjudged invalid, can claim subrogation to the rights of the mortgagees whose liens have been discharged; and he would be entitled to a decree of foreclosure against the land so deeded as security.—Lockwood v. Bassett, 49 Mich. 546.

¶ 699. A mortgagor's agreement to pay a certain sum to his daughter who advanced a like amount to pay an instalment of interest on the mortgage stated that the design was "to secure the payment of said money, it being for money paid by her as aforesaid." Held, that such agreement did not entitle the payee to the lien of the mortgage to the amount of the interest so paid.—Desot v. Ross, 95 Mich. 81.

¶ 700. On a judgment for a third note not due when the foreclosure took place for the other two of the notes secured by mortgage and the payment of the judgment by the mortgagor, he would be subrogated to the mortgagee's rights so as to obtain repayment, it being presumed that the foreclosure price was lessened by the amount of the unpaid and outstanding third note.—Shermer v. Merrill, 33 Mich. 284.

¶ 701. Where property owned by two partners is subject to a mortgage, and as between the two it is the duty of one to discharge it, and the other pays the debt on condition that the mortgage shall inure to his benefit, an equity arises in his favor entitling him to indemnity through the mortgage.—Laylin v. Knox, 41 Mich. 40.

¶ 701a. A purchaser at an administratrix' sale of land pursuant to leave of court, to pay a mortgage and other debts, is presumed to know that the administratrix, who was the widow of the deceased, had no right to dispose of the homestead rights of minor children, and is not in position to be subrogated to the rights of the mortgagee.—Gerber v. Upton, 123 Mich. 605.

§ 156. ——On redemption or payment by junior lienor.

Redemption in general, see post IX.

Subrogation for redemption money, see Foreclosure § 191.

¶ 702. A second mortgagee is entitled to redeem from a prior mortgage and have the benefit of an assignment of the mortgage.—Lamb v. Jeffrey, 41 Mich. 719.

¶ 703. In order of time there were three mortgages on land. One H., as agent for B., advanced money to discharge mortgage number 2, and took as security mortgage number 3 upon the same property. H. had acted in the same capacity for mortgagee number 2, whose lien was discharged, and had at that time been assured by the assignee of mortgage number 1, which was then of record, that such mortgage was paid, and would be promptly discharged; and H. believed that he was acquiring for his principal, B., a first lien upon the land, none having been created since the prior transaction. Held, that B. was entitled to be subrogated to the rights of mortgagee number 2 whose lien he had satisfied, and therefore to take precedence over the assignee of the original mortgage, whose misrepresentation estopped him from claiming priority as to mortgagee number 2.—Palmer v. Sharp, 112 Mich. 420.

§ 157. ——On substitution of mortgages or obligations.

Discharge by change in form of debt, see ante § 146.

¶ 704. A creditor named in a trust mortgage as one to be secured thereby if certain

conditions were met, among them the substitution of new notes for outstanding indebtedness so as to consolidate it, having refused to accept the provisions of the mortgage has no interest therein, which may be the subject of subrogation affording equities on foreclosure.—Gillam v. Barnes, 123 Mich. 119, per Moon, J., others concurring in the result.

¶ 705. K. paid off and discharged the first two out of three mortgages on certain property, and then took a new mortgage for the amount paid. Held, that this was subsequent to the one left unpaid, and that K. was not entitled to be subrogated to the rights of the first two mortgagees.—Kitchell v. Mudgett, 37 Mich. 81.

¶ 706. One who advances money to a married woman to pay off an existing mortgage and to receive a new mortgage is entitled to be subrogated to the original mortgagee on discovering that the borrower does not have title to the land in question notwithstanding the land is her homestead.—Sproal v. Larsen, 138 Mich. 142.

¶ 707. An administratrix who petitions the probate court to be allowed to make a third mortgage for $1,500 and subsequently is authorized to make a mortgage for $3,000 on the same petition on a showing that she can pay off the two prior mortgages amounting to $1,700 and have the balance for the purposes specified in the petition is subrogated to the rights of the prior mortgagees upon a subsequent holding of the mortgage void.—Russell v. Wheeler, 129 Mich. 41.

¶ 708. A first mortgage was foreclosed in chancery without making the second mortgagee a party. The land was bid in by the first mortgagees, one of whom conveyed his interest to his co-mortgagee, and he in turn quitclaimed the land to the mortgagor, who had remained in possession upon an understanding giving him an opportunity to secure money to redeem. The consideration was $2,500 due upon the first mortgage, $2,250 of which the mortgagor secured by mortgaging the land to a loan association, which supposed from the report of its attorney, who had examined an abstract of the title to the land, that it was securing a first mortgage. Held, that to avoid letting the second mortgage into a priority not intended in equity the making of the deed to the mortgagor and the mortgage to the loan association should be regarded as one transaction, and that the association is entitled to be subrogated to the rights which the first mortgagee had when the loan was made, at which time the second mortgagee had the right to redeem from the foreclosure of the first mortgage, or to foreclose his own mortgage, subject to the lien of the first mortgage.—Draper v. Ashley, 104 Mich. 527.

§ 158. ——To relieve person prevented from redeeming.

¶ 709. Assignment of foreclosed mortgage may be compelled in equity in behalf of person who had been entitled to redeem, but who had been fraudulently prevented from raising money necessary for tender.—Moore v. Smith, 95 Mich. 71.

§ 159. Penalty for failure to discharge.

See also ante ¶ 595.
Penalties in general, see Penalties.
Measure of obligation and recovery on mortgage to secure penal bond for performance of services, see also Bonds § 8.
Penalty for refusal to discharge, see Comp. L. 1915, § 11745.
Action against mortgagee for refusal to discharge, see Comp. L. 1915, § 11745.

¶ 710. How. St. § 5704, in imposing a penalty for neglecting to discharge a mortgage "after full performance of the condition," means so far as the condition is legal and binding; the amount of consideration may therefore be disputed.—Wilber v. Peirce, 56 Mich. 169.

¶ 711. The purpose of the penalty imposed by statute for refusing to discharge a mortgage on tender of the amount due is not only to indemnify the mortgagee for his trouble but to act as a punishment.—Engle v. Hall, 45 Mich. 57.

¶ 712. The statutory penalty for refusing to discharge a mortgage cannot be recovered of one who has no interest in the mortgage or the debt, and has no means of knowing himself to be in default for not giving a discharge.—Murphy v. Fleming, 69 Mich. 185.

¶ 713. The statutory penalty is imposed only for a wrongful refusal, and not for one made in good faith by advice of counsel and under a mistake as to one's legal rights.—Myer v. Hart, 40 Mich. 517.

¶ 714. Counsel's advice may show good faith absolving a mortgagee from the penalty for refusing to discharge a mortgage.—Myer v. Hart, 40 Mich. 517.

¶ 715. The statutory penalty for refusing to discharge a mortgage (How. St. § 5704) will not be imposed if the mortgagee refused in good faith and in reliance upon supposed legal rights.—Parkes v. Parker, 57 Mich. 57.

¶ 716. The penalty is not imposed when there has been an honest and reasonable difference between the parties as to their right.—Burrows v. Bangs, 34 Mich. 304.

¶ 717. The court declined to impose the statutory penalty for refusing to discharge a mortgage on tender of the amount due or to order the cancellation of the lien, where the case was such that the mortgagee might in good faith have been mistaken as to what

he had a right to exact.—Canfield v. Conkling, 41 Mich. 371.

¶ 718. The statutory penalty for refusing to discharge a mortgage should not be enforced where the refusal was not manifestly unreasonable and the mortgagee honestly believes that his claim is not satisfied.—Huxford v. Eslow, 53 Mich. 179.

¶ 719. An instruction in substance that the honesty of a mortgagee in believing that the mortgage has not been satisfied is a sufficient defense to an action for the penalty for not discharging it if it has been, in an action for the statutory penalty for failing to discharge a satisfied mortgage, was as favorable as the defendant was entitled to.—Wilber v. Peirce, 56 Mich. 169.

¶ 720. Where payments of annual interest upon a mortgage have been received shortly after due, with the understanding between the parties that they should be accepted in full satisfaction of the yearly interest, a subsequent assignee, who purchased after maturity of the mortgage, is liable to the statutory penalty for refusing to release the mortgage upon a tender of the amount due computed upon that basis, although the tender was insufficient by strict computation, applying the payments at large.—Barnard v. Harrison, 30 Mich. 8.

¶ 721. A mortgagee made an irregular attempt to foreclose by advertisement, and his notice, which was imperfect, was withdrawn after a single publication; held, that he could not demand the attorney fee provided for in case of foreclosure, and having declined the tender of the full amount due because such fee was not paid, and having refused to discharge the mortgage, he was liable to the statutory penalty.—Collar v. Harrison, 30 Mich. 66.

¶ 722. One who gives an invalid mortgage has nevertheless the right to pay it off, and consequently the right to have it discharged; its invalidity therefore cannot be pleaded as a defense to an action for the penalty for refusing to discharge it.—Wilber v. Peirce, 56 Mich. 169.

¶ 723. The statutory penalty for refusing to discharge a mortgage is recoverable in equity on a bill to redeem.—Cowles v. Marble, 37 Mich. 158.

§ 160. Suit to compel discharge or declare debt satisfied.

Issues and proof, see post § 161.
Bills to redeem and proceedings thereunder, see post §§ 170-174.
General law of rescission and suits for rescission and cancellation, see Rescission.
Suits and procedure to quiet title, see Quieting Title, III.
Jurisdictional amount in chancery bill for discharge, see Equity § 16.
Bill in equity to compel discharge, see Comp. L. 1915, §§ 11745, 11746.

¶ 724. Equity has jurisdiction upon a bill seeking to have a mortgage which constitutes an apparent lien on complainant's title declared satisfied.—Ormsby v. Barr, 22 Mich. 80.

¶ 725. A bill filed to compel discharge of a mortgage, and to collect the statutory penalty, should be treated as one to remove cloud from title, if the mortgage has merely the effect of such a cloud.—Bush v. Freer, 91 Mich. 315.

¶ 726. A grantee of premises covered by a mortgage which is alleged to have been paid may maintain a bill against the mortgagee for its discharge without proving any other interest in the premises than the grant from the mortgagor. If the mortgage has been paid, the mortgagee will not be allowed to dispute the mortgagor's title or that of his grantee as a reason for refusing to discharge it.—Ormsby v. Barr, 22 Mich. 80.

¶ 727. A bill for discharge of mortgage on ground of tender of amount due was retained, where tender was found insufficient, as a bill to redeem under general prayer for relief, the bill having offered to pay whatever might be found due.—Dayton v. Dayton, 68 Mich. 437.

¶ 728. In a suit on a bill to obtain a discharge of a mortgage a decree should be given as prayed, where the only reasons for refusal to discharge urged by the real party in interest related to the land itself and not to his separate interest as owner of the mortgage, and where the mortgage was in fact paid, though an assignment had been made to harass complainant.—Bush v. Freer, 91 Mich. 315.

¶ 729. An outlawed mortgage given before complainant bought the encumbered land by one who then owned an equitable interest, and of which complainant had no actual knowledge, will be discharged in chancery without proof of actual payment.—Kingman v. Sinclair, 80 Mich. 427.

¶ 730. The fact that a judgment has been recovered on a note secured by mortgage is no answer to a suit by the mortgagors to have the mortgage set aside on showing that the note has been paid.—Rickle v. Dow, 39 Mich. 91.

§ 161. ——Issues and proof.

Pleading and proof of payment or tender in general, see Payment, V.
General law of evidence, see Evidence.
Pleading and proving discharge of mortgage on foreclosure, see Foreclosure ¶ 349.
Recovery of judgment on note as bar to suit to cancel mortgage secured by it, see Former Adjudication ¶ 171.

¶ 731. Where the discharge of a mortgage was sought on the ground that payment had been tendered, the court declined to consider the question of usury, but held that complainant must abide by his tender.—Canfield v. Conkling, 41 Mich. 371.

§ 162. Reinstatement and revival of lien.

Necessity of verification of bill to reinstate discharged mortgage, see Equity ¶ 234.

Restoring discharged mortgage to defeat dower, necessity of resort to equity, see Dower ¶ 125.

¶ 732. Where a mortgage has been discharged from the record through mistake, equity will restore it and give it its original priority as a lien, when the rights of innocent third parties will not be affected.—Ferguson v. Glassford, 68 Mich. 36.

¶ 733. A mortgagee discharged mortgages on certain lands in consideration of a deed of a portion of them which he understood to be otherwise unencumbered, but on which, in fact, an attachment of which he had no notice had been levied since the mortgages were given, though the land had not been sold on execution. Held, that it was within the jurisdiction of equity to set aside the discharge; and that the attachment creditor was not deprived of rights thereby, but the equities were adjusted between the parties. —French v. De Bow, 38 Mich. 708.

¶ 734. Where a discharge of mortgage is given on the receipt of less than is due, by reason of an erroneous computation of interest, it is not a matter of course for equity to interfere afterwards to correct the error; and it will be done only when equities appear.—Wright v. Garrison, 40 Mich. 50.

¶ 735. Where a circumstance appeared in the case which would render it inequitable for the holder of the mortgage to collect the full amount of interest, a court of equity, irrespective of strict legal rights, will decline to interfere on his behalf to give relief because an error was made in the computation of the amount of interest due.—Wright v. Garrison, 40 Mich. 50.

¶ 736. A party seeking to restore and foreclose a mortgage that has been discharged by mistake and without any fault of the mortgagor cannot have it reinstated to secure any extortionate sum made up by semi-annual computations of compound interest, even where the mortgage discharged was made up in that way and had been given to take up a previous mortgage.—Sheldon v. Holmes, 58 Mich. 138.

¶ 737. A mortgage debt having been extinguished by a deed of the premises to the mortgagee, who contracted to reconvey the remainder after satisfying the indebtedness out of the property, it could be revived as a lien upon the property only by a mutual rescission of the deed and contract, which would imply a reconveyance so far as to put all parties in statu quo, or by a new subsequent agreement founded upon a new and sufficient consideration; it would be idle to talk of the abandonment of the contract under the circumstances.—McCabe v. Farnsworth, 27 Mich. 52.

¶ 738. Where, after foreclosure, the mortgagor's title turns out to have been invalid, and he, taking advantage of a curative act, obtains a confirmatory patent from the state, the mortgagee may have his lien reinstated in equity.—Toms v. Boyes, 50 Mich. 352.

¶ 739. A release with a proper acknowledgment is not open to impeachment of the certificate of acknowledgment except by clear, convincing, and satisfactory proof that it is false and fraudulent.—Saginaw Building & Loan Ass'n v. Tennant, 111 Mich. 515.

¶ 740. Upon a bill to restore a mortgage the discharge of which has, it is alleged, been procured by fraud, the fraud is not established by facts that raise the inference of full payment.—Beal v. Congdon, 75 Mich. 77.

¶ 741. A discharge of mortgage obtained from a dying mortgagee was set aside on appeal upon the grounds of mental incapacity and undue influence and the cause was remanded for foreclosure.—Worthington v. Major, 94 Mich. 325.

¶ 742. One whose son had executed to him a mortgage devised it to the son on condition that the latter should pay $400 to his sister. By arrangement the sister gave the executor a receipt "in full for the legacy" to her on his surrendering a note of similar amount against her husband, and the son gave the executor his note for the amount that he was to pay his sister together with $20 due from him to the executor, the latter agreeing to discharge the mortgage. Held, that the executor, on the son's failure to pay his note, could not revive and foreclose the mortgage to enforce payment of the sister's legacy, since that was discharged.—DeCoo v. Woodworth, 96 Mich. 362.

¶ 743. A conveyance by a husband to his wife and also a subsequent conveyance by the wife were set aside in an action by the husband's heirs. The second grantee had given a mortgage on the land, the proceeds of which were used to pay off a mortgage on a parcel of land conveyed to his grantor. Held, that the latter lien should be revived in favor of the heirs who should be subrogated to the rights of the original mortgagee. —Markillie v. Allen, 120 Mich. 360.

¶ 743a. Mortgages discharged by a trustee out of the proceeds of land unlawfully sold by him should be revived in favor of the defeated purchaser, the trustee's deed being

annulled and the right of subrogation established.—Curran v. Bartlett, 165 Mich. 205.

¶ 743b. A bill to revive mortgages will lie where they were released on the execution of a new mortgage, supposed to have been signed by the wife of the mortgagor but in fact forged as to her name, and where the new mortgage was foreclosed and the property bid in upon the belief that the claim of forgery was a pretense but afterward the claim of the wife was legally established as superior to the foreclosure.—Linn v. Linn, 122 Mich. 130.

IX. REDEMPTION AND ACCOUNTING.

§ 163. Equity and right to redeem in general.

[Note. The distinction between the common law equity of redeeming from the mortgage by paying the debt according to the condition and the statutory or decretal right of redemption from foreclosure decree has been observed. Redemption from foreclosure decrees is treated in Foreclosure, VII, and the equity of redemption, proper, is treated here.]

See also ante ¶ 74a.
Proper remedy and grounds for suit, see post §§ 164, 165.
Defenses and bar or limitation of right, see post §§ 166, 167.
Amount and terms of payment to redeem and offsets and deductions, see post § 168.
Persons entitled to sue, see post § 169.
Bills to redeem and proceedings thereunder, see post §§ 170-177.
Accountability of parties under the mortgage, see post § 178.
Accountability for land held under absolute deed, see post § 179.
Subrogation to mortgage lien on redemption of junior lienor, see ante § 156.
Subrogation to mortgage lien to relieve person prevented from redeeding, see ante § 158.
Invalidity of stipulation waiving or attempting to destroy in advance the equity of redemption, see ante ¶ 219.
Right of mortgagee to purchase equity of redemption, see ante § 66.
Rights of junior mortgagees and lienors generally, see ante §§ 80-83.
Bills for accounting, see post § 180.
Right of mortgagor to redeem mortgage after assenting to assignment thereof by way of pledge by his assignee, see Pledges.
Equity of redemption as dowable estate, see Dower § 12.
Public policy as to agreement in advance to cut off or waive redemption, see Contracts § 68, ¶¶ 273, 274.
Denial of leave to file bill of review in reformation suit on condition that redemption be allowed from security deed, see Equity ¶ 978.

¶ 744. Equity favors the right of redemption.—Stahl v. Dehn, 72 Mich. 645.

¶ 745. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off.—Batty v. Snook, 5 Mich. 231.

¶ 746. An agreement contemporaneous with or subsequent to a transaction that is in effect a mortgage is void if it stipulates to give up the equity of redemption on default.—Batty v. Snook, 5 Mich. 231.

¶ 747. The equity of redemption is not an equitable, but is practically a legal estate.—Gorham v. Arnold, 22 Mich. 247; Hoffman v. Harrington, 33 Mich. 392.

¶ 748. The equity of redemption is an interest in land such as can only be conveyed by writing.—Cowles v. Marble, 37 Mich. 158; Rawdon v. Dodge, 40 Mich. 697.

¶ 749. The equity of redemption is an interest entirely distinct from that of the mortgage, and the mortgagee acquires no interest in it except by foreclosure.—Crow v. Conant, 90 Mich. 247.

¶ 750. A mortgagee cannot transfer title to any part of the mortgaged premises free and clear of the right to redeem.—Gorham v. Arnold, 22 Mich. 247.

¶ 751. A second mortgagee's right to redeem a prior mortgage cannot be cut off or prejudiced by arrangements between the mortgagor and the holder of the first mortgage for an extension of the time in which to pay it.—Sager v. Tupper, 35 Mich. 134.

§ 164. Proper remedy and grounds for suit.

To redeem from statutory foreclosure, see post § 165.
Bills to redeem and procedure thereunder, see post §§ 170-177.
Bills to redeem from defective foreclosures, see Foreclosure, V.

¶ 752. Relief in equity against forfeiture is founded upon the principle that the possessor of a legal right shall not be allowed to use it to work oppression or injustice; and when a mortgagor not guilty of laches brings himself within this principle, and it can be applied without injustice to others, the court should administer the proper relief.—Sandford v. Flint, 24 Mich. 26.

¶ 753. Courts of equity cannot extend the time for redemption on a statutory foreclosure where redemption within the time limited has been prevented by accident and misfortune, or by an unavoidable mental and physical disorder.—Cameron v. Adams, 31 Mich. 426.

¶ 754. The right to redeem from a mortgage executed prior to 1843 could not affect the right of possession, and could only be asserted by bill.—Hoffman v. Harrington, 33 Mich. 392.

¶ 755. The remedy of one who by fraud of the holder was induced to rely on a promise of money to redeem until it was too late, whereupon the promisor bought in the mortgages and liens which he holds, is to redeem from such holder.—Wilson v. Eggleston, 27 Mich. 257.

¶ 756. Where one whose land had been sold in statutory foreclosure was induced by the acts and conversation of one who had bought the land from the foreclosure purchaser to believe that the title had been taken for his own benefit, and to give up efforts to get from other quarters the money to redeem until it was too late, he is entitled to a decree for a redemption, and an accounting.—Newman v. Locke, 66 Mich. 27.

¶ 757. Where, pending the year of redemption from a statutory foreclosure, the owner of the equity of redemption is induced by the acts and statements of the foreclosure holders and of their grantee to give up efforts to raise the money in time, and to believe that he will be allowed further time, the title will be considered as taken for his benefit.—Newman v. Locke, 66 Mich. 27.

¶ 758. Where the mortgagor of property has been induced to refrain from redeeming from foreclosure sale by fraudulent conduct and misrepresentation, equity will interpose and grant relief by extending the time of redemption, but, in order to warrant the interference of equity, fraud must be clearly proved.—Palmer v. Palmer, 194 Mich. 79.

¶ 759. Transactions between the parties with reference to a sale by the defendant to the complainant of a mortgage interest cannot have any force as the foundation for a bill to redeem from the mortgage.—Harwood v. Underwood, 28 Mich. 427.

¶ 760. The president of a bank, which had foreclosed a mortgage on complainant's property for more than the amount legally due, could not, by refusing to furnish complainant information as to how much was actually due upon the mortgage, defeat her of her right to redeem, nor by paying over more than was legally due to the bank compel her to pay him a like sum, where upon his agreement that, if complainant would send him $100 before the period of exemption expired, he would redeem the property for the amount legally due and sell it to complainant on contract, complainant sent the $100 as agreed, and the president used the money together with his own funds in purchasing the property; since equity will not permit him to take advantage of his own wrong.—Cusick v. Spencer, 149 Mich. 434.

¶ 761. Where a mortgage of indemnity was foreclosed at law before the mortgagee had been damnified the mortgagor was held entitled to redeem.—Thurston v. Prentiss, W. 529.

§ 165. ——To redeem from statutory foreclosure.

¶ 762. A bill to redeem is the appropriate remedy where the foreclosure is by advertisement.—Dodge v. Northrop, 85 Mich. 243.

¶ 763. An offer to redeem held not indispensable to a bill for relief from a statutory foreclosure.—Sanford v. Flint, 24 Mich. 26.

¶ 764. A wife's homestead and dower rights in land mortgaged by the husband before the marriage and afterwards occupied by the parties as a homestead entitle her to redeem from statutory foreclosure a mortgage executed by her husband, and to have the benefit of an assignment of the mortgage.—Moore v. Smith, 95 Mich. 71.

¶ 765. Where a mortgage was foreclosed by advertisement and the real owner was not made a party, and the mortgagee by a bill in chancery sought to quiet title as against the claim of the owner, and the latter by cross-bill asked leave to redeem upon the ground that before the equity of redemption expired he had offered to redeem, held, that a decree providing for redemption was proper.—Northern Michigan Building & Loan Ass'n v. Fors, 190 Mich. 69.

§ 166. Defenses and bar or limitation of right.

Laches, delay and estoppel, see post § 167.

¶ 766. To bar the equity of redemption the mortgage should be foreclosed by advertisement or in equity.—Comstock v. Howard, W. 110.

¶ 767. While a statutory foreclosure sale satisfies the debt and thus far releases the personal obligation it does not so far extinguish the mortgage that a person entitled to redeem and redeeming thereunder is not protected; and accordingly a defective foreclosure is no bar to a bill by a wife to redeem and have homestead assigned to her after statutory time to redeem from foreclosure.—Moore v. Smith, 95 Mich. 71.

¶ 768. The right of a second mortgagee to redeem from the foreclosure of the prior mortgage is barred if he allows the foreclosure to become absolute.—Gantz v. Toles, 40 Mich. 725.

¶ 769. The mere assumption of a mortgagee, evidenced by his giving a deed, that he has title in fee, cannot bar the equity of redemption; neither can an occasional occupation under such deed, or any occupation short of a continuous and notorious one adverse to the right to redeem.—Humphrey v. Hurd, 29 Mich. 44.

¶ 770. A mortgagee cannot avoid redemption on bill in equity to redeem by setting up that he and the mortgagor have made false representations to third parties.—Crawford v. Osmun, 70 Mich. 561.

§ 167. ——Laches, delay, and estoppel.

¶ 771. Where a second mortgagee asked to redeem in equity, and more than twenty years had elapsed since the right to redeem accrued, it was held the right was barred by lapse of time, whether the premises had been occupied under the first mortgage for twenty years or not.—Cook v. Finkler, 9 Mich. 131.

¶ 772. Where no steps have been taken to redeem a mortgage for nearly forty years after its maturity, and more than thirty after an open attempt to foreclose, it requires a very strong showing to authorize a bill to redeem.—Hoffman v. Harrington, 33 Mich. 392.

¶ 773. A delay of seven years is not such laches as will defeat a mortgagor's right to redeem, where neither the mortgagee nor his assignee, treated the mortgagor frankly and openly, but withheld from her the true facts in regard to the payments made upon her mortgage, and, knowing, of her claims, acted in open hostility and defiance thereof and were themselves in no way misled.—Cusick v. Spencer, 149 Mich. 434.

¶ 774. A wife in 1892, as surety for her husband, gave an absolute deed as security for a mortgage executed previously by him. In 1896 the husband, without authority, assumed as his wife's agent to treat the deed as a payment on the mortgage debt. Held, the wife was not, in 1906, precluded by laches from bringing a bill to have the deed declared a mortgage and to redeem.—Miller v. Peter, 158 Mich. 336.

¶ 775. Plaintiff's father bought land and had the title thereto put in the name of his brother who mortgaged same to defendant bank. At the death of his father plaintiff was twelve years old and for sixteen years was familiar with the facts about his father's property. Upon becoming of age he was advised as to his interest in the land in question but did not start suit until he was twenty-eight years old. Held, he was barred by laches from the right to redeem.—Beidler v. City Bank of Battle Creek, 172 Mich. 381.

¶ 776. Fourteen years' delay in seeking to redeem from statutory foreclosure claimed to be void because including in sum for which land was sold an attorney fee and certain unpaid taxes, held gross laches.—Emmons v. Van Zee, 78 Mich. 171.

¶ 777. A mortgagee whose fraudulent conduct in hindering the raising of the necessary money has prevented a tender of the amount due him is estopped in a suit brought against him to redeem from a statutory foreclosure and to compel an assignment of the mortgage from setting up the want of tender.—Moore v. Smith, 95 Mich. 71.

§ 168. Amount and terms of payment to redeem and offsets and deductions.

Method of computation of interest, see also post ¶ 819.

Valuation of mortgage for tax assessment as evidence of amount of interest due thereon, see Foreclosure ¶ 362.

Arbitration of amount necessary to redeem, see also Arbitration ¶ 37.

¶ 778. The redemption of a mortgage will not be decreed on any terms other than the payment of the mortgagee's claim.—Cowles v. Marble, 37 Mich. 158.

¶ 779. A., the holder of the first of five mortgages on a piece of land, took proceedings in chancery to foreclose it, making all the subsequent mortgagees parties except D., the last. Decree for the sale was obtained, and a sale made at which B., the administrator of C., the second mortgagee, became the purchaser for a few dollars over the amount of the first mortgage. B. bought in his own name, but stated at the time that he bought to protect the interests of the C. estate. He then filed his bill against D., setting up all the facts and praying that D. be decreed to redeem by paying the amount of both the A. and C. mortgages and costs, or be foreclosed. D. filed a cross-bill, claiming the right to redeem on paying the amount of B.'s bid, with interest. The mortgaged premises were shown to be worth at least the amount of the A. and C. mortgages. Held, that D. could not be permitted to redeem without paying the amount of both.—Baker v. Pierson, 6 Mich. 522.

¶ 780. A claim that complainant's husband, who attended to the business for her, knew the facts as well as the president of the bank, which had foreclosed a mortgage on complainant's property for more than the amount legally due, and which land such president bought at such sale, and that therefore complainant on redemption was bound to pay such president the amount he paid the bank, is not supported by the facts where, though her husband knew that payments had been made upon the mortgage and the amount of them, the computation and just what made up the total amount for which the place was sold were arbitrarily withheld from him by the bank and its president.—Cusick v. Spencer, 149 Mich. 434.

¶ 781. Where a bill to enforce the discharge of a mortgage had been filed before the time for redemption had expired, but after foreclosure was begun, and it was held that the complainant mortgagor was not entitled to a discharge, he was allowed to redeem on paying the amount of the debt with interest at the stipulated rate, and the costs of foreclosure, with interest, but without the attorney fee provided for in the mortgage.—Parks v. Allen, 42 Mich. 482.

¶ 782. Complainant was the owner of a parcel of land covered by two mortgages, the

first of which also covered two adjoining parcels, and both mortgages were being foreclosed. Defendant under an agreement with complainant that if he would bid in her land at the foreclosure sale under the second mortgage and also bid the amount of the mortgage on the three parcels she would repay him, became the purchaser at both sales. Complainant on bill to redeem sues to compel him to convey to her the parcel purchased under the second mortgage. Held, that in order to have such conveyance she must repay him the amount paid for the three parcels in which case she would be subrogated to his rights in all the parcels. —Dayton v. Stahl, 132 Mich. 360.

¶ 783. A grantor redeeming property conveyed by deed, which is absolute in form only, should be allowed credit for the purchase-price of a part of the land that has been sold by his grantee.—Clark v. Landon, 90 Mich. 83.

¶ 784. Where redemption was decreed as against a party in possession under an irregular statutory foreclosure, which he supposed to be regular, and under which title he had made improvements and paid taxes on the land, such taxes were allowed to him on the accounting, but he was charged with rents and profits.—Millard v. Truax, 73 Mich. 381.

¶ 785. Defendant Miller and his wife owned, separately, each four lots. Mrs. Miller was in jail for failure to pay a fine of two hundred dollars. She told her husband that if he would raise two hundred dollars to pay her fine she would deed him absolutely her four lots. Miller went to one Cronks and borrowed $270, on security of the eight lots, deeding him his four lots, and out of the money paid the said fine. In order to save expense, Miller had his wife deed her four lots directly to Cronks. He paid her nothing for this conveyance. Cronks gave back a land contract to defendant Miller, on all eight of the lots, which called for a conveyance of the lots upon payment by defendant of the $270. Complainant Ferry purchased of Mrs. Miller two of the four lots belonging to her, and brought a bill to redeem. Held, she could not redeem without paying the entire debt of $270, but by so doing she would be subrogated to the mortgagee's rights and might redeem.—Ferry v. Miller, 164 Mich. 429.

§ 169. Persons entitled to sue.

Parties and joinder in suit, see post § 172.

¶ 786. One who shows no subsisting legal or equitable right in the property, nor any lien or charge upon it, cannot maintain a bill to redeem from a mortgage.—Harwood v. Underwood, 28 Mich. 427.

¶ 787. No one has any right to redeem from a mortgage who has no existing interest in the land; but the tender of redemption money is construed as the claim of such an interest, and if the mortgagee receives and retains the money tendered he cannot repudiate the claim.—Millard v. Truax, 50 Mich. 343.

¶ 788. The mere levy of an execution upon lands to which the judgment debtor never had any title, and in which he never held any leviable interest, does not constitute any lien or charge upon the lands, or invest the execution creditor with any right or title on which to found a suit for the redemption of a mortgage upon them.—Harwood v. Underwood, 28 Mich. 427.

¶ 789. Subsequent encumbrancers are not entitled to file a bill simply for the purpose of redeeming from a regular and valid statutory foreclosure.—Marshall v. Blass, 82 Mich. 518.

¶ 790. One whose sole interest in lands is under a trust deed, by virtue of which he is to be entitled to the lands after payment of the mortgages upon it and certain other specified demands, is not entitled, if he repudiates the trust, to file a bill to redeem from the mortgages.—Smith v. Austin, 11 Mich. 34.

¶ 791. A bill to redeem, filed by several persons jointly, cannot be maintained if the ground of their joint claim fails, whatever any one of them, claiming title from another source, might be entitled to in a separate proceeding.—Bigelow v. Booth, 39 Mich. 622.

¶ 792. A bankrupt had a mortgage on certain property. Sale being had under a later mortgage, his assignee, who had not been impleaded in foreclosing it, took from the mortgagor an order for the surplus, but only with the idea of using it to procure redemption of the bankrupt's mortgage without litigation. Held, that his taking the order did not preclude his bringing suit to redeem, and such a defense could not be heard if not asserted in the answer.—Avery v. Ryerson, 34 Mich. 362.

¶ 793. A mortgagor's administrator being entitled by statute to the possession of his intestate's lands may file a bill to redeem, or to compel the release of a satisfied mortgage.—Enos v. Sutherland, 11 Mich. 538.

§ 170. Bills to redeem and proceedings thereunder.

See also ante ¶ 727.

Office or tender of payment, see post § 171.

Parties and joinder, see post § 172.

Issues, proof and variance, see post § 173.

Presumptions and evidence, see post § 174.

Decree and terms of relief, see post § 175.

Accounting incident to redemption, see post § 176.

Procedure on default of decreed terms of redemption, see post § 177.

Suits to compel discharge or declare debt satisfied, see ante §§ 160, 161.

Grounds for suit, see ante § 164.
Defenses to suit, see ante §§ 166, 167.
Bills for accounting, see post § 180.
Bill to redeem after foreclosure as in effect a bill of review, see Equity § 240.
Bills to redeem from defective foreclosures where primary purpose is to avoid and foreclosure is treated as voidable, see Foreclosure § 158.
Bills to redeem from defective foreclosures, see also Foreclosure of Mortgages, V.

¶ 794. One who files a bill to redeem from a mortgage must show by his bill that he has an interest in the equity of redemption. —Lamb v. Jeffrey, 47 Mich. 28.

¶ 795. Where any other person than the mortgagor files a bill to redeem the bill must show that complainant has some title or interest in the land derived through the mortgagor, or in some way springing out of his general equity of redemption. And it must show the nature or derivation of the title or interest so claimed.—Smith v. Austin, 9 Mich. 465.

¶ 796. Where a bill to redeem only stated that complainant, after the giving of the mortgage, became interested in the land by contract, but without setting out the contract, or stating the parties, or its terms, or the interest contracted, it was held insufficient.—Smith v. Austin, 9 Mich. 465.

¶ 797. Recitals in exhibits attached to the bill, and which the bill prays may be made a part of the bill with all their averments, which recitals speak of complainant as having "become the purchaser" of the mortgaged premises, cannot aid the bill in this particular; the recitals not showing from whom the purchase was made, nor the interest purchased, nor whether it was subject to the mortgage or not.—Smith v. Austin, 9 Mich. 465.

¶ 798. Bill to redeem from a conveyance claimed to be a mortgage. The bill was not filed until thirty-four years after the maturity of the mortgage, which the bill alleges to have remained unpaid, and twenty-four years after the grantee had sold and conveyed the land. A party seeking to redeem after such a lapse of time is bound to show affirmatively in his bill such facts as will establish the instrument as continuing in force and subject to redemption.—Reynolds v. Green, 10 Mich. 355.

¶ 799. The bill showed that the grantee in the mortgage conveyance, and those claiming under him, had claimed and disposed of the premises as absolute owners for more than twenty years, and that possession had been had under them. It averred that the possession had not been continuous and adverse for twenty years, but did not show that it was taken within that time. No excuse was shown for the delay in applying to redeem, and it was held that the averments in the bill were too uncertain to found a right to redeem upon.—Reynolds v. Green, 10 Mich. 355.

¶ 800. Where an assignee in bankruptcy files a bill to redeem, the objection that it is not shown that the assignee obtained permission from the court of bankruptcy to bring the suit will not be considered unless it is pleaded, if at all.—Avery v. Ryerson, 34 Mich. 362.

¶ 801. If one who files a bill to redeem avers that he owns a certain mortgage which is a subsequent mortgage to that of defendant, and his bill is not demurred to, it may be sustained notwithstanding he fails to set forth such facts as shown that his mortgage and that from which he seeks to redeem are mortgages in the same chain of title. Especially is this so when it appears that defendant has recognized his right to make payments by receiving interest from him.—Lamb v. Jeffrey, 47 Mich. 28.

¶ 802. A bill, by a plaintiff under a purchase-money mortgage to foreclose an installment thereof against the purchaser which bought in at its own foreclosure of a later mortgage, which was superior in equity, may be treated as a bill to redeem on its appearing that the present plaintiff was omitted from the former foreclosure suit and that the equities require it.—Pritchard v. Kalamazoo College, 82 Mich. 587.

¶ 803. A bill to vacate foreclosure of a mortgage and praying general relief may be sufficient as a bill to redeem.—Drayton v. Chandler, 93 Mich. 383.

¶ 804. A bill by the receiver of a copartnership to recover property conveyed by it to the defendant and by him mortgaged to obtain money for the firm, held not a bill to redeem.—Security Trust Co. v. Dinsmore, 186 Mich. 273.

§ 171. ——Offer or tender of payment.

Necessity of tender or offer before suit in order to have costs on decree for redemption, see Costs § 33.

¶ 805. In a bill by a mortgagor for relief against a statutory foreclosure for a sum larger than was due upon the mortgage, an averment of an offer to redeem is not an indispensable requisite in a case where there is no reason to believe the defendant has been misled, and the case shows that the parties have gone into the merits fully as upon a bill to redeem.—Sandford v. Flint, 24 Mich. 26.

¶ 806. Where one who seeks to enforce a right to redeem from a prior mortgage omits to keep good his tender in his bill, the omission, as in cases of specific performance, only raises a question of costs.—Lamb v. Jeffrey, 41 Mich. 719.

§ 172. ——Parties and joinder.

Persons entitled to sue, see ante § 169.

¶ 807. Suit to redeem having been brought by the administrator of the grantor in a deed absolute that was in fact a mortgage, it was for the first time objected at the hearing on pleadings and proofs that the heirs of the mortgaging grantor should have been joined as complainants. Held, that as the heirs were nowise prejudiced, and the administrator, under the statute, had such an interest in the real estate as entitled him to redeem, and complete justice could be done to the parties in the case as it stood, the objection was not well taken.—Enos v. Sutherland, 11 Mich. 538.

¶ 808. A joint bill to redeem cannot be maintained if the ground of complainants' joint claim fails.—Bigelow v. Booth, 39 Mich. 622.

¶ 809. The husband should be brought in as party to a deserted wife's bill to redeem homestead from his conveyance intended to operate as a mortgage.—Sanborn v. Sanborn, 104 Mich. 180.

¶ 809a. A bill to redeem from a mortgage securing a note made payable to the mortgagee's heirs four years after his death, which mortgage had been foreclosed for the interest by the mortgagee, may interplead the heirs and the mortgagee's administrator so as to ascertain to whom the money is payable.—Love v. Francis, 63 Mich. 181.

§ 173. ——Issues, proof and variance.

¶ 810. If one has acquired possession of lands under a mortgagee, but asserts a paramount title, the assignee of the mortgagor who files a bill to redeem is not obliged to show that the mortgagor had title when he gave the mortgage, but the defendant must take upon himself the burden of showing that the title he sets up in opposition to the mortgage title is valid and paramount.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 811. Where a bill for relief against a mortgage neither counts upon nor mentions an alleged assignment to the complainant of a right to redeem, such assignment is outside the issue.—Glass v. Glass, 50 Mich. 289.

¶ 812. Upon a bill to redeem defendant will not be allowed to increase the amount apparently due by showing an agreement, not stated in either the bill or the answer, to pay extra interest on the mortgage.—Fosdick v. Van Husan, 21 Mich. 567.

§ 174. ——Presumptions and evidence.

Burden of proof, see also ante ¶ 810.

Sufficiency of evidence on appeal from redemption suit, see Appeal § 431.

¶ 813. Recognition by the purchaser of property sold under the foreclosure of a mortgage, of a party's ownership of such property, and his advising with her about repairs, are circumstances supporting her right to redeem the same.—Cusick v. Spencer, 149 Mich. 434.

§ 175. ——Decree and terms of relief.

Declination of equity to impose forfeiture on redeeming party, see Penalties and Forfeitures.

Treating general prayer as prayer to redeem, see also Equity ¶ 344.

Rules for awarding costs on bill to redeem, see Costs, II, B.

Equity decrees in general, see Equity, X.

¶ 814. Upon a bill filed to set aside a statutory foreclosure sale, the decree should provide for redemption on payment within a specified time of the amount actually due, and in case of default that the mortgaged premises should be sold as in foreclosure cases.—Huyck v. Graham, 82 Mich. 353.

¶ 815. Where the decree on a bill to redeem provided that, if redemption were not made within three months, defendant should have strict foreclosure, it was modified on appeal so as to permit defendant to proceed to sale.—Newkirk v. Newkirk, 56 Mich. 525.

¶ 816. It is proper, on bill to redeem, where a deed absolute in form is adjudged to be a mortgage to direct a sale of the premises to satisfy the amount due in default of payment by the time fixed, instead of decreeing a strict foreclosure.—Emerson v. Atwater, 12 Mich. 314.

¶ 817. Where, on bill to redeem, a deed absolute in form is adjudged to be a mortgage, and the mortgagee had, before the bill was filed, conveyed to one of the other defendants, the decree should direct the amount due to be paid to such grantee instead of the mortgagee.—Emerson v. Atwater, 12 Mich. 314.

¶ 818. On a bill to redeem in a case where a controversy exists as to the amount due upon it, the mortgagee having proceeded to foreclose by advertisement, if the court allows the redemption the proper decree is that, unless the redemption money is paid within a specified time, the premises be sold as in foreclosure cases, and not that the title shall be absolute in the mortgagee.—Fosdick v. Van Husan, 21 Mich. 567.

¶ 819. On a bill to redeem from an irregular foreclosure, if the foreclosure proceedings are found invalid the decree should provide for redemption from the mortgage as an unforeclosed security, and not for redemption from the void sale, and in fixing the amount to be paid on such redemption it is erroneous to make a rest in computing interest at the date of the sale, and the decree should provide for a sale as on foreclosure to produce satisfaction in case of

failure to redeem.—Grover v. Fox, 36 Mich. 461.

¶ 820. The complainant procured the defendant to advance the purchase price of realty, the deed being taken in the name of the defendant, and an agreement made whereby the complainant was appointed agent for the property, with an option to purchase. The complainant later surrendered the property upon the unauthorized promise of an agent of the defendant to buy his equity. Held, upon action to redeem or establish a lien on the land, that the defendant should have an option of discharging complainant's claim or of an accounting and sale to satisfy defendant's lien, unless complainant shall redeem.—Leach v. Grube, 147 Mich. 348.

¶ 821. A dismissal of a bill to redeem from foreclosure, instead of decreeing redemption or sale in the alternative, makes the foreclosure absolute and bars the mortgagor's rights.—Goodenow v. Curtis, 33 Mich. 505; Adams v. Cameron, 40 Mich. 506.

¶ 822. Where, as preliminary to a bill to redeem from a prior mortgage, the amount necessary for redeeming from an irregular statutory foreclosure thereof was deposited with the register of deeds, the court on granting leave to redeem stopped interest on the deposit during the time it remained in the register's hands and while the adverse party refused to receive it and contested the redemption.—Sager v. Tupper, 35 Mich. 134.

¶ 823. The proper decree on a bill to cancel a past-due mortgage sought to be foreclosed is one for redemption if the mortgage is found to be valid.—Goodenow v. Curtis, 33 Mich. 505.

¶ 824. On a bill in effect a bill to redeem from a deed given as security, plaintiff, a wife in possession of the property occupied as a homestead, is entitled to retain possession pending a postponement to bring in as a party the husband, who was the nominal grantor; and it is error to decree possession to the grantee-mortgagee.—Sanborn v. Sanborn, 104 Mich. 180.

¶ 825. At a statutory foreclosure sale of two lots the mortgagee's agent having bought both honestly believing a house to be on each, whereas both houses are on one lot, which is worth $1,000, while the other is only worth $100, the mortgagor's subsequent grantee with notice and without consideration, who seeks to redeem the lot on which both houses stand, should not be permitted to do so; but the foreclosure sale should be set aside and the mortgage foreclosed in chancery.—Root v. King, 91 Mich. 488.

¶ 826. Where a second foreclosure by advertisement was begun pending a suit in equity to redeem from the mortgage and to enjoin a sale under a prior proceeding, it was held that as the court of equity could take complete jurisdiction upon the bill then pending, and as the dispute between the parties could only be adequately dealt with in equity, the new proceeding by advertisement was unnecessary and was taken subject to the final action of the court in the equity suit, and should be set aside.—Louder v. Burch, 47 Mich. 109.

§ 176. ——Accounting incident to redemption suit.

Accountability of mortgagee in possession in general, see ante § 75.

Bills for accounting, see post § 180.

¶ 827. In a suit to redeem from a mortgage where the mortgagee was in possession collecting rents, it was proper to direct an accounting, that the balance above expenses might be applied to the discharge of the mortgage.—Shouler v. Bonander, 80 Mich. 531.

¶ 828. Where an assignment of a land contract has been taken as a security, and the assignee, a mere mortgagee, has wrongly procured a deed and taken possession, redemption may be decreed against him on payment of the amount of his claim and reimbursing him for taxes he has paid, less the rental value of the premises during his unlawful occupancy.—Meigs v. McFarlan, 72 Mich. 194.

§ 177. ——Procedure on default of decreed terms of redemption.

¶ 829. The practice on bills to redeem is against strict foreclosure in case of default, and sale as on foreclosure is ordered should the redemption money not be paid as agreed.—Meigs v. McFarlan, 72 Mich. 194.

§ 178. Accountability of parties under the mortgage.

See also ante ¶ 784.

Accountability for land held under mortgage, see post § 179.

Accountability of mortgagee in possession, see ante § 75.

Accountability for land held under absolute deed, see post § 179.

¶ 830. A. assigned to B. a mortgage for $150 on lands of which A. owned the title and guaranteed the payment thereof. Subsequently B. agreed for the sum of $250, payable in instalments, to reassign the mortgage and to convey another parcel of the land. A. paid $200 on the contract and the last-mentioned parcel of land was by his consent sold by B. for $500. Held, that on receiving this sum B. was bound to reassign the mortgage and account for the balance not necessary to pay up the contract.—Wing v. Railey, 14 Mich. 83.

¶ 831. A mortgagee on statutory foreclosure sale bid in the premises for a sum which included the amount he was entitled to claim and also the greater part of an

illegal attorney's fee. Held, that the surplus could be recovered from him by the mortgagor who failed to redeem; it not having been paid over to the sheriff.—Kennedy v. Brown, 50 Mich. 336.

¶ 832. On adjusting the equities between a mortgagee and a subsequent purchaser the mortgagee should be allowed to charge a sum paid to relieve the land from an equity in favor of third persons to which the subsequent purchaser was subject.—Montague v. Haviland, 101 Mich. 80.

¶ 833. In an accounting by a mortgagee in possession of a hotel property he cannot be held for the larger rent that he might have realized had he permitted his lessee to keep a bar for the sale of liquors; prior to 1875 such sale would have been unlawful, and since 1875 no duty to lease property for saloon purposes is imposed by the law.—Curtiss v. Sheldon, 91 Mich. 390.

¶ 834. Defendant bought of complainant for $1,983 a note for $300 and another for $2,000, both secured by a mortgage on a farm. Complainant indorsed the notes. Defendant agreed to apply the proceeds of the $300 note, when paid, to the payment of a debt owed by complainant. Defendant foreclosed the mortgage, and bought the farm in without taking any steps to hold complainant on his indorsement. In a bill to compel defendant to account for proceeds sufficient to pay the $300 note, held, that defendant could not set up complainant's indorsement as a defense.—Holmes v. Huizenga, 160 Mich. 344.

¶ 835. Defendant bought of complainant for $1,983 a note for $300 and another for $2,000, both secured by a mortgage on a farm. Defendant agreed to apply the proceeds of the $300 note, when paid, to the payment of a debt owed by complainant. Defendant foreclosed the mortgage and bought the farm in. Held, defendant must account for a sufficient part of the proceeds to pay the $300 note.—Holmes v. Huizenga, 160 Mich. 344.

¶ 836. Complainant mortgaged his land to one Van Der Meulen, and transferred the promissory notes secured thereby, one for $300 and the other for $2,000, to defendant for $1,983. Defendant agreed to apply the proceeds from the $300 note, when paid, to a debt owed by complainant. The farm buildings were insured and complainant represented that the insurance protected the mortgage. No such clause was in the policy. The buildings burned, and the insurance was paid to Van Der Meulen. Defendant foreclosed the mortgage. Held, in a bill for accounting that defendant was not compelled to account for his failure to collect the insurance money.—Holmes v. Huizenga, 160 Mich. 344.

¶ 837. An assignee for creditors, whose assignors held land taken subject to a mortgage and situate in another state, cannot maintain a bill against the mortgagee to ascertain the amount due and to adjust the sum distributable; since, because there was no contract by the assignors to the mortgagee, the mortgage debt or the deficiency was not a debt owing by them. The proper practice for the assignee would be to make distribution without regard to the mortgage, and if sued to charge his costs incurred as an item in his accounting.—Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 838. Where possession of land has been taken under color of right, and honestly, as where one holds under an irregular statutory foreclosure which he believes to be regular, it seems that in a court of equity, on bill to redeem from a mortgage, the tenant need not account for actual or possible rents and profits on the footing of a wrongdoer.—Millard v. Truax, 73 Mich. 381.

¶ 839. On a bill to redeem from a mortgage where improvements were made by a grantee in the honest belief that he had acquired title, he was allowed, in an accounting with those who had equities against the land for the increased value of the land by reason of such improvements, against which were offset the rents and profits of the land, but not the increase of rental value due to the improvements.—DeMey v. Defer, 103 Mich. 239, writ of error dismissed in 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941.

¶ 840. A mortgagor, who gave a mortgage to secure the debt of a third person and to release property of such person from a claim and incumbrances, is entitled to accounting from the mortgagee, who misapplied the proceeds of the mortgage to the payment of other debts and suffered the incumbered property to be consumed by the application of it to the satisfaction of the specific debt.—Bullis v. State Bank of Deckerville, 143 Mich. 632.

¶ 841. Where a mortgagee has property in his hands for which he is accountable to the mortgagor, the latter, in suing him for refusing to discharge the mortgage, can insist that the property be accounted for upon it by way of determining whether it has not been satisfied.—Wilber v. Peirce, 56 Mich. 169.

§ 179. Accountability for land held under absolute deed.

¶ 842. If a creditor, who has taken a deed absolute as security, conveys the land to a bona fide purchaser, he must account to the debtor for its value at the time of the sale, whether he received that amount or not.—Enos v. Sutherland, 11 Mich. 538.

§ 180. Bills for accounting.

Accounting incident to redemption suit, see ante § 176.

Right to accounting under mortgage void in hands of illegal corporation, see Corporations ¶ 899.

Supplemental pleading to bring in payment after accounting bill filed, see Equity ¶ 565.

¶ 843. On a bill for an accounting, based on a claim that the mortgage was given to secure a specific debt and that the proceeds were diverted, the mortgagor's wife, who joined in the mortgage, and his mother, who released her life estate in the premises to make the mortgage realizable, are not necessary parties in the absence of any further specific allegations showing their rights and interests in the matter litigated.—Bullis v. State Bank of Deckerville, 143 Mich. 632.

¶ 844. On a bill for an accounting and to have a deed declared a mortgage and the amount due ascertained, where the presumption that the sum mentioned in the mortgage as the consideration is correctly stated has been overthrown by evidence, and it is claimed that the mortgage was not given to secure an ascertained indebtedness but to secure the payment of such a sum as should be later found due on an accounting, the burden of proof is upon the grantee, the grantor being dead.—Cady v. Burgess, 144 Mich. 523.

¶ 845. In an accounting, where the difference between the parties in a large part, if not wholly, is accounted for by the defendant's claim that a large interest rate was exacted and agreed upon by the complainant than that claimed by complainant, the account will not be disturbed after a great lapse of time.—Ruloff v. Hazen, 124 Mich. 570.

¶ 846. On a bill by the widow of an intestate and co-heirs against a mortgagee who had taken a deed for an accounting of transactions between the intestate and the mortgagee a decree for the complainants is reversed where, under the evidence and upon a fair accounting for the value of the land and charging the mortgages and proper payments against it there is nothing due complainants.—Morris v. Anderson, 142 Mich. 279.

¶ 847. In a bill to restrain the foreclosure of a renewal mortgage given in 1891 and for an accounting, where the complainant claimed that various mortgages prior to the last one had been paid, for which the defendant should account, and where the defendant was a man 82 years old and nearly blind, and the only memorandum he had throwing any light on the subject was an entry showing a balance on July 1, 1876, which with interest added would substantially represent the amount of a mortgage given in 1877, renewing one of 1869, and where both parties appealed from the decree, the finding of the lower court fixing the 1877 mortgage settlement as the starting point was sustained.—Ruloff v. Hazen, 124 Mich. 570.

¶ 848. In a suit to have a deed declared a mortgage and for an accounting where the defendants concede the land to the complainants upon payment of the amount due, a decree finding an amount due should deduct the amount of a mortgage placed on the land by the defendants.—Lindow v. Webber, 125 Mich. 641.

X. RECORDING AND MORTGAGE TAX.

§ 181. In general.

Mortgage taxes, see Taxes, XIV.

Necessity and sufficiency of recordation of mortgage, see Notice and Record of Title, II.

Presumption that tax stamps on mortgage specify amount to be secured, see ante ¶ 152.

Fees and tax for recording, see Notice and Record of Title.

Mortgage tax law, see Comp. L. 1915, §§ 4268-4277.

MORTMAIN to MOTHER.

Cross-References.

Mortmain—
- Nonexistence of statutory inhibition, see Corporations § 82.

Mother—
- Inheritance by or from, see Descent.
- Rights between parents and children, see Parent and Child; Divorce, IX.
- Status and relation toward illegitimate child, see Bastards.

MOTIONS AND ORDERS.

TREATS of motions in court requesting the action of the court incidentally to an action or to the exercise of its powers and of the orders made on motions. It excludes petitions in equity (see Equity) and does not treat of specific matters of practice such as Discontinuance; Directing Verdict; Trial, V, C (motion to strike); Pleading, IV (motions on the pleadings).

Analysis.

§ 1. The motion and notices.
§ 2. Proof of notice.
§ 3. Propriety and occasion of motion; matters triable.

§ 4. Hearing and trial; affidavits and evidence.
§ 5. Pleadings or record to show grounds.
§ 6. Orders, entry and effect.
§ 7. Renewal of motions.

Motions for particular orders or relief, see specific topics treating of the relief or the order in question, e. g., Continuances § 9; Discontinuance § 22; Defaults § 10; Venue, II (change).
Motions and interlocutory proceedings in criminal cases, see Indictment.
Motion practice in Supreme Court, see Appeal §§ 166-168.
Motions and orders for extension of time to make and settle bill of exceptions or case, see Appeal § 96.
Motions to quash and petitions to dissolve attachments, see Attachment § 117 et seq.
Application and motions on taxation of costs, see Costs §§ 70, 76, 131.
Motion for directed verdict, see Directing Verdict, II.
Motions to quash levy or writ of execution, see Executions § 117.

§ 1. The motion and notices.

Proof of notice and service thereof, see post § 2.
Hearing and scope thereof and admissibility and sufficiency of proofs, see post § 4.
Pleadings and copies as foundation of motion, see post § 5.
Contents and requisites of the order, see post § 6.
Parties entitled to notices in equity, see Equity § 59.
Persons to be notified of motion to set aside execution sale, see Executions § 103.
Motion as general appearance, see Appearance § 8.
Rule as to entitling papers in a case and as to indorsements, see 1916 C. C. Rule 3.
Motions required to be in writing, contents of motion, and signatures, see 1916 C. C. Rule 15, § 1.
Time for filing motions in circuit courts, see 1916 C. C. Rule 15, § 1.
Circuit rules for notice and time of notice, see 1916 C. C. Rule 15, § 2.
Defendants entitled to be notified and served, see 1916 C. C. Rule 13.
Practice in serving papers on attorneys for parties or on parties themselves, see 1916 C. C. Rules 5-10.
Notices of motions in Supreme Court, see Sup. Ct. Rules 28, 44.
Service of notices in Supreme Court, see Sup. Ct. Rules 21-26.

¶ 1. All notices in legal proceedings must be written.—Mason v. Kellogg, 38 Mich. 132.

¶ 2. Notices and other papers in legal proceedings (not affidavits) are sufficiently entitled if they do not mislead.—Whipple v. Williams, 1 Mich. 115.

¶ 3. A motion in the circuit court to dismiss an appeal from the decision and report of commissioners on a claim, grounded on the insufficiency of the certified copy of the order of the commissioners as required by Comp. L. 1897, § 9390, is a special motion within 1897 C. C. Rule 19, requiring four days' notice; and accordingly, both parties having announced "ready" on the docket as called, an oral motion made when the case is reached cannot be entertained against objection for want of the notice.—Pruden v. Clark, 148 Mich. 163.

¶ 4. The four days' notice required of special motions, under 1897 C. C. Rule 19, is not waived, where upon the making of an oral motion at the trial of an appeal from the allowance of a claim against an estate the appellant called attention of the court to the want of a notice and asked leave to rectify the defect in the record of the commissioners on which the motion was grounded.—Pruden v. Clark, 148 Mich. 163.

¶ 5. An application for a change of venue under Pub. Acts 1905, No. 309, comes within 1897 C. C. Rule 19, subd. b, providing that notices of the argument of certain motions shall be given and the length of time which should intervene, and will be denied where no notice of motion was given.—Peterson v. St. Clair Circuit Judge, 143 Mich. 79.

¶ 6. An order allowing a trustee in bankruptcy, substituted as complainant in a chancery suit, to sell a stock of goods claimed by a creditor of the bankrupt, granted without a hearing. Held, improvidently made.—Earl v. Jacobs, 177 Mich. 163.

¶ 7. On a motion to compel a complainant to elect between prosecuting his suit in the court of chancery and proceeding on a writ of error in the supreme court, it is not necessary to serve a copy of the proceedings in that court.—Webb v. Williams, W. 452.

¶ 8. A motion cannot properly be overruled because the grounds on which it is based are not stated, when they sufficiently appear from the record.—Shaw v. Hoffman, 21 Mich. 151.

¶ 9. Circuit Court Rule 35, providing that "a defendant who has appeared by notice of retainer or appearance shall be entitled to notice in advance of all future proceedings in the cause, although he may not have followed his appearance by plea or demurrer," defines the practice in the single case where a party has appeared, but has not pleaded, and does not require the giving

of notice in advance in any case where, under the old rules of practice, it was not necessary to apprise the opposite party in advance of the proceedings about to be taken. So held, where the principal defendant sought to have a writ of garnishment dismissed because he was not served in advance with notice of an intention to issue the same, or of the subsequent proceedings thereunder.—Ketcham v. Kent Circuit Judge, 115 Mich. 60.

¶ 10. Notice of a motion to expunge from a report of a grand jury matter reflecting on the integrity and conduct of the prosecuting attorney need not be served on the members of the jury.—Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200.

¶ 11. A special motion to quash a writ of attachment was noticed Sept. 14 for hearing on Sept. 18. Held sufficient, unless the motion had to be heard upon an issue framed.—Stringer v. Dean, 61 Mich. 196.

¶ 12. Where the jurat of an affidavit was omitted in a copy served with a notice of motion, held, that copies of affidavits so served must be true and complete.—Chesebro v. Chesebro, 21 Mich. 506.

¶ 13. Where the notice of a motion for a change of venue was dated March 5th, the motion dated March 7th, the affidavit upon which it is claimed the motion was based dated March 12th, but all were filed upon the 12th with the clerk, they may be properly treated as one proceeding.—Moreland v. Lenawee Circuit Judge, 144 Mich. 329.

§ 2. Proof of notice.

¶ 14. Against objection to hearing the cause for want of notice of argument an affidavit of the service of regular notice of hearing in the supreme court, and of the filing of proof thereof with the clerk, is sufficient evidence of those facts until denied by affidavit, though the proof so filed cannot now be found in the clerk's office.—In re Robinson's Estate, 6 Mich. 137.

¶ 15. Proof of service of a motion, as for leave to appeal, must be made by copy sworn to or officially certified; an affidavit of service showing the substance or purport of the notice is insufficient.—McCaslin v. Camp, 26 Mich. 390.

§ 3. Propriety and occasion of motion; matters triable.

[Note. The propriety and occasion for a motion as distinguished from some other form of appeal to the court is a question of procedural law, while the propriety and occasion for the relief sought by the motion is a question of remedial law or even of substantive law. Thus the question whether a continuance ought to be allowed, or a new trial granted, or the venue changed pertains to the specific topics, e. g., Continuances; New Trial; Venue. Only the practice on the motions in their general aspect is treated in Motions and Orders.

In addition to the foregoing it has been deemed necessary to treat in other specific topics the question whether motion, plea, or demurrer is the proper mode of attacking a pleading (see Pleading, III, IV; Equity, VII, C; Indictment, I, D) or motion, plea, petition, or bill in equity is proper in seeking for relief from a judgment or attacking a writ (see Judgments, V, VI; Equity, XI; Injunctions, I; Attachment § 109 et seq.; Executions § 117; Process, III). See further cross-references following.]

Propriety of motion as depending on stage of the case, see specific topic treating of the relief sought by the motion.

Necessity of presenting question by request or motion in order to call forth ruling for review on appeal or error, see Saving Questions.

Motion or ex parte procedure to take default, see Defaults § 10.

Motions as method of raising question of former adjudication, see Former Adjudication § 94.

Necessity of previous motion to fix duty compellable by mandamus, see Mandamus § 22.

Proper mode of taking objection to garnishment proceedings, motion or disclosure, see Garnishment § 95.

Rule for allowing stay to make motion, see 1916 C. C. Rule 16.

¶ 16. Legal claims cannot be finally determined on motion and affidavit.—Lyon v. Smith, 66 Mich. 676.

¶ 17. Generally, no matter can properly be tried upon mere affidavit, except such as depends upon the discretion of the court; and the supreme court cannot control such discretion. When an alleged compromise and payment are contested, a question is raised upon the rights of the parties which cannot properly be tried upon affidavits.—People ex rel. Parker v. Calhoun Circuit Judge, 24 Mich. 408.

¶ 18. It was error to dismiss a writ of replevin on motion based upon affidavits, on the grounds that the defendant was a deputy sheriff and the writ was directed to the sheriff and served by another deputy; that the writ was issued without authority of law, and that the service was unlawful and irregular and gave the court no jurisdiction; the questions sought to be determined were not properly triable on affidavits, but should have been in some way brought to trial on evidence upon an issue of fact. Whether they could have been tried under the general issue, or would more properly be the subject of a plea in abatement, quære.—Jewell v. Lamoreaux, 30 Mich. 155.

¶ 19. The charge that defendant secured by fraud the settlement and discontinuance

of the action against him is not triable upon affidavits on a motion to vacate it.—Voight Brewery Co. v. Wayne Circuit Judge, 103 Mich. 190.

§ 4. Hearing and trial; affidavits and evidence.

Necessity of notice and opportunity for hearing, see ante § 1.
Power of other judge to hear motion and make order in case, see Judges § 5.
Affidavits and entitling them in name of case, see Affidavits.
Issues triable on motion and affidavits to vacate discontinuance, see Discontinuance § 10.
Right to consider record of main case on motion for trial of garnishment, see Garnishment ¶ 207.
General law of evidence, see Evidence.
Docketing Supreme Court motions, see Sup. Ct. Rule 31.
Arguments on motions in Supreme Court, see Sup. Ct. Rule 27.
Briefs on motions in Supreme Court, see Sup. Ct. Rule 30.
Day for argument in circuit courts, see 1916 C. C. Rule 15, § 3.
Argument of motions in circuit courts, see 1916 C. C. Rule 15, § 4.
Mode of taking oral testimony on hearing of motions, see Jud. Act, chap. XVIII, § 8; Comp. L. 1915, § 12580.

¶ 20. If any part of the ground of a motion consists of facts not apparent on the face of the proceedings, an affidavit or other competent evidence of its existence must be presented.—Storey v. Child, 2 Mich. 107.

¶ 21. It is proper to permit affidavits to be read on the hearing of a motion for a receiver in a judgment creditor's suit to meet matters set up in avoidance in defendant's answer.—Rankin v. Rothschild, 78 Mich. 10.

§ 5. Pleadings or record to show grounds.

Necessity of statement of record grounds in motion, see ante ¶ 8.
Bill and answer as proofs on motion for interlocutory or provisional relief, see Equity § 164 et seq.; Injunctions §§ 118, 119, 132; Receivers, II.
Answer to bill as affidavit on motion for interlocutory relief, see also Equity ¶ 665.

¶ 22. On a motion based on the record and proceedings in the cause, whereby the facts appear as well as by a petition on which it is also based, the fact that the copy of the petition served omitted the jurat thereto is immaterial.—Graham v. Elmore, Harr. 265.

¶ 23. For the purposes of proof on a motion a copy of a petition served on the opposite party without the jurat attached is binding evidence, the motion being based thereon. —Graham v. Elmore, H. 265.

¶ 24. On a motion and rule to open a decree pro confesso taken against one of the defendants, the motion being based on the record and proceedings in the cause, the papers in the cause entitled in the names of the two defendants cannot be used in or with respect to a separate creditors' suit against the other defendant based on the decree, he also having moved to set it aside.—Graham v. Elmore, H. 265.

§ 6. Orders, entry and effect.

Right to renew motion after disposal of previous motion, see post § 7.
Orders incident to particular proceedings, see specific topic treating of the proceeding in question.
Necessity of entry of order overruling plea before proceeding in cause, see Equity § 60.
Finality of orders for purposes of appeal or error, see Appeal §§ 45-50.
Review of discretionary motions, see Appeal, XII, D.
Review of findings on which order is based, see Appeal § 461.
Presumption that affidavits referred to were sole basis of order, see Appeal § 373, ¶ 1573.
Mandamus to correct improper ruling on motion or to require hearing of motion and disposal of same, see Mandamus, II.
Mandamus to compel ruling on motion or to review order, see Mandamus, II.
Motion costs, see Costs §§ 28, 46, 58, 103, 121, 122.
General law of estoppel and bar by judgment, including effect of orders as res adjudicata, see Former Adjudication.
Interlocutory orders and rulings during trial as res adjudicata, see Former Adjudication § 16.
Conclusiveness of orders after judgment or decree, see Former Adjudication § 32.
Common rules and special rules defined and distinguished, see 1916 C. C. Rule 17, § 1.
Time for filing common and special rules, see 1916 C. C. Rule 17, § 1.
Practice as to entering and signature of orders by court or judge, see 1916 C. C. Rule 17, § 2.

¶ 25. It is no objection to an order that it purports to be made on the application of one who is not the solicitor in the cause. It is not necessary that an order should show on whose motion it is made.—Graham v. Elmore, H. 265.

¶ 26. An order nunc pro tunc will not relieve a proceeding from an irregularity in the matter of service.—Dewey v. Dewey, 151 Mich. 586.

¶ 27. A nunc pro tunc order cannot be had except for the purpose of supplying an omission or mistake in the record, or to secure the entry of an order which should have been made as a matter of course, and as a legal duty.—City of Grand Rapids v. Coit, 151 Mich. 109.

¶ 28. It is not within the purview of an order nunc pro tunc to operate ex post facto to give force to a chamber order which was void for want of jurisdiction, or to give validity to proofs taken under such void order, in a chancery cause without authority of law.—Eslow v. Township of Albion, 32 Mich. 193.

¶ 29. An order in part erroneous is not void so far as relates to matters properly contained in it.—Howard v. Palmer, W. 391.

¶ 30. A rule entered by consent will not be vacated unless fraud or misrepresentation is made to appear.—Hammond v. Place, H. 438.

¶ 31. Consent orders and decrees are binding upon the parties consenting, and cannot afterwards be controverted so long as they remain in force.—Russell v. White, 63 Mich. 409.

¶ 32. Parties to a suit for a mutual accounting construe their arrangement and relation when they unite in a consent order.—Wyatt v. Sweet, 48 Mich. 539.

¶ 33. Counsel should take notice of all orders and judgments filed during the term.—Wisconsin Chair Co. v. Charlevoix Circuit Judge, 189 Mich. 548.

¶ 34. Where in an action at law a party makes a motion for a new trial on the ground of newly-discovered evidence, coupled with a motion to amend his declaration so as to set out such evidence, and the motion for a new trial is denied while the other motion is not directly passed on, the denial of the motion for a new trial in effect denies the motion to amend where one of the grounds for the motion for a new trial sets up the facts which it is sought by the amendment to include in the declaration.—American Fidelity Co. v. R. L. Ginsburg Sons Co., 192 Mich. 693.

¶ 35. An order upon motion was presumed to have been made in and not out of court, although not entered on the daily journal, where the judge appended to the motion in the motion book the certificate "Granted, B. F. G., Circuit Judge."—Merrill v. Montgomery, 25 Mich. 73.

§ 7. Renewal of motions.

Estoppel or bar by order on motion, see Former Adjudication.

Statutory provisions as to new application after refusal, see Jud. Act, chap. II. §§ 104, 105; Comp. L. 1915, §§ 12173, 12174.

¶ 36. An ex parte order extending the time to settle a bill of exceptions or move for a new trial, though void as to settlement of the bill because offensive to 1897 Cir. Ct. Rule 47 in that it was more than 60 days, is valid as to time for moving for new trial; since the statutes and rule as to time for moving for new trial give five days but allow it to be done within "such further time as shall be allowed by the court," making no restriction on ex parte allowances.—Hayes v. Ionia Circuit Judge, 125 Mich. 277.

¶ 37. After a motion has been denied on its merits it should not be renewed, without leave of the court, on the same facts, or on any new facts which might have been included in the first motion. The party must present all of his case at once, whether he have several grounds or not.—Johnson v. Johnson, W. 309.

¶ 38. The action of the lower court in vacating a leave to amend a plea by adding thereto an affidavit denying execution of instruments sued on, such action being obedient to a mandamus, is not stare decisis on a second motion addressed to the proper judge, where the former order was unwarranted because the granting judge could not hear it, not having been the trial judge.—Portsmouth Savings Bank v. Gratiot Circuit Judge, 83 Mich. 646.

MOTIVE to MULTIPLICITY.

Cross-References.

Motive—
- Element in crime or tort, see Crimes; Homicide; Larceny; False Imprisonment; Fraud; Malicious Prosecution; Libel.
- Element aggravating damages, see Damages § 159 et seq.
- Evidence of motive in proof of other facts, see Indictment, VIII, B, 1; Evidence, III; and see specific topics Homicide; Larceny; False Imprisonment; Fraud; Malicious Prosecution; Libel.
- Facts admissible to prove motive, see Evidence § 102; Indictment § 181.
- Questions for jury and instructions in criminal cases, see Indictment, IX, D, E.
- As criterion for validity of statute, see Constitutional Law § 26.

Motor Vehicles—
- See Highways, XIV.
- Statutory liens for repairs, see Liens § 4.
- Bailments of, see Bailments.
- Constitutionality of regulations, see Constitutional Law.
- Power of municipalities to regulate, see Municipal Corporations, IX, C, D.
- Actionable injuries from use of motor vehicles in highways, see Highways, XIII.
- Use of highways by automotive vehicles, see Highways § 366.
- Master's liability for servant's negligent use, see Master and Servant, IV.
- Actions for injuries from automotive vehicles on highway, see Highways, XIII, B.

Injuries to pedestrian from automobile fire truck running off the street, see Highways § 237.
Killing person by reckless driving as manslaughter, see Homicide § 12.
Liability for injuries from defective highways and bridges, see Highways, XII, C.
Moving Buildings in Streets—
See Highways, XI.
Moving Pictures—
See generally Exhibitions and Shows.
Injunction to prevent infringement on pictorial rights, see Injunctions § 88.
Moving Trains—
Operation of trains in general, see Railroads, VIII.
Duty respecting passengers and freight, see Carriers.
Duty towards servants of railroad proprietor, see Master and Servant, III.
Boarding moving train as contributory negligence, see Carriers §§ 192, 199; Master and Servant, § 591.
Crossing in front of or by clambering over train as contributory negligence, see Railroads, VIII; Street Railways, IV.
Multifariousness of Bills—
See Equity §§ 73-76.
Multiplicity—
Ground for assumption of jurisdiction in equity, see Equity, III, C.
Ground for injunction, see Injunctions § 16.

MUNICIPAL AND PUBLIC BONDS.

TREATS of bonds issued by the political subdivisions of the state for the repayment of money.

Analysis.

I. Power to issue, and precedent acts and conditions.

§ 1. In general; power to issue.
§ 2. Limitations on amount.
§ 3. Special public utility bonds.
§ 4. Meetings, votes and records to authorize bonds.
§ 5. Precedent conditions.

II. Form, requisites, effect, issuance and sale.

§ 6. Form and requisites of bonds.
§ 7. Term and maturity.
§ 8. Bids and proposals for purchase.
§ 9. Issuance and delivery.
§ 10. Surrender and redelivery.
§ 11. Construction and effect of bonds and recitals.

III. Defective and illegal bonds, and rights of holders.

§ 12. Ultra vires or invalid bonds in general.
§ 13. Bona fide transfers and rights thereunder.
§ 14. ——Effect of recitals in bonds.
§ 15. ——Invalidities on face of bonds.
§ 16. ——Proof of bona fides and jury questions.
§ 17. Estoppel and ratification and election.
§ 18. Right to repayment of price of bonds.
§ 19. Injunctive or other relief.

IV. Indorsement and transfer.

§ 20. In general.

V. Sinking funds and payment.

§ 21. In general.

VI. Enforcement and collection.

§ 22. In general; proper remedy and procedure.
§ 23. Pleading and trial and judgment.

[Note. Because of the great variety of statutes, including the local acts, which bear on the subject of municipal and public bonds, it would be impossible to make references to the statutes without producing a confusing mass of them. It has not been attempted, but the reader is cautioned to examine the indices to the published statutes and particularly to search the charter of the city in question.]

I. POWER TO ISSUE, AND PRECEDENT ACTS AND CONDITIONS.

§ 1. In general; power to issue.

Limitation on amount, see post § 2.
Power respecting special utility bonds secured on the utility, see post § 3.
Meetings and votes to authorize issuance, see post § 4.
Conditions precedent, see post § 5.
Character, term, and maturity of bonds which may be issued and mode of sale and issuance, see post II.
Implications and presumptions as to negotiability of bonds, see also post § 6.
Power of municipality to borrow money, see Municipal Corporations § 121.
Scope of provisions open to regulation by freeholders' charters, see Municipal Corporations § 18.
Prohibition of railroad or other aid bonds, see Constitutional Law § 284.
Power of legislature over fiscal affairs of local government, see Constitutional Law §§ 70, 71.
Constitutional right to vote, see Constitutional Law § 252.

¶ 1. Neither townships nor their officers have any power to borrow money, or to issue bonds, except as that power is conferred by the legislature.—Bogart v. Township of Lamotte, 79 Mich. 294.

¶ 2. The municipal corporations of Michigan cannot exercise the power of taxation in aid of private corporations building or proposing to build railroads to be owned and controlled by their corporators; and bonds issued by way of such aid, being incipient steps leading to taxation, are unauthorized. People ex rel. Bay City v. State Treasurer, 23 Mich. 499.

¶ 3. The Act of March 22, 1869, relating to the issuance of railroad aid construction bonds by townships and municipalities, is an enabling act, confers a power not theretofore existent, and any departure from its requirements cannot be allowed.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 4. Railroad aid bonds issued by a township pursuant to the Michigan Act of March 22, 1869, are valid obligations of the township.—Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

¶ 5. Local Acts 1903, No. 534, authorizing the issuing of bonds for paving and providing for an assessment to pay interest and principal, necessarily implies in the township board the right to pledge the township credit.—Township of Grosse Pointe v. Finn, 134 Mich. 529.

¶ 6. Local Acts of 1889, No. 455 (Saginaw Charter § 25), authorizing city to issue bonds for $125,000 to construct bridges, was not impliedly repealed by Local Acts of 1891, p. 839, authorizing issue of bonds for $75,000 by city, but the later act is auxiliary to the charter and the issue of bonds for $200,000 is authorized.—Tillotson v. City of Saginaw, 94 Mich. 240.

¶ 7. A charter provision empowering the common council to "issue new bonds for the refundings of bonds and evidences of debt already issued," authorizes the issue of refunding bonds for railroad-aid indebtedness that has passed into judgment.—City of Port Huron v. McCall, 46 Mich. 565.

¶ 8. Under charter power "to issue new bonds for refunding evidences of indebtedness already issued" council may issue bonds to pay judgments.—City of Port Huron v. McCall, 46 Mich. 565.

¶ 9. A charter provision empowering a city to construct electric light works, limited by a proviso that the power shall not be construed to authorize the incurring of any indebtedness against the city unless by vote of the electors, does not, by implication, confer the power to borrow money and issue bonds for such purpose; especially if, in other sections of the charter containing provisions for issuing bonds, such powers are expressly conferred under carefully-defined limitations as to the manner in which they shall be exercised.—Farr v. City of Grand Rapids, 112 Mich. 99.

¶ 10. The City of Detroit cannot issue bonds for a hospital site and building under charter authority to issue public building bonds.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 11. Bonds for a garbage reduction plant cannot be issued by the City of Detroit un-

der a charter provision authorizing the issuance of public building bonds.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 12. Bonds cannot be issued by the City of Detroit for a hospital site and building until authorized by a charter amendment.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 13. The City of Detroit cannot issue bonds for a garbage reduction plant until authorized to do so by a charter amendment.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 14. Pub. Acts 1915, No. 150, providing that any school district within the state whose population shall exceed 15,000 and be less than 100,000, shall have power and authority to borrow money and issue bonds to an amount not greater than 5 per cent of the total assessed valuation of such district and requiring a submission to the electors of such district of questions relative to such borrowing of money and issuing bonds therefor, precludes a city of such population from exercising the right to borrow money and issue bonds of such district.—MacQueen v. Port Huron City Commission, 194 Mich. 328.

¶ 14a. While the same strictness is not, perhaps, required in construing statutes authorizing the issue of bonds for paving, erection of markets and the like, as in those authorizing bonds for gifts or grants to railroads and similar purposes, still the general rule is that they must be strictly construed.—Stebbins v. Grand Rapids Superior Court Judge, 108 Mich. 693.

§ 2. Limitations on amount.

Limitations on term and maturity, see post § 7.

Bonds reckoned as part of outstanding debt for purpose of ascertaining amount of indebtedness, see also Municipal Corporations ¶ 522.

Special utility bonds as included or excluded from debt limit, see post § 3.

Rights of holders where limit is exceeded, see post III.

General limitations on making of contracts and on amount of indebtedness which may be incurred, see Municipal Corporations § 112 et seq.; Counties § 22 et seq.; Townships, III.

Municipal purposes as excluding school bonds, see Municipal Corporations ¶ 599.

Constitutional power to issue special public utility bonds beyond general bond limit, see Const. art. VIII, § 24.

¶ 15. Section 5e of the Home Rule Act, as amended by Act No. 203, Pub. Acts 1911, § 5442n, How. St., 2nd Ed., restricting the bonding limit of cities, except as to issues authorized by a three-fifth majority of the electors, is unconstitutional.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 16. Section 7 of chapter 11 of the charter of the City of Detroit, increasing the bonding limit of the city from two to four per cent of its assessed valuation, does not contravene the Constitution or any general law of the state.—Common Council of City of Detroit v. Engel, 187 Mich. 88.

¶ 17. Bonds for public lighting cannot in the absence of a charter amendment, be issued by the City of Detroit in excess of the limit fixed for such purpose by its charter. Common Council of City of Detroit v. Engel, 187 Mich. 88.

§ 3. Special public utility bonds.

General law of elections of voters, see Elections.

¶ 18. Under P. A. 1913, Act No. 5, § 4, subd. b, a municipality after proper vote may bond itself for but two per cent of its assessed valuation for the purpose of acquiring public utilities, so that the limit of the total bonded indebtedness may be ten per cent of its assessed valuation. Attorney General ex rel. Barbour v. Lindsay, 178 Mich. 524.

¶ 19. Under the Michigan Constitution of 1909 a city may issue both bonds which create a general indebtedness and those which create no indebtedness but are based on the security of the general utility alone.—Attorney General ex rel. Hudson v. Common Council City of Detroit, 164 Mich. 369.

¶ 20. A city may under §§ 23 and 24 of the Constitution of 1909, issue bonds to acquire a public utility in excess of the limit of general indebtedness prescribed by its charter, so long as such bonds are issued on the security of the general utility alone and do not create a general indebtedness.—Attorney General ex rel. Hudson v. Common Council City of Detroit, 164 Mich. 369.

¶ 21. Act No. 279, Pub. Acts 1909, which empowers a city to issue special nonliability bonds based on the security of the public utility alone, after the city has created a general bonded indebtedness up to the limit of its borrowing power, is constitutional.—Attorney General ex rel. Hudson v. Common Council City of Detroit, 164 Mich. 369.

§ 4. Meetings, votes and records to authorize bonds.

Departure from authorized terms as voted, see post § 7, ¶ 40.

Vote to authorize creation of sinking fund, see post ¶ 111.

Order of business of councils in considering bond issues, see also Municipal Corporations ¶¶ 145, 146.

Effect of later resolution to rescind earlier, see also Municipal Corporations § 67.

¶ 22. Under a Muskegon Charter, tit. 9, §§ 5, 12 (Local Acts 1889, No. 304), prohibit-

ing the council from raising money by tax or loan in any one year in an amount exceeding three per cent of the assessed valuation unless authorized by a majority vote of the electors, the council may issue bonds without such vote where the total amount of the bonds and of the general tax levy for the year is less than three per cent of such valuation.—Common Council of City of Muskegon v. Gow, 94 Mich. 453.

¶ 23. Resolutions of common council relating to issue of bonds were sustained notwithstanding seeming inconsistencies arising from an attempt to follow language of two different statutes.—Tillotson v. City of Saginaw, 94 Mich. 240.

¶ 24. Local Acts of 1893, No. 235, entitled an act to reincorporate the city of Ironwood and to add territory thereto, and providing in chap. 9, § 9, for the borrowing of money for public improvements and the issue of bonds as evidence of indebtedness signed "by the mayor and city clerk and countersigned by the controller" and for the submission of the question of making any loan "to the qualified voters of said city at some annual or special elections called for that purpose in the same manner as other special elections are called" in the act, and that, before any loan shall be voted upon the clerk shall post specified notices in at least three public places, and that the council may provide by ordinance the manner of voting upon any questions of borrowing money but the votes should be canvassed as provided by the act, and construed, although going into effect on the day that it was passed, and although continuing the old organization until qualifications of new officers elected under the statute, not to warrant the submission by the old council of the question of incurring a bonded indebtedness at the first election specified under the act, at which time the old council ceased to exist, since it could not have been the intention of the legislature that the old council should have the right to call the election and confine the powers of the new council to the issuance of the bonds voted for.—Manhattan Co. v. City of Ironwood, 74 Fed. 535.

¶ 25. Where a statute authorizing a vote in a certain village upon a bonding proposition did not prescribe the notice to be given, the notice prescribed for general elections by the general act for the incorporation of villages was held sufficient.—Village of Highland Park v. McAlpine, 117 Mich. 666.

¶ 26. Upon a village election held to determine whether improvement bonds should be issued, ballots containing distinguishing marks are absolutely void, and cannot be used in determining whether or not the proposition was carried by the required two-thirds of the votes cast.—Wightman v. Village of Tecumseh, 157 Mich. 326.

¶ 27. Failure of the ballot used at a village election for the purpose of authorizing a bond issue to construct a sewer system to state the purpose of the vote does not invalidate the election, where a notice of the time, place, and purpose thereof was published as required by resolution of the council, the proposed loan had been fully discussed prior to the election, and there was no possibility or claim that any voter was misled or prejudiced by the omission.—Wightman v. Village of Tecumseh, 157 Mich. 326.

¶ 28. Where a proposition to bond a city is submitted to the electors at a general election, under a charter providing for an issue of bonds when "the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose of voting upon such question," a majority of all the votes cast at the election, and not merely a majority of those cast on the bonding question, is essential to authorize the issue of the bonds.—Stebbins v. Grand Rapids Superior Court Judge, 108 Mich. 693.

¶ 29. Township bonds, if legally issued, are fixed charges against the township, and the record of the meeting of the township board at which money is voted to be raised to pay such bonds need not show the neglect or refusal of the electors to vote money for that purpose.—Newaygo County Mfg. Co. v. Echtinaw, 81 Mich. 416.

¶ 30. How. St. §§ 739, 740, 748, imposing the duty on the township clerk to keep the record of the proceedings of the township board, and also of the township meetings, does not make the recording of proceedings a condition precedent to their validity, and, under such statutes, creditors of a township holding its bonds cannot be defeated because of the neglect of the clerk properly to record the evidence of the orders and resolutions constituting the contract on the faith of which they have rendered service or advanced money to the township.—Rondot v. Rogers Tp., 99 Fed. 202.

¶ 30a. How. St. § 492, as to form of ballots in voting upon proposed loan for purchase of site and erection of county buildings is directory in so far as the precise words "For the Loan" and "Against the Loan" are prescribed.—Thomas v. Kent Circuit Judge, 116 Mich. 106.

§ 5. Precedent conditions.

Effect of nonperformance as defense to innocent purchasers, see post ¶¶ 77, 78.
Making provision for sinking fund, see post § 21.
Necessary allegations as to performance of conditions, see post § 23.
Appropriations and provisions for cost of local improvements, see Local Improvements, II.

¶ 31. The issuance of bonds by the common council of the city of Detroit to raise money to pay for lands purchased or condemned by the commissioners of parks and boulevards under Local Acts of 1889, No. 388, § 15, need not be approved of by the board of estimates of the city.—Commissioners of Parks of Detroit v. Rush, 84 Mich. 154.

¶ 32. Under Laws 1873, Act No. 224, abolishing citizens' meetings and substituting in their place a board of estimates, it was held essential that the question of the purchase of lands for a park, and of the issue of park bonds under the legislation relating to the Detroit park, should be submitted to and receive the approval of the board of estimates as well as the common council, and that when the council authorized the issue of the bonds without the submission of the question to the board of estimates, the mayor was justified in declining to execute the bonds, since their issue was not lawfully authorized.—People ex rel. Board of Park Com'rs v. City of Detroit, 29 Mich. 343.

¶ 33. Conceding that consent to the building of it as well as the approval by the secretary of war of the location and plans of a bridge to be constructed by a city over a navigable river is a condition precedent to the issue by the city of bonds to raise money for building such bridge, correspondence with him indicating his approval if the city would assent to a condition imposed by him that a government engineer should superintend the construction of the bridge and tendering a formal written approval lacking only the respective signatures was held sufficient to warrant such issue.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 34. Where an issue of bonds is authorized for the purpose of raising money with which to construct a bridge and to procure the right of way therefor, it is no objection to the issue of such bonds that the right of way has not been obtained.—Naegely v. City of Saginaw, 101 Mich. 532.

II. FORM, REQUISITES, EFFECT, ISSUANCE AND SALE.

General law of bonds, see Bonds.

§ 6. Form and requisites of bonds.

Recital as to character of bond and fund charged, see also post ¶ 60.

Addition of judgments against city to next tax levy, see Municipal Corporations § 138.

¶ 35. The word "bond" imports a seal, and, when used in a statute authorizing the issue by a municipal corporation of written obligations negotiable in character, means specialties or writings under seal.—Rondot v. Rogers Tp., 99 Fed. 202.

¶ 36. Officers issuing bonds as evidence of township indebtedness under Pub. Acts 1867, No. 98, relating to the authorizing of townships to raise money by tax, or to borrow money, to build or repair bridges, must be presumed to have intended to issue sealed instruments.—Rondot v. Rogers Tp., 99 Fed. 202.

¶ 37. It will be deemed that negotiable bonds were intended when a statute authorizes the issuing of bonds running for a long period of time, and bearing interest, and it appears on the face of the act that the bonds may be put upon the market and sold.—Ashley v. Board of Supervisors of Presque Isle Co., 60 Fed. 55.

¶ 38. Under How. St. § 2717, authorizing a city to issue "bonds" for loans negotiable bonds may be issued.—City of Cadillac v. Woonsocket Inst. for Savings, 58 Fed. 935.

§ 7. Term and maturity.

¶ 39. How. St. § 483, subd. 8, which provides that the several boards of supervisors shall have power to provide for the payment of any loan made by them by a tax upon the county, which shall in all cases be within 15 years from the date of such loan, limits the issue of all county bonds to 15 years.—McMullen v. Ingham Circuit Judge, 102 Mich. 608; Alpena County Sup'rs v. Simmons, 104 Mich. 305.

¶ 40. A board of supervisors adopted a resolution authorizing the borrowing of $35,000 upon the credit of the county, for the purpose of erecting a court-house, and the issue of the bonds of the county for that sum, payable in ten instalments, within 30 years of the date of their issue, the first instalment to be made payable 10 years from said date. The loan was adopted by the electors, and the board of supervisors passed a resolution authorizing the issue of the bonds, to be payable in 15 years from the date of issue. Held, that the voters were clearly given to understand that the entire loan would not be payable in 15 years, but would be extended over a period of 30 years; that no such loan is authorized by law, and it was therefore void; but that, if the resolution were valid, the board disregarded the instructions of the electors, by making the entire amount payable at one time, and that for this reason the proposed issue of bonds is void.—McMullen v. Ingham Circuit Judge, 102 Mich. 608.

¶ 41. Laws 1893, Act No. 149, which provides for a county road system, and authorizes the issue of bonds upon a vote of the electors of the county to raise money to be expended in the construction and maintenance of such roads, is silent as to the time of the maturity of said bonds, which is therefore limited by How. St. § 483, subd. 8, a general law, to 15 years.—Alpena County Sup'rs v. Simmons, 104 Mich. 305.

§ 8. Bids and proposals for purchase.

Issuance and delivery of bonds proper, see post § 9.

Proposals for contracts generally with the public, see Public Contracts, II.

¶ 42. Where a bid for the issuance of county bonds is not conditioned on the approval by the bidder's attorney of the validity of the issue, the bidder cannot afterwards assert that such condition entered into his bid.—Finn v. Board Sup'rs Bay Co., 167 Mich. 166.

¶ 43. A transaction between a city and a bank for the disposal of park bonds whereby the bank agrees for a specific sum to take such bonds at par with accrued interest from date of bonds up to and including a specified date, less a specified commission, construed as an absolute sale and purchase of the bonds.—City of Bay City v. Lumbermen's State Bank, 193 Mich. 533.

¶ 44. An objection that a direction by the common council of a city to the mayor, controller, and clerk to accept bids and make sale of bonds is an illegal delegation of power is sufficiently answered by the fact that, within two days after a bill was filed by the objectors to restrain the issue of the bonds, the officers named reported their action to the council, and the same was ratified and confirmed by that body.—Naegely v. City of Saginaw, 101 Mich. 532.

§ 9. Issuance and delivery.

Surrender and redelivery of improperly delivered or issued bonds, see post § 10.

Authority of officers to sign or deliver bonds, see Municipal Corporations ¶ 823.

Propriety and conditions for delivery of railroad aid bonds, see Railroads, V.

Right of consolidated corporation to have bonds voted for constituent corporation, see Railroads, V.

Execution and delivery of instruments in general, see Execution of Instruments.

Parol proof of conditional execution, see Evidence § 157.

Liability of school district or of purchaser for loss due to failure of depositary banks holding bonds and purchase price for them, see Schools, IV.

¶ 45. There is no duty on the part of a township to execute and deliver to a railroad corporation aid bonds voted under a statute which is unconstitutional, and accordingly mandamus will not issue to compel delivery.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452.

¶ 46. Under the act of March 22, 1869, providing that a municipality voting aid to any railroad "shall, within sixty days after the question of aid is determined, issue its coupon bonds for the amount so determined," bonds issued after the sixty days and antedated are not invalid; the statute is simply permissive.—Township of Chickaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 600.

¶ 47. A village council authorized the president and clerk to sign water-works bonds, but gave no authority to deliver them. Held, that a delivery by the president would not entitle a holder to recover.—Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670.

¶ 48. Delivery of municipal bonds by an officer whose authority is limited to signing them does not authorize a holder to recover. —Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670.

¶ 49. The word "executed" in the statute of March 22, 1869, authorizing townships, etc., to issue railroad-aid bonds does not import the final delivery of such bonds; that is directed to be done by the state treasurer. —Young v. Clarendon T'p, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 50. Township railroad aid construction bonds issued by a township under the act of March 22, 1869, providing that such bonds, if issued by the township, shall be "executed" by the supervisor and clerk thereof and the seal affixed, if one is possessed by the township; that such bonds, when issued, shall be "delivered" to the state treasurer, who shall hold them as trustee for the township and railroad as provided by the act; that the treasurer, upon receipt of the bonds, shall register them and keep them safely; that, upon certificate from the governor that the railroad company has complied with the provisions of the act, the bonds shall be indorsed and delivered to the company, and the past due coupons returned to the township, and that if any bonds so deposited with the treasurer shall not, within three years from the time when the same were received by him, be demanded in compliance with the terms of the act, the same shall be cancelled and returned to the proper officers of the township, were not operative where they were not indorsed and delivered to the company by the treasurer, the "delivery" of the bonds giving effect to them as valid instruments being a delivery by the state treasurer and not a delivery by the township officers to the state treasurer.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 51. Under the railroad aid act of March 22, 1869, the governor's certificate was a condition precedent to the state treasurer's power to deliver such bonds to the company, so that title to such bonds did not vest in the company merely by delivering them to the treasurer and by the company's compliance with the provisions of the act. —Young v. Clarendon Tp., 132 U. S. 340,

33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 52. Township bonds delivered to the state treasurer under the railroad-aid act of March 22, 1869, as trustee for the township and for the railroad company for which they were issued, but which were never indorsed and delivered by him to the company as required by the statute, never became operative.—Young v. Clarendon T'p, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 53. The provision in the act of March 22, 1869, relating to the issuance of township railroad aid construction bonds, that if any township votes aid to railroads, which are authorized, it shall, within sixty days after the question of aid is determined by vote of the electors, issue its coupon bonds for the amount so determined to be granted, gives the township the whole of the sixty days in which to issue the bonds, but it does not prevent the issuance of valid bonds after such period, and the mere antedating of the bonds does not invalidate them.—Township of Cluckaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 620.

¶ 54. A village council entered into a contract with S to give him certain bonds as a bonus for establishing a factory. The issue of bonds for a public park was submitted to the electors and carried and the bonds were issued and deposited with a bank in escrow to be delivered to S upon the completion of his contract. The bonds were delivered to S who negotiated them to plaintiff. Held that there was a sufficient delivery.—Schmid v. Village of Frankfort, 131 Mich. 197.

¶ 55. Where a village council agreed to give S village bonds as a bonus for constructing a factory, and then submitted to the electors a proposition to issue park bonds which was carried and park bonds issued and delivered in escow for S in pursuance of the agreement, no other bonds being authorized or talked of, it cannot be set up that the council had not authorized the deposit of park bonds but of other bonds.—Schmid v. Village of Frankfort, 131 Mich. 197.

¶ 56. A prima facie delivery of a village bond is made out by evidence that it was authorized by the trustees, that it was given to the plaintiff's vendor and a part payment on the bond made subsequently by the village.—Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 57. Where a statute under which a city is authorized to secure a loan for park purposes by bonds of the city provides for the purchase at such rate of interest, not exceeding a specified rate per annum, as the common council shall determine, and that no sale of such bonds shall be negotiated at less than face value at par, the sale of such bonds to a bank for their face value and a subsequent payment of a certain sum out of the park fund as commission constitutes a discount, is illegal, and may be recovered back.—City of Bay City v. Lumbermen's State Bank, 193 Mich. 533.

§ 10. Surrender and redelivery.

Mandamus to compel delivery back to municipality for cancellation, see Mandamus ¶ 505.

Mandamus to redeliver void bonds to issuing municipality, see Mandamus ¶¶ 525a, 525b.

¶ 58. It is the duty of the state treasurer, having possession of railroad aid bonds of a city or township voted and executed under the unconstitutional act of 1869 (Laws 1869, Act No. 45), to redeliver them to the city authorities on demand.—People ex rel. Bay City v. State Treasurer, 23 Mich. 499; People ex rel. La Grange Township v. State Treasurer, 24 Mich. 468.

§ 11. Construction and effect of bonds and recitals.

Defective bonds and illegal bonds and rights of holders of them, see post III.

Rights and liabilities consequent on annexation or division of territory after issuance of bonds, see Counties § 30; Municipal Corporations § 9; Townships, III.

Railroad aid bonds, see also Railroads, V.

¶ 59. A bond is the obligation of the village rather than the trustees of the village which is entitled "Public Improvements Bond of the Village of Mecosta" and refers to the act under which it purports to issue showing that it is to be paid out of funds raised by taxation on village property although it recites that the board of trustees acknowledges itself indebted.—Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 60. The statement on a municipal bond that it is a refunding bond constitutes a compliance with How. St. § 2717, requiring each bond to "show upon its face the class of indebtedness to which it belongs and from what fund it is payable."—City of Cadillac v. Woonsocket Inst. for Savings, 58 Fed. 935.

¶ 61. The security of county bonds is not affected by the fact that by a local act an attempt has been made to segregate a township from the county and add it to another county.—Finn v. Board Sup'rs Bay Co., 167 Mich. 166.

III. DEFECTIVE AND ILLEGAL BONDS, AND RIGHTS OF HOLDERS.

§ 12. Ultra vires or invalid bonds in general.

Bona fide takers and their rights, see post § 13 et seq.

Rights in bonds issued by irregularly formed county, see Counties ¶ 16.

¶ 62. A township board having taken up township orders, payable on presentation, and issued in lieu thereof a seven-year bond, drawing ten per cent interest, which action was not authorized by any existing statute, the principle of ultra vires applies.—Bogart v. Township of Lamotte, 79 Mich. 294.

¶ 63. Bonds issued by a village incorporated under the general law of this state in excess of the amount authorized by such incorporation act are issued without authority of law. So held, where bonds to the amount of $650 recited that they were issued in conformity with the general laws of the state under which the village was incorporated and were authorized by the board of trustees at a regular meeting thereof on a designated day for the purpose of purchasing certain fire apparatus, and were payable out of the general funds of the village. The bonds exceeded in amount the sum for which the council could incur indebtedness without a vote of the electors, which was not had, and were also in excess of the indebtedness which the electors could authorize the council to incur.—Spitzer v. Village of Blanchard, 82 Mich. 234.

¶ 64. The rights of the owner of municipal bonds issued in aid of the construction of a railroad under the general statute of March 22, 1869, relating to the giving of aid to a railroad by any city or township by vote of its electors by "loan or donation, with or without conditions," are to be determined under decisions rendered prior to the time that the railroad company, to whose rights such owner of bonds had succeeded, had earned the bonds under contract with the city in conformity with the statute.—Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008.

§ 13. Bona fide transfers and rights thereunder.

Sufficiency of delivery of bonds to give them inception, see ante § 9.

Necessity that bonds show authority on their faces, see also post § 15.

Proofs of good faith and questions for the jury, see post § 16.

Established precedents as fixing rights of parties, see also Courts § 19, ¶ 48.

General law of negotiable instruments in respect to bona fide holders, see Negotiable Instruments, XIII.

¶ 65. A bona fide holder of village bonds issued under a special statute authorizing their issue for the purpose of public improvements, and who had no notice that they were intended to aid in the construction of a railroad, may recover thereon.—Common Council of Village of Cedar Springs v. Schlich, 81 Mich. 405.

¶ 66. The purchaser of a school-district bond need look no further back than its face for the facts which show a compliance with the statute under which it is issued.—Gibbs v. Colfax Township Frac. School District No. 10, 88 Mich. 334.

¶ 67. A bank advancing money on municipal bonds payable to bearer which were stolen from the rightful holder by the person transferring same to the bank, held under evidence to have obtained same in due course.—City of Adrian v. Whitney Central Nat. Bank, 180 Mich. 171.

¶ 68. The act of March 22, 1869, authorizing the pledging of municipal aid to railroad companies has been sustained by the federal courts as to bonds issued before it was declared invalid, such bonds having come into the hands of bona fide holders.—Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227, affirming 1 Flipp. 120, Fed. Cas. No. 13735; Taylor v. City of Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

¶ 69. The federal courts hold that statutes authorizing municipal aid to railroads are constitutional, and those courts permit recovery upon bonds issued prior to the decision in People v. Salem, 20 Mich. 452, which denied power to issue them.—Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227, affirming 1 Flipp. 120, Fed. Cas. No. 13735; Taylor v. City of Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

¶ 70. One to whom negotiable bonds are transferred by indorsement in payment of antecedent debts is a holder for value.—Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

¶ 71. Purchasers of bonds cannot be considered bona fide holders if after their purchase an action is brought upon the bonds and judgment recovered by the payees named in the coupons.—Hale v. Baldwin Tp. Board, 49 Mich. 270.

¶ 72. All persons dealing with municipal bonds are bound to take notice of the provisions of the statutes under which such bonds purport to have been issued.—Manhattan Co. v. City of Ironwood, 74 Fed. 535.

¶ 73. The rights of the holder of municipal bonds issued in aid of a railroad are not determined by the law as expounded by the supreme court of the state at the time he received them; even if not a holder for value, he is entitled to whatever rights the railroad company had by virtue of its contract with the municipality.—Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

¶ 74. The rights of the holder of a municipal bond payable to bearer claiming to hold same in due course are governed by the Negotiable Instruments Act, Pub. Acts 1905, No. 265, How. Ann. St., 2nd Ed., §§ 2672-263.—City of Adrian v. Whitney Central Nat. Bank, 180 Mich. 171.

¶ 75. Municipal bonds, valid on their face, in the hands of innocent holders without notice, are collectible, and the city must pay them; even though such bonds were issued as part of a conspiracy on the part of officials of such municipality to use the money so raised illegally.—Bates v. City of Hastings, 145 Mich. 574.

¶ 76. A holder for value of railroad aid bonds issued by a township is entitled to whatever rights the railroad company had by virtue of its contract with the township. —Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

§ 14. ——Effect of recitals in bonds.

Face of bond as protection to taker, see also ante ¶ 66.

Duty to take notice of statutory limitations, see also ante ¶ 72.

¶ 77. If the statute under which a village is incorporated creates conditions precedent upon which the right to issue bonds depends, and these conditions are not complied with —there being no board or officer to determine that they were—there can be no innocent holders of such bond, even though they contain a recital that they have been issued in accordance with law.—Spitzer v. Village of Blanchard, 82 Mich. 234.

¶ 78. Where there is no authority in a village council or in its president and clerk to issue the bonds of the village unless first authorized to do so by a vote of the electors, and the incorporation act does not make the president and clerk the judges to determine and certify to the fact of such election, a recital in bonds, signed by such president and clerk, that they had been issued in accordance with law, binds no one dealing with the bonds.—Spitzer v. Village of Blanchard, 82 Mich. 234.

¶ 79. In assumpsit on municipal bonds, on their face devoted to a public purpose, it is immaterial whether the factory for which they were in fact issued, was in operation at the time of their delivery.—Schmid v. Village of Frankfort, 134 Mich. 619.

§ 15. ——Invalidities on face of bonds.

Duty to take notice of statutory limitations and conditions, see ante ¶ 72.

¶ 80. The doctrine of bona fide holding does not apply to a township bond that does not show on its face any authority to issue it, and such a bond is taken subject to the defense of entire illegality.—Bogart v. Township of Lamotte, 79 Mich. 294.

¶ 81. A township is estopped as against a bona fide purchaser of bonds to object that meetings of the electors for the purpose of voting on a bond issue for bridge building purposes was not properly called when the bonds recite that they were issued in conformity with Pub. Acts 1867, No. 98, and were authorized by the legal vote of the qualified voters of the township at a special meeting held on a certain date, and the statute requires the issuance of the bonds by the township board.—Rondot v. Rogers Tp., 99 Fed. 202.

¶ 82. A village bond properly signed and purporting to have been issued under authority of the statute designated and summarized and for the lawful purpose therein set out is good in the hands of a bona fide purchaser although in fact issued for an unlawful purpose other than the one set out. —Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 83. Where a township bond does not show, upon its face, any authority upon the part of the township to issue it, the doctrine of bona fide holder does not apply, but the holder takes it subject to the defense of entire illegality.—Bogart v. Township of Lamotte, 79 Mich. 294.

§ 16. ——Proof of bona fides and jury questions.

¶ 84. The burden of proof is on the plaintiff to show bona fides in the purchase of a village bond regular on its face but in fact issued for an unauthorized purpose.—Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 85. A bona fide purchase of a village bond good on its face but void because issued for an unauthorized purpose, is not made out by evidence tending to show that the bond was taken by a bank in the course of business where the employee who took it did not testify; as want of notice is an affirmative fact to be shown by the plaintiff. —Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 86. The fact that the purchasers of municipal bonds took a guaranty from the sellers does not indicate lack of bona fides.—Schmid v. Village of Frankfort, 134 Mich. 619.

¶ 87. It is incumbent on the holder of municipal bonds that are concededly invalid otherwise to show that he is a bona fide holder for value.—Schmid v. Village of Frankfort, 141 Mich. 291.

¶ 88. It was a question for the jury whether a purchase of bonds was bona fide where it appeared that the bargain was made for them on the 5th of June when some money was paid, that two days later the balance except $500 was paid, and that it was paid on the 22d, and where defendant village's claim was that the purchase was made on the 22d rather than the 5th, and there was evidence tending to show that letters passed evincing the fact that the bonds were bonus bonds, and that a guaranty of the payment of the bonds was delivered at the time of final payment on the 22d and that certain copies of records certified under date of June 18th was also delivered after the 5th and probably after the 18th, if not on the 22d, plaintiff offering evidence that the guaranty was promised on the 5th and executed on the 22d and that the perfection of the papers was promised then; since on the whole the taking of the guaranty and the letters, if received, might discredit plaintiff's claim that the sale was on the 5th.—Schmid v. Village of Frankfort, 141 Mich. 291.

¶ 89. On the question whether bonds were purchased in good faith from a holder of them, it is competent for such holder to testify that he received a letter from plaintiff asking if he had any Frankfort bonds to sell, that he had lost it, that he replied in the affirmative stating that they were bonus bonds for building a factory, and that the reply was properly addressed and mailed to plaintiff.—Schmid v. Village of Frankfort, 141 Mich. 291.

¶ 90. Testimony of the owner of a bonus bond that he sold it to the manager of the bank through which title came to plaintiff, and that he did not impart his knowledge concerning the character of the bond is sufficient to go to the jury as a prima facie case of bona fide purchase by the bank.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 91. On the question whether a purchase of a village bond was bona fide it is admissible to show either that the sale was a simulated one or to discredit the witness who testified that it was made by showing that he said or admitted that the sale was simulated.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 92. Admissions of the original owner of a municipal bond, void because given as a bonus, cannot impair the right of a subsequent bona fide purchaser thereof.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 93. The fact, that one of the plaintiffs suing on a village bond given as a bonus without lawful consideration in aid of a mill had signed a bond to secure a contract to build the mill, is no evidence that a bank of which such person was a director had notice that the bond was invalid, there being an absence of evidence that he then was acting for the bank or that he knew that the authorities of the obligor village had anything to do with the transaction.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 94. The test for notice from facts challenging inquiry is whether it would be bad faith not to investigate, and not whether the fact "would naturally and reasonably lead an ordinarily careful and prudent man to make inquiry"; and an instruction in the quoted words is erroneous.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 95. Whether plaintiffs, suing upon certain village bonds, were bona fide purchasers is for the jury under evidence showing that they relied on the recitals in the bonds and on an accompanying letter from the prosecuting attorney that the proceedings were upon their face valid, and there is no evidence that they knew of the invalidity of the bonds.—Schmid v. Village of Frankfort, 131 Mich. 197.

¶ 96. In assumpsit against a village on municipal bonds, it is error to instruct that the plaintiffs were not bona fide purchasers if they did not rely solely upon the recitals in the bonds, as such instruction is equivalent to saying that they could not rely upon external evidence of validity.—Schmid v. Village of Frankfort, 134 Mich. 619.

¶ 97. On a bill by a village to enjoin the negotiation of bonds and to compel surrender and cancellation thereof, where it appeared that the bonds were valid upon their face, evidence that the defendants had no notice of invalidity of the bonds until it became necessary for them to forward the interest coupons for collection, establishes the character of the defendants as bona fide purchasers, against a claim that a letter was written apprising them of the real nature of the bonds, where the defendants denied that they received any such letter, and neither the original nor any copy thereof could be produced.—Village of Frankfort v. Schmid, 155 Mich. 313.

§ 17. Estoppel and ratification and election.

See also ante ¶ 81.
Ratification of unauthorized acts by delegates, see ante ¶ 44.

¶ 98. A township is not estopped, by paying interest on bonds, from disputing their validity.—Bogart v. Township of Lamotte, 79 Mich. 294.

¶ 99. Under Const. art. 4, § 49, forbidding counties to incur indebtedness for roads unless by a two-thirds vote of supervisors and a majority vote of electors, and Comp. L. 1897, § 4283 authorizing the issue of bonds for such purpose, an affirmative vote to issue bonds to run for 30 years when under Comp. L. 1897, § 2484 they can only be made payable within 15 years cannot be cured by subsequent legislation; (Local Acts 1901, No. 286 authorizing the board to issue 30 year bonds in accordance with the original proposition) as the electors voted for a proposition unauthorized by law and the curative act was beyond the power of the legislature.—Shearer v. Board of Supervisors of Bay County, 128 Mich. 552.

¶ 100. The fact that a city has received in exchange for void bonds, issued under a statute authorizing aid to railroads, the bonds of the railroad company in whose favor the city bonds were issued, does not make valid the unauthorized obligations of the city.—Thomas v. City of Port Huron, 27 Mich. 320.

¶ 101. Creditors who have received township railroad-aid bonds in payment cannot retain them and question their validity at the same time; if they wish for a payment in cash they must give up the bonds.—Michigan Air Line R. Co. v. Mellen, 44 Mich. 321.

¶ 102. A township is estopped, as against a bona fide purchaser of its bonds, to object that meetings of the electors for the purpose of voting on a bond issue for bridge building purposes was not properly called where it received the money paid for the bonds, used it for the public purpose designed, and paid the interest coupons for two years of the ten-year term.—Rondot v. Rogers Tp., 99 Fed. 202.

§ 18. Right to repayment of price of bonds.

Rights of parties under executed illegal public contracts and rule of nonimplication of contract against the public, see Public Contracts, V.

General right to repayment of money paid by mistake or illegally, see Payment, VI; Implied Contracts.

¶ 103. A county may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful, and the creation of the debt not prohibited by law, and does not come within the exception exempting a county from liability where it has never received the benefit of the money, or the loan itself was in excess of its authority to create a debt.—Eaton v. Shiawassee County, 218 Fed. 588; writ of certiorari denied 239 U. S. 647, 60 L. ed. 484, 36 Sup. Ct. Rep. 221.

§ 19. Injunctive or other relief.

General propriety of injunctions against action by public officers, see Injunctions, II, D.

Right of taxpayer to sue, see Injunctions § 21.

Injunction against discontinuance of public market while bonds outstand payable from proceeds of operation of market, see also Municipal Corporations ¶ 453.

Propriety of information by attorney general to prevent bond issue and diversion of funds, see also Municipal Corporations ¶ 619.

¶ 104. A resolution submitting to the electors the question of an issue of paving bonds provided that a certain percentage of the cost of the improvement should be paid according to frontage. The city owned a considerable extent of the frontage, and the amount apportionable to it by reason of such ownership was made a general charge, reducing the percentage of the total cost actually assessed upon private property. All of the bonds were issued before the roll for the first instalment of the assessment had been prepared, and the greater part, before the amount to be specially assessed upon individual property had been ascertained. Held, that a bill would not lie to restrain the city from paying the bonds, on the ground that they were issued in violation of the vote of the electors.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 105. In a suit by a taxpayer to rescind the sale of bonds for the construction of a public improvement, the mere fact that one of the contractors upon whom service of process may be made is absent from the state and cannot be served neither prevents the issuance of the injunction nor is a reason for its dissolution.—Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204.

¶ 106. A case within the jurisdiction of equity, entitling the complainant to the relief sought, is stated, where a taxpayer's bill alleges that the officials of a municipality conspired to raise money by the sale of bonds, in proceedings ostensibly regular, and for a legal object, and after inducing innocent persons to purchase such bonds, intended to expend such money for private enterprises, and which prays that such officials be restrained from such illegal expenditure.—Bates v. City of Hastings, 145 Mich. 574.

IV. INDORSEMENT AND TRANSFER.

§ 20. In general.

Authority to issue negotiable bonds, see ante § 6.

Bona fide takers and their rights against obligor, see ante § 13 et seq.

General law of negotiation and transfer of negotiable paper, see Negotiable Instruments.

Accounting between railroad corporation and officer for disposal of aid bonds placed in his hands, see Railroads, V; Corporations, XVII, G, H.

¶ 107. A judgment creditor, seeking by bill in the nature of a creditor's bill, to subject to the satisfaction of a judgment against a railroad company, township railroad aid construction bonds issued under the act of March 22, 1869, and returned to the township under the provisions of the act because of the failure of the company to obtain the certificate of compliance with the provisions of the act from the governor, stands exactly in the shoes of the railroad company and possesses no greater rights.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107, affirming 26 Fed. 805.

V. SINKING FUNDS AND PAYMENT.

§ 21. In general.

Power to issue refunding bonds, see ante § 1.

Original or inceptional delivery of bonds, see ante § 9.

Necessity of allotting portion of levy of tax specifically to payment of debt and interest, see Municipal Corporations § 140.

Effect of failure to keep up sinking fund for market bonds, see also Municipal Corporations ¶ 454.

Statutes regulating refunding and extending of county and township bonds, see Comp. L. 1915, § 2312 et seq.

Statutes for creation of county sinking fund commission and for management of sinking funds, see Comp. L. 1915, § 2386 et seq.

¶ 108. The resolution of a city council setting aside annually "not less" than a specified sum of money to create a sinking fund to pay bonds is not illegal on the ground that the words "not less" in the resolution enable the city to set aside more than the amount required to meet the bonds.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 109. Under section 42, title 7, charter of Muskegon, as amended by Act No. 344, Loc. Acts 1901, requiring the city council to provide a sinking fund to meet bonds issued for a municipal lighting plant at the time of the establishing thereof, the word "establishing" refers to the legal rather than the physical creation of such plant.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 110. The act of a city in setting aside annually a sum of money to create a sinking fund to pay bonds is not illegal by reason of the fact that the sinking fund would exceed the amount of the bond issue if invested at 4 per cent interest, and if the city continued to set aside such annual sum up to the date of the maturity of the bonds.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 111. Under section 42 of title 7 of the Charter of Muskegon as amended by Act No. 344, Loc. Acts 1901, it is not necessary that the city council submit to the electors for ratification its resolution providing a sinking fund to meet bonds issued to construct a municipal electric lighting plant, and such bond issue being approved by the electorate the council may at a later date provide for such sinking fund.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 112. The resolution of a city council setting aside annually a specified sum of money for a sinking fund to pay bonds issued for the erection of a municipal lighting plant is not illegal in that it states said sum shall be made up in part from revenue derived from such plant and in part from the contingent fund of the city, without specifying how much is to come from each fund.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 113. The county of C. issued bonds to aid in procuring enlistments in the army, and by resolution provided that each town might, if it saw fit, receive a number of the bonds proportioned to its quota of men to be raised. The towns took the bonds. Held, that each town must be regarded as borrowing the bonds, and must provide for the payment of those taken; and that any money paid by the county for principal or interest on a bond must be refunded by the township to which it was loaned.—People ex rel. Cass County Sup'rs v. Townships of Porter & Calvin, 18 Mich. 101.

¶ 114. Although as to the holders the county would be debtor in such bonds, yet as between the county and the towns the latter would be principal debtors.—People ex rel. Cass County Sup'rs v. Townships of Porter & Calvin, 18 Mich. 101.

¶ 115. In an action to compel the payment of a township bond issued in 1864 for volunteer bounty fund payable in one year upon which was indorsed that the interest was paid in full to Dec., 1865, and wherein the defendant denied liability and alleged payment, testimony that two former township officers into whose possession the

bond had come had sought its payment was material to show that the bond had been paid and thereafter wrongfully taken from the township by its officers, and was admissible where it appeared that the officials who signed the bond were dead, that all the books and records had been destroyed by fire twenty-two years before, and that 40 years had expired after the issuance of the bond before this action had been brought. —Collier v. Township Board of St. Charles, 147 Mich. 688.

VI. ENFORCEMENT AND COLLECTION.

§ 22. In general; proper remedy and procedure.

General law of procedure on bonds and contracts, see Assumpsit; Bonds § 6 et seq.; Contracts, X.

General law of pleading, evidence and trial, see Pleading; Evidence; Trial; Instructions, etc.

Limitations applicable to action of assumpsit on sealed township bonds, see Limitations ¶¶ 75, 76.

Limitation of suit to reach bonds turned back to issuing township, see Limitations ¶ 93.

Adequacy of legal remedy against village and its officers for recovery of money paid on bonds fraudulently issued, see also Fraud ¶ 765.

Right of transferee of bonds or coupons to sue in federal courts, see Courts § 90. § 90.

Mandamus to compel levy of taxes, see Mandamus § 87.

¶ 116. Under Comp. L. 1871, §§ 927-936, authorizing the payment of bounties to volunteers, etc., the bonds provided for were on the footing of established liabilities against the township, and to be presented, like other claims for orders on the treasury, to the township board; and payment might be enforced, not by action against the township, but by mandamus against the town officers, in case of refusal to do their duty in this regard.—Township of Dayton v. Rounds, 27 Mich. 82.

¶ 117. Where the legal obligation of a township to pay bonds issued by it and the good faith of the holder thereof are disputed, it seems that the proper remedy against the township is by action; mandamus denied.—Loomis v. Rogers Township Board, 53 Mich. 135.

¶ 118. Payment of bounty bonds is to be enforced not by action against the township that issued them, but by mandamus against the town officers.—Township of Dayton v. Rounds, 27 Mich. 82.

¶ 119. That an amount sufficient to pay bonds issued by a city has been included in assessments which have failed of collection, or the proceeds of which have been misappropriated, does not bar the right of bondholders to sue for a money judgment against the city.—Hammond v. Place, 116 Mich. 628.

¶ 120. A bill by a judgment creditor, in the nature of a creditor's bill seeking an equitable garnishment to subject to the satisfaction of a judgment against a railroad company, township railroad aid construction bonds issued under the act of March 22, 1869, deposited with the state treasurer and returned to the township because of the failure of the company to obtain the certificate of compliance with the provisions of the act from the governor, is barred by laches of the railroad company where not filed until 14 years from the time of the governor's refusal to issue such certificate.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107, affirming 26 Fed. 805.

§ 23. Pleading and trial and judgment.

Sufficiency of plea of non est factum to put delivery in issue, see also Pleading, III, IX.

Addition of the amount of the judgment to the next tax levy, see Municipal Corporations § 138.

¶ 121. In an action on municipal bonds issued under authority of law, plaintiff need not aver performance of any of the requisites necessary to give them validity; but it is for the defendant to show, if it exists, the want of such validity.—Township of Lincoln v. Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518.

¶ 122. In an action against a township by the holder of railroad aid construction bonds issued by the township under the act of March 22, 1869, on such bonds, a declaration stating that the defendant, acting under and in accordance with the authority conferred by the act, made a certain donation to the railroad company, and for that purpose did execute the bonds in question, that the bonds were afterward duly delivered to the company as provided in the act and that the plaintiff before maturity became the owner thereof for value, is good on demurrer, although containing no averment that an election was held, to authorize the issue of bonds, as required by law, and no averment as to various other prerequisites to such issue.—Township of Lincoln v. Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518.

¶ 123. In a trial by the court without a jury of an action on a village bond, there is a sufficient finding of the fact of delivery of the bond where the court's findings refer to the authorization of the president of the village trustees to sign the bond and the giving of the bond to the plaintiff's vendor, speaks of the bond as issued by the village and says that it came into the hands of the plaintiff's vendor.—Thompson v. Village of Mecosta, 127 Mich. 522.

MUNICIPAL CORPORATIONS.

TREATS of the general law of municipalities, excluding various matters of public concern which are not purely municipal, such as Eminent Domain; Highways; Municipal and Public Bonds; Municipal Courts; Public Contracts; Local Improvements. Other excluded matters are referred to at the end of the analysis and also in appropriate places within the body of the topic.

I. NATURE AND ATTRIBUTES, CREATION AND ORGANIZATION, AND TERRITORY AND BOUNDARIES (§§ 1-13).
II. CHARTERS AND CLASSES OF MUNICIPALITIES, AND NEW CHARTERS (§§ 14-21).
III. GENERAL FUNCTIONS, POWERS, AND MODE OF EXERCISE (§§ 22-34).
IV. MEETINGS, VOTES, PARLIAMENTARY PROCEDURE, AND RECORDS (§§ 35-43).
V. ENACTMENT, FORM, AND REQUISITES OF ORDINANCES AND RESOLUTIONS (§§ 44-48).
VI. NATURE, INTERPRETATION, OPERATION, AND PROOF OF ORDINANCES AND RESOLUTIONS (§§ 49-72).
VII. RELIEF AGAINST INVALID ORDINANCES, RESOLUTIONS, AND ACTS (§ 73).
VIII. ADMINISTRATIVE, MINISTERIAL, AND PROPRIETARY FUNCTIONS AND THEIR EXERCISE (§ 74).
IX. POLICE POWER AND SUBJECTS OF REGULATION (§§ 75-99).
X. PUBLIC PROPERTY, BUILDINGS, PLACES, AND WORKS; GRANTS, TITLES, AND CONVEYANCES (§§ 100-111).
XI. CONTRACTS AND INDEBTEDNESS (§§ 112-123).
XII. TORTS AND CRIMES (§§ 124-135).
XIII. TAXES AND REVENUES, MANAGEMENT OF SAME, AND APPROPRIATIONS (§§ 136-146).
XIV. CLAIMS AND DEMANDS, PRESENTMENT, AUDIT, AND WARRANTS (§§ 147-161).
XV. OFFICERS, EMPLOYEES, AND DEPARTMENTS (§§ 162-203).
XVI. ACTIONS AND SUITS BY AND AGAINST MUNICIPALITY (§§ 204-241).

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§ 18. ——Scope and validity of provisions.
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§ 20. ——Framing and submission of charter and amendments.
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Health laws and regulations and administration, see Health.
Poor laws and officers, see Poor Persons.
Public works and improvements, see Local Improvements; and see also Highways; Bridges; Waters, VI.
General law of public contracts, see Public Contracts.
General law of taxes and local assessments, see Taxes; Local Improvements.
General law of public bonds, see Municipal Bonds.
Parks and public grounds, see Parks.
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General law of highways and streets, including liability for injuries from defective and unsafe streets, see Highways.
Law relating to gas, water, and electric service and street railways, see Gas; Electricity; Telegraphs and Telephones; Waters, VI; Street Railways.
Condemnation of private property for public use, see Eminent Domain; Highways, II, B.
[Note. For the statutes relating to municipal corporations the reader should consult the general incorporation acts in the published general laws and also the local laws containing the various local charters. It is manifestly impossible to include in this topic references to all such statutes without overloading it with citations of statutes that have no general applicability and that may even be obsolete. See the indices to the published laws.]

I. NATURE AND ATTRIBUTES, CREATION AND ORGANIZATION, AND TERRITORY AND BOUNDARIES.

§ 1. Nature and attributes in general.

[Note. The nature, corporate limitations, and attributes of public corporations are exemplified in the decisions upon their powers and functions throughout the body of this topic, and also in some of the other topics referred to. Many of the principles of municipal corporation law arise directly from the peculiar nature of a public corporation and their nature and attributes are seldom the subject of any direct decision.]

Nature of corporate capacity in which park beyond limits is held for the public, see post ¶ 113.
Mode and manner of incorporation, see post § 2.
Coexistence of municipalities within same territory, see post ¶ 6.
Charter and corporation as coefficients, see post ¶ 32.
Due process clause as binding municipalities, see Constitutional Law § 135.
Protection of municipalities against deprivation of property or rights without due process, see Constitutional Law §§ 136, 137.
Right of representation on board of supervisors, see Counties § 50.
Constitutionally defined bodies "corporate" of a public nature, see Const. art. VIII, §§ 1, 16, 20.

¶ 1. The authorities are numerous that the word "municipal" has not a well-defined and technical meaning, and must be construed with reference to the evils to be prevented and the purposes to be accomplished, the history of the provision of the constitution in which it is used, and the practical construction that has been placed upon it.—Kent County Agricultural Soc. v. Houseman, 81 Mich. 609.

§ 2. Creation and organization.

Annexation and detachment of territory, see post §§ 5-9.
Consolidation, merger, and division, succession, and reincorporation, see post §§ 10, 11.
Dissolution and extinction, see post § 13.
General provisions of the constitution, see Const. art. VIII, §§ 20-25.

¶ 1a. The history of the system of incorporating cities and villages under general statutes, and the conditions and restrictions generally imposed upon the power conferred, and the principles that govern them, considered.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 2. A compulsory incorporation can only come from direct legislative action, or the action of such person or bodies as may, by the law of the land, be vested with sufficient delegated authority to bind the community. The limitations to this compulsion under the precedents of the common law of England and various states in this country considered.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 3. Laws 1873, Act No. 179, providing for the incorporation of villages is defective if

it makes no provision for again appointing the first village election in case of a failure to hold it at the time first appointed.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 4. Until its officers have been elected and qualified, a newly-incorporated village is not deemed organized so as to be entitled to share of liquor tax.—Highland Park v. Wayne County Treasurer, July 10, 1889 (not reported).

§ 3. ——General enabling provisions.

History of the general enabling acts, see ante ¶ 1a.

Delegation by the legislature of power to form or change municipality, see Constitutional Law § 88.

Constitutional duty of legislature to enact general incorporation laws, see Const. art. VIII, § 20.

¶ 5. Article 8, section 20, of the new Michigan Constitution makes it mandatory on the legislature to pass a general village and city incorporation law.—Common Council, City of Jackson v. Harrington, 160 Mich. 550.

§ 4. Territory, limits, boundaries, and ward divisions.

Annexation and detachment of territory, see post § 5.

Extraterritorial powers, works and properties of municipalities, see post §§ 28, 29.

Representation of wards by aldermen, see post § 163.

Division of ward as affecting residence of alderman and vacating his office, see post ¶ 786.

Legislative power to change boundaries or territory, see Constitutional Law § 69.

Changing apportionment district by change of boundaries, see Constitutional Law § 260.

Territorial limits to jurisdiction of municipal courts, see Municipal Courts § 7.

Judicial notice as to ward divisions and local geography or locations, see Evidence §§ 9, 10.

¶ 6. Public corporations organized for the same purpose, with the same rights, powers and duties, cannot exist in the same territory; but where they are organized for different purposes, have different rights and duties relating to entirely distinct matters, they may and often do occupy the same territory, working in harmony, each within the scope of its authority.—Attorney General ex rel. McRae v. Thompson, 168 Mich. 511.

¶ 7. The power to enforce incorporation upon farming lands which are sparsely settled, if it can be delegated at all, must be given expressly, and will not be implied against private consent; the power is strictly construed; and the same is true of compelling the fusion of distinct villages without joint consent.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 8. An opportunity ought to be provided of being heard in every step of proceedings which determine the liability of individuals to be included with their territory in particular municipalities; and one of the most vital questions involved is that of boundaries; and its determination belongs to policy, rather than law, and is political and not judicial.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 9. Whether, under the constitution, a village lying partly in different towns and counties can, either by direct action or under delegated authority, be incorporated as a unit, quære.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 10. Benton Harbor was incorporated under general statute, Act No. 215, Pub. Acts 1895. By a special statute, Act No. 472, Local Acts 1903, the boundaries of the city were established, but no method was provided for changing them. The Act of 1903 stated that the city, except as provided herein, should be governed by the Act of 1895. Held, the rule that boundaries fixed by a special act should not be changed by the method provided by a general act did not apply in this case, since the special act clearly intended the general act to govern in this particular.—City of Benton Harbor v. Cutler, 159 Mich. 364.

§ 5. Annexation and detachment.

Submission of question to electors for vote, see post § 6.

Consequences of annexation or detachment, see post §§ 7-9.

Effect of detachment to dissolve corporation, see post ¶ 29.

Effect of statutory detachment to repeal charter, see post ¶ 50.

Application and effect of ordinances to after-annexed territory, see post § 56.

Vacation of office of councilman or trustee by loss of residence through change of boundary in course of detachment, see post ¶¶ 788, 789.

Right of officers to pay during time of unlawful annexation by other municipality, see post ¶ 887.

¶ 11. The general power conferred on boards of supervisors by Act No. 279, Pub. Acts 1909, §§ 5447-5453, How. St., 2nd Ed., to annex territory to municipal corporations, carries implied power to make such incidental orders as may become necessary to effectuate the conferred powers.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

¶ 12. Act No. 279, Pub. Acts 1909, §§ 5447-5453, How. St., 2nd Ed., is not rendered void by reason of the fact that it does not lodge

in boards of supervisors discretion to pass upon petitions for the annexation of territory to a municipality, but leaves the determination of the question to the electors of the latter body and of the territory to be affected.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

¶ 13. The fact that Act No. 279, Pub. Acts 1909 (§§ 5447-5453, How. St., 2nd Ed.), does not vest boards of supervisors, in annexing territory to municipal corporations, with express power to preserve the integrity of representative districts, does not render the act obnoxious to §§ 3 and 4 of Art. V of the Constitution, since power is implied to provide in the order submitting the question to the electorate, for the preservation of representative districts.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

§ 6. ——Submission to electors.

Effect of provision for submission to nullify power of supervisors, see ante ¶ 12.

General law of elections, see Elections.

¶ 14. Under Pub. Acts 1909, No. 279, § 9, How. 2nd. Ed., § 5450, relating to the annexation of territory to a city, where the territory consists of parts of two or more townships, a separate majority vote in favor of annexation in each of the portions of the respective townships is essential before annexation of the particular territory may follow.—Cook v. Kent County Board of Canvassers, 190 Mich. 149.

¶ 15. An order of submission of the question of annexation of territory adjoining a city under Pub. Acts 1909, No. 279, § 9, How. 2nd Ed., § 5450, by the board of supervisors to the voters in the district to be annexed which contains no provision for the maintenance of the integrity of the legislative and senatorial districts is invalid under art. V, §§ 3, 4, of the Constitution.—Cook v. Kent County Board of Canvassers, 190 Mich. 149. (Ostrander, J., concurring on other grounds.)

¶ 16. Proceedings by a city for the annexation of the territory of adjoining townships under the Home Rule Act, Pub. Acts of 1909, No. 279, How. 2nd. Ed., § 5447, are not invalid because the resolution by the county board of supervisors directing the submission of the question of annexation provides that the election notices and ballots shall contain a provision that the annexation is to be for all purposes except that of electing representatives for the legislature and the annexation, if accomplished, shall have no effect whatever on such election of representatives, and the notices and ballots do not contain such provision, as it must be presumed that the electors knew that the integrity of the legislative district would be preserved in accordance with the resolution of the commission.—Collins v. City of Detroit, 195 Mich. 330.

§ 7. ——Effect on legislative and other political districts.

Implication in statute of necessity for preserving legislative districts, see ante ¶ 13.

Necessity of inclusion of provisions for preservation of apportionment districts and interpretation of order of submission and ballots with respect thereto, see ante ¶¶ 15, 16.

Township rights and liabilities on annexation or inclusion within city, see Townships.

¶ 17. Representative districts cannot be affected by the annexation of territory to municipal corporations under Act No. 279, Pub. Acts 1909, §§ 5447-5453, How. St., 2nd Ed.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

¶ 18. An order of submission made under Act No. 279, Pub. Acts 1909, §§ 5447-5453, How. St., 2nd Ed., should provide that the annexed territory should become part of the municipality for all voting purposes except for the election of representatives.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

¶ 19. Proceedings by a city to annex the adjoining territory of several townships under the Home Rule Act, Pub. Acts 1909, No. 279, How. 2nd Ed., §§ 5447-5455, have no effect upon the school districts within the annexed territory until action is taken by the several township boards and a committee of the board of education of the city.—Collins v. City of Detroit, 195 Mich. 330.

§ 8. ——Laws and ordinances affected.

¶ 20. A municipal law or ordinance designed for a city at large operates throughout its actual boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time.—People v. Detroit United Ry., 162 Mich. 460. Reversed in 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87.

§ 9. ——Effect on property and debts and taxes.

Mandamus to compel adjustment of rights and property on dividing or annexing territory, see Mandamus § 90.

¶ 21. Territory added to a municipality is subject to the payment of debts previously incurred, and it is not material that the addition is effected by a consolidation of two cities.—Smith v. Mayor, etc., of City of Saginaw, 81 Mich. 123.

¶ 22. The right of a municipality to a liquor tax collected therein becomes vested at the date at which the law requires the tax to be paid; and if not then paid the subsequent annexation of the territory to

that of some other municipality before its payment does not transfer to the latter the right to the money.—Township of Springwells v. Wayne County Treasurer, 58 Mich. 240.

¶ 23. A special assessment was levied against the property of the plaintiff by the Village of Fairview. Afterwards the legislature passed a law annexing Fairview to the City of Detroit. Detroit had a charter provision that no special assessment should be vacated unless the property owner pay to the city a sum representing the amount his property was benefited by the improvement. Held, in a bill by plaintiff to set aside the assessment, that a personal liability against the plaintiff instead of one against his property could not be enforced in this case, as it would be making the annexing law retroactive and unconstitutional.—Weber v. City of Detroit, 158 Mich. 149.

§ 10. Consolidation, merger, and division.

Effect of consolidation on property and debts, see ante ¶ 21.

¶ 24. Making a person an ex officio officer of one organization by virtue of his holding office in another does not tend to merge the two organizations.—Attorney General ex rel. McRae v. Thompson, 168 Mich. 511.

§ 11. Succession and reincorporation.

¶ 25. A corporation privileged by charter to supply a village with water does not lose its privilege when the village is incorporated as a city, nor is it then necessarily confined to the land covered by the village.—City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606.

§ 12. Corporate existence and collateral attack.

When existence deemed to begin, see also ante ¶ 4.

Pleading existence of the municipality as a corporation, see post § 213.

Consolidation and succession, see ante §§ 10, 11.

Dissolution and extinction, see post § 13.

Judicial notice respecting cities and villages, see Evidence, I; Indictment § 128.

Remedy to question assumption of office or franchise, see Quo Warranto.

¶ 26. Defects in the proceedings under which a village government has been formed should be pointed out in a direct proceeding instituted in behalf of the state. A private party cannot collaterally question the assumption of municipal corporate powers which are not disputed by the state.—Bird v. Perkins, 33 Mich. 28.

¶ 27. The state itself may be precluded from raising objections to the regularity of a village's incorporation after the corporate government has been fairly established with general acquiescence.—Bird v. Perkins, 33 Mich. 28.

¶ 28. The legality of the organization of a village by special act of the legislature cannot be attacked collaterally in a prosecution for resisting the village treasurer in removing property levied upon by virtue of his tax roll and warrant.—People v. Smith, 131 Mich. 70.

§ 13. Dissolution and extinction.

¶ 29. The incorporation of a village is not dissolved by statutory detachment of greater part of territory, population and officers.—People v. Village of Highland Park, 88 Mich. 653.

¶ 30. As a municipal corporation once created cannot be dissolved or cease to exist except by legislative provision or consent, failure of the people of a village for a term of years to hold an election does not effect a dissolution.—Cain v. Brown, 111 Mich. 657.

¶ 31. The incorporation of a village cannot be said to have been vacated, even though an election was called for the purpose by the village council, where it does not appear that the petition for vacation, which was mailed to the village president nine months before the action was taken, was ever presented to the council for action, or was ever acted upon.—Cain v. Brown, 111 Mich. 657.

II. CHARTERS AND CLASSES OF MUNICIPALITIES, AND NEW CHARTERS.

§ 14. In general; legislative powers.

Construction and effect of charters, see post § 15.

Amendment, alteration, and repeal of charters, see post § 16.

Freeholders' charters, see post § 17 et seq.

Succession and reincorporation, see ante § 11.

Validity of ordinances as depending on charter powers of municipality or councils, see post VI, IX.

Limits on taxing power, see post § 137.

Constitutional limitations on legislative powers in general, see Constitutional Law.

Judicial notice of charters and organic acts, see Evidence §§ 23-25.

¶ 32. No valid municipal corporation can exist without a charter or a municipal charter without a corporation; a combination of the two makes the corporation, and framing or revising the charter is part of the necessary process of incorporating a city.—Gallup v. City of Saginaw, 170 Mich. 195.

¶ 33. Charters and by-laws are subject to the general legislation of the state.—Smith v. Village of Adrian, 1 Mich. 495.

§ 15. Construction and effect.

Charter as measure of powers granted, see post § 22.

Implied powers under charter, see post § 22 et seq.

Presumption that charter provisions contemplate lawful action in further consequence of requirements, see post ¶ 607.

Effect of charter to abrogate existing ordinance, see post § 66.

Provision requiring adoption of rules of procedure by councils, see post ¶ 146.

Construction and implication of power to regulate by ordinance, see also post § 75.

Charter provisions regulating or restricting contract powers, see post XI.

Charter provisions regulating and limiting revenue and fiscal powers and policy, see post XIII.

Provisions for presentment and notice of claims, see post § 148 et seq.

Charter provisions respecting offices and officers, see post XV.

Scope of contractual powers, see post § 112 et seq.

Charter considered as a mere statute, general law of statutes, see Statutes.

Sufficiency of titles of acts embodying charters and amendments to them, see Statutes, III.

General law of statutory construction, see Statutes, V.

Charter powers to issue bonds, see Municipal Bonds §§ 1, 2.

Validity of local and special laws and charters, see Statutes, II.

Partial validity of legislation void in part, see Statutes, V.

Charter powers and status of Detroit Recorder's Court, see Municipal Courts § 1.

Charter as contract protected against impairment, see Constitutional Law § 172.

¶ 34. City charters must be rationally construed as intended to create corporations which shall resemble in their essential character the class into which they are introduced.—Torrent v. Muskegon Common Council, 47 Mich. 115.

¶ 35. A city charter should not be given a literal construction where a manifest absurdity would be the result.—People v. Parsons, 200 Mich. 39.

¶ 36. The provisions of a municipal charter must be construed together in their bearing on a legal question.—Louden v. East Saginaw, 41 Mich. 18.

¶ 37. The several provisions of the charter of the city of Detroit are to be construed so as to be harmonious, if possible.—Commissioners of Parks of Detroit v. Rush, 84 Mich. 154.

¶ 38. In construing one provision of a charter, it is important to consider other provisions upon the same or similar subjects.—Farr v. City of Grand Rapids, 112 Mich. 99.

¶ 39. Village charters will not be so construed as to change the operation of the general taxing laws, unless such an intent is plainly expressed.—Howell v. Village of Cassopolis, 35 Mich. 471.

¶ 40. Village charters are to be construed as not designed to encroach upon the general law any further than the plain terms show an intent to do so. The provision of the Kalamazoo charter authorizing the president and trustees to ordain and establish by-laws for constructing and keeping in repair the public highways, bridges, etc., applies to the highways, bridges, etc., which are to be constructed and kept in repair by the village itself through the exercise of the taxing power, and not to bridges over mill-races, which by general statute it is made the duty of the mill proprietors to construct.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 41. The charter of Paw Paw, in giving the village control of the building and mending of all bridges within it, but making the cost a township charge, is inharmonious; unless the township and village authorities unite, the village has exclusive control of the subject and is exclusively liable; and the township authorities cannot enforce the obligation of a citizen of the village to repair a bridge over his mill-race.—Paw Paw Highway Commissioner v. Willard, 41 Mich. 627.

¶ 42. The re-enactment or modification of charter provisions cannot be held to effect special legislation outside of the charter without clear indication of such an intent.—Attorney General v. City of Detroit, 71 Mich. 92.

¶ 43. The Waterworks Act (How. Stat. Chap. 84) giving municipalities power to contract with water companies for the supply of water, is a substantive and independent enactment; and where a city avails itself of its provisions, the act stands as a part of its charter, as a separate chapter dealing with the specific subject of water supply, and such city cannot be heard to claim that under its charter, subsequently enacted, the compensation provided for is beyond its taxing power, and that as the Waterworks Act conflicts with the charter, the latter being the later legislative act must prevail.—Menominee Water Co. v. City of Menominee, 124 Mich. 386.

¶ 44. Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.), regulating the making of public lighting contracts, cannot be said not to apply to a city because it has a specific charter passed two years later, under which it might equally well have made the contract in question. The rule of the Menom-

inee Water Co. against City of Menominee, 124 Mich. 395, is to be followed.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 45. A city charter is a declaration of the public policy of the city.—Schurtz v. City of Grand Rapids, 199 Mich. 20.

¶ 46. The Grand Rapids city charter provides for the levy, collection and return of school taxes in conformity with the general laws of the state, as, by § 298 of the charter, in repealing Local Acts of 1905, No. 593, Title XIV of such act relating to the board of education is left intact.—Kopczynski v. Schriver, 194 Mich. 553.

¶ 47. There is no such conflict between § 87 of the Grand Rapids city charter conferring powers upon a city manager after adoption of the commission form of government and § 88 providing that the mayor shall be recognized as the executive head of the city and shall exercise only such powers as the state laws, the charter, or the city commission specifically confer upon him, and the Home Rule Act, Pub. Acts 1909, No. 279, § 3, requiring that each city charter shall provide for the election of a mayor who shall be the executive head, as to raise a constitutional question or to make the charter as an entirety invalid.—Kopczynski v. Schriver, 194 Mich. 553.

¶ 47a. A statute conferring powers upon a municipality will be presumed to have been framed with reference to the rule that nothing is to be taken by intendment in construing a legislative grant of power.—Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384. Affirmed in 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

¶ 47b. The rule that nothing will be taken by intendment in a legislative grant of power to a municipality, is not rendered inapplicable by the fact that the power delegated is one which could be exercised only through the local authorities, and not by the legislature directly.—Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384. Affirmed in 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

¶ 48. The charter of a city speaks only from the day it takes effect.—North v. City of Battle Creek, 185 Mich. 592.

§ 16. Amendment and alteration and repeal.

Amendments to freeholders' charters, see post §§ 20, 21.

General rules as to amendment and repeal of charters, see Statutes, VII.

Amendment or repeal of charter power to issue bonds, see also Municipal Bonds ¶ 6.

¶ 49. City charters are amendable at pleasure by the legislature.—City of Detroit v. Blackeby, 21 Mich. 84.

¶ 50. A village charter is not repealed by a statute (amending the charter of a neighboring city) which detaches from the village the greater part of its territory, and which has the effect of vacating a majority of the village offices.—People v. Village of Highland Park, 88 Mich. 653.

¶ 51. Unless the legislative intent to repeal a charter can be deduced from a subsequent general act, it will be held that the charter is not repealed by implication, and an intention to except the municipality from the operation of the general law will be presumed.—People v. Wenzel, 105 Mich. 70.

¶ 52. The amendment of the charter of a municipal corporation by the legislature of its own motion, the notice required of the introduction of a bill for that purpose, and the construction to be given to Const. art. 15, § 16, Act of April 7, 1851, in relation to the notice to be given of application to be made for amendments to the charter of a corporation, considered, but not decided.—People ex rel. Le Roy v. Hurlbut, 24 Mich. 44.

¶ 53. Amendments to a city charter are to be construed as a part of the original charter.—Field v. Board Water Com'rs City of Manistee, 156 Mich. 186.

¶ 54. It was the intention of the legislature in passing Pub. Acts 1875, No. 62 (How. St., § 2768 et seq.), an act defining the duties and powers of incorporated villages, to enact a municipal code applicable to all villages subsequently incorporated by special act or under the mode provided by Pub. Acts 1857, No. 168 (How. St., § 2983 et seq.), and the later act supersedes the earlier, where they cover the same ground.—City of Gladstone v. Throop, 71 Fed. 341.

§ 17. Adoption and amendment by electors; freeholders' charters.

Scope and validity of provisions and compatibility with general laws and constitution, see post § 18.

The commission, its powers, and the framing and submission of the proposed charter, see post §§ 19, 20.

Votes and ratification or rejection of proposed charter, see post § 21.

Expenses of charter commission as exception to statutory requirement of previous appropriation, see post ¶ 598.

Amendment of charter by electors as delegation of legislative power, see Constitutional Law § 88.

Constitutional provisions for freeholders' charters, see Const. art. VIII, § 21.

¶ 55. Act No. 279, Pub. Acts 1909, passed in pursuance of article 8, section 20 of the new Michigan Constitution, and providing for the incorporation of cities, applies to all cities with respect to its provisions for the amending of charters.—Common Council, City of Jackson v. Harrington, 160 Mich. 550.

¶ 56. The "Home Rule" Act (Act No. 279, Pub. Acts 1909), providing for freeholders' charters, applies to cities incorporated under local acts prior to the passage of Act No. 279.—Gallup v. City of Saginaw, 170 Mich. 195.

¶ 57. Under the Michigan Constitution, art. 8, § 20, and the "Home Rule" Act (Act No. 279, Pub. Acts 1909), providing for freeholders' charters for cities, the system is one of general grant of rights and powers, subject only to certain enumerated restrictions, instead of the former method of granting only enumerated rights and powers definitely specified.—Gallup v. City of Saginaw, 170 Mich. 195.

¶ 58. Under Act No. 279, Pub. Acts 1909, a city may not amend its charter until it has revised it so as to contain the compulsory provisions of section 3 of the act and the restrictive provisions of section 5.—Attorney General ex rel. Hudson v. Common Council, City of Detroit, 164 Mich. 369.

§ 18. ——Scope and validity of provisions.

Bonding provisions, see also Municipal Bonds ¶¶ 15, 16.

Constitutional subjection to state constitution and general laws, see Const. art. VIII, § 21.

Writ of prohibition to prevent charter commission from removing member, see Prohibition, Writ of.

School affairs as matter beyond scope of home rule charters, see Schools I.

¶ 59. The Home Rule Act is one of the general laws of the state and, under § 36, How. 2nd Ed., § 5477, no city charter may be adopted pursuant to its provisions which contravenes the provisions of such act.—Crary v. Marquette Circuit Judge, 197 Mich. 452.

¶ 60. A provision of a city charter adopted under the Home Rule Act (Act No. 279, Pub. Acts 1909, How. Ann. St., 2nd Ed., chap. 97) that the city should be represented on the board of supervisors, by certain officers to be designated by the city commissioners, is valid.—Attorney General ex rel. Lodge v. Bryan, 182 Mich. 86.

¶ 61. A city adopting a charter under the Home Rule Act (Act No. 279, Pub. Acts 1909, How. St., 2nd Ed., chap. 97), is expressly prohibited from affecting local acts pertaining to the public schools.—Board of Education of Traverse City v. Straub, 182 Mich. 665.

¶ 62. In view of the clause of section 4b of Act 210 of Pub. Acts 1915 which prohibits a city from increasing by charter amendment, the amount which it may borrow by more than 2 per cent. of its assessed property valuation at any one time, a city of the fourth class which by charter amendment under the Home Rule Act (Pub. Acts 1909, No. 279) has reduced its borrowing rate for the purchase or construction of waterworks from 5 per cent. to 2 per cent. cannot by a single amendment restore the former rate.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

¶ 63. Since the Recorder's Court of the City of Detroit is a state agency in its execution of the criminal laws of the state, its jurisdiction in so far as it relates to matters of state concern cannot be affected by the electors of the city through a charter amendment.—Detroit Civil Service Commission v. Engle, 187 Mich. 83.

¶ 64. On a bill by a taxpayer for an injunction to restrain the commission of a city from selling and issuing bonds for the purpose of procuring funds for a new school building for which preliminary steps under its city charter, which was enacted under the Home Rule Act, Pub. Acts 1909, No. 279, How. 2nd Ed., § 5441 et seq., had been taken, it is immaterial whether the new charter contains language prohibiting the city from pledging its credit or raising city revenue by taxation to be turned over to the school board for education purposes, as such electors had no power, in adopting the new charter, to embody in it any provision relieving the city of rights, duties and obligations granted or imposed by the legislature upon it as a state agency in relation to the public schools.—MacQueen v. Port Huron City Commission, 194 Mich. 328.

§ 19. ——Charter commission, powers and attributes.

¶ 65. Members of a charter commission created under Pub. Acts 1909, Act No. 279, as amended by Pub. Acts 1911, Act No. 203, How. 2nd Ed., § 5442n, are local officers elected for the sole purpose of framing and proposing charters to be submitted to the municipal electors for acceptance or rejection.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 66. A charter commission created under Pub. Acts 1909, Act No. 279, as amended by Pub. Acts 1911, Act No. 203, How. 2nd Ed., § 5442n, has only such powers as are specifically conferred upon it by the statute, and no further or greater powers can be given it by inference.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 67. A charter commission created under Pub. Acts 1909, Act No. 279, as amended by Pub. Acts 1911, Act No. 203, How. 2nd Ed., § 5442n, has no power to oust and remove a member.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 68. The powers conferred upon a charter commission by Pub. Acts 1909, Act No. 279, § 20, as amended by Pub. Acts 1911, Act No. 203, How. 2nd Ed., § 5442n, creat-

ing it, making it the sole judge of the qualifications and elections of its members and to fill vacancies, does not per se make it a legislative body.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 69. Where a vacancy in a charter commission created under Pub. Acts 1909, Act No. 279, as amended by Pub. Acts 1911, Act No. 203, How. 2nd Ed., § 5442n, is created by the resignation of a member, and a person is appointed by the commission to fill the vacancy, the appointment is for the unexpired term.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 70. Where a city has, in pursuance of Act No. 279, Pub. Acts 1909, cast a majority vote for revision of its charter, the common council is compelled under section 19 of said act to appropriate sufficient money to meet the expenses of a charter commission.—Attorney General v. Mayor & Common Council, City of Adrian, 164 Mich. 143.

¶ 71. Act No. 279, Pub. Acts 1909, provides that to be eligible to the office of member of a city charter commission an elector must have a residence of at least three years in the municipality. Held, such act is not unconstitutional as contravening § 2, art. 16, Const. 1909, which provides that no other test than the oath of office prescribed by the Constitution shall be required as a qualification for any office or public trust.—Attorney General ex rel. Selby v. MacDonald, 164 Mich. 590.

§ 20. ——Framing and submission of charter and amendments.

Voting and majority requisite to adoption, see post § 21.

¶ 72. Act No. 279, Pub. Acts 1909, which was passed in pursuance of the Michigan Constitution of 1909 giving electors in cities the right to amend the city charters, is not unconstitutional by reason of the provision in said act which enables only twenty per cent. of the electors to initiate amendments instead of all the electors.—Attorney General ex rel. Hudson v. Common Council, City of Detroit, 164 Mich. 369.

¶ 73. The Michigan Constitution provides that under the general incorporation laws the electors of each city shall have power to amend its charter. Act No. 279, Pub. Acts 1909, § 18, passed in pursuance of the Constitution, states that any city may submit to vote the question of the revision of its charter "when its legislative body shall by a two-thirds vote of its members elect declare for a general revision of the charter, when an initiatory petition shall be presented" by the electors. Held, the act meant to require only one and not both of the above steps as preliminary to the submission of the question.—Common Council, City of Jackson v. Harrington, 160 Mich. 550.

¶ 74. Section 21, Act No. 279, Pub. Acts 1909, provides that where an amendment of a city charter originates in the legislature it shall lie on the table thirty days before action is taken on it. Held, this section has no application to the resolution of a city council to submit the question of revision of a charter to the electors under section 18 of said Act.—Common Council, City of Jackson v. Harrington, 160 Mich. 550.

¶ 75. The time when a charter to be framed by a charter commission shall be completed is limited to ninety days after the commission convenes, as provided by Pub. Acts 1909, Act No. 279, §§ 15, 20, How. 2nd Ed., §§ 5456, 5461, which must be construed together, as amended by Pub. Acts 1911, Act No. 203.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535.

¶ 76. A charter commission, in submitting the question of adoption of a city charter to the electors under the Home Rule Law, Pub. Acts 1909, No. 279, How. 2nd Ed., § 5442 et seq., as amended by Pub. Acts 1913, No. 5, may not submit alternative provisions.—Maher v. City of Jackson, 191 Mich. 266.

¶ 77. Section 21, Act No. 279, Pub. Acts of 1909, as amended by Act No. 203, Pub. Acts of 1911, relating to the submission of amendments to city charters by the common council, requires the submission at the next ensuing election after the proposed amendment is adopted by said council, whether said election be general or special.—Attorney General ex rel. Vernor v. Common Council, City of Detroit, 168 Mich. 249.

¶ 78. A municipal election ballot which asks the question whether the voter favors authorizing the common council to fix the compensation of certain elective and appointive officers of the City of Detroit within certain limitations, also to fix the compensation of subordinates to such officials, must be deemed sufficient to apprise the electors of the purpose and effect of a proposed amendment to the city charter where it is not shown that the electors were misled, and where it appears that the proposed amendment was printed in the official newspaper of the city; that 10,000 copies thereof were distributed by the city clerk among the electors of the city, and that the question of the adoption or rejection of the amendment was discussed in the public newspapers generally.—Burton v. City of Detroit, 190 Mich. 195.

§ 21. ——Votes and ratifications.

General law of elections, see Elections.

¶ 79. A proposed city charter, which is submitted by the charter commission under Pub. Acts 1909, No. 279, How. 2nd Ed., § 5442 et seq., as amended by Pub. Acts 1913, No. 5, will be regarded as adopted although an alternative section is improperly submitted at the same time, where the charter, in its

entirety receives a strong affirmative vote and it is not shown that any elector was deceived or misled by the manner of submission into voting contrary to his intention on that proposition.—Maher v. City of Jackson, 191 Mich. 266.

¶ 80. A provision for an amendment to a specified section of a proposed city charter which, by the terms of its submission by the charter commission, will, if favorably acted upon, take the place of a designated section of the proposed charter, does not constitute an independent section, but an alternative section or proposition.—Maher v. City of Jackson, 191 Mich. 266.

¶ 81. At a municipal election, 1,246 votes were cast in favor of revising the city charter, as provided by Act No. 279, Pub. Acts 1909, and 1,049 votes were cast against revision. The greatest number of votes cast at such election for any office was 2,749. Held, the proposition of revision was carried by the necessary majority vote.—Attorney General v. Mayor & Common Council, City of Adrian, 164 Mich. 143.

III. GENERAL FUNCTIONS, POWERS, AND MODE OF EXERCISE.

§ 22. Extent and source of power in general.

Powers on particular subjects, see post § 23 et seq.
Territorial limits and place for exercise of powers, see post §§ 28, 29.
Manner of exercising power, see post § 30.
Distribution and delegation of powers, see post §§ 31, 32.
Estoppel to question power or exercise thereof, see post § 33.
Police power and regulative power, see post IX.
Powers other than police or regulative, see post X-XIV.
Officers and organs for exercise of power, see post XV.
Scope and subjects of regulative and ordaining powers, see post IX.
Charter as exclusive measure of ordaining or regulative powers, see post § 75.
Implied powers to pass ordinances, see post § 75.
Power to acquire or dispose of property, see post X.
Inherent power to take and hold land, see post § 100.
Power to contract and incur debts, see post XI.
Power to borrow money, see post § 121.
Duty to take notice of want of power to contract, see post § 113.
Taxing and fiscal powers, see post XIII.
Proper objects and purposes of expenditure, see post § 144.
Public investigation of public questions as improper object of special expenditures, see post ¶ 611.
Power to issue bonds, see Municipal Bonds § 1.
Inherent power to remove officers, see post § 170.
Right of local self-government under the constitution, see Constitutional Law, II, C.
Legislative delegation of power on city, see Constitutional Law, II, D.
Authority of municipal corporations to exercise right of eminent domain, see Eminent Domain § 5.
Effect of repeal of constitutional prohibition to enlarge power under charter antedating constitutional provision, see also Intoxicating Liquors § 31.
Constitutional limitations on powers, see Const. art. VIII, § 25.

¶ 82. Municipal corporations take their powers from legislative enactments, and they are limited to those powers which are expressly granted, which are necessarily incident to the powers expressly granted, and which are essential to the declared objects and purposes of the corporation.—Taylor v. Bay City Street R. Co., 80 Mich. 77.

¶ 83. Municipal corporations possess only those powers which are expressly conferred, or necessarily implied, in consequence of their being essential to the exercise of their proper functions.—Stebbins v. Judge of Superior Court of Grand Rapids, 108 Mich. 693.

¶ 84. Powers exercised by municipal corporations are all derived from the legislature, and must be found either in the express words of the grant or be powers necessarily incident to those expressly granted or powers essential and indispensable to the declared objects and purposes of the corporation.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

¶ 85. The powers of municipal corporations must be strictly construed, and such corporations can exercise only those powers which are either granted by express words, or those necessarily or fairly implied in or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.—Detroit Citizens' St. R. Co. v. City of Detroit, 64 Fed. 628.

¶ 86. A city has only such powers as have been conferred upon it by the legislature.—Wheeler v. City of Sault Ste. Marie, 164 Mich. 338.

¶ 87. Municipal corporations possess no powers except those conferred by the acts creating them.—City of Detroit v. Blackeby, 21 Mich. 84.

¶ 88. The rights and powers of municipal corporations are limited by the laws under which they are organized.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 89. The corporation of the city of Detroit has no power except that which is con-

ferred by the act of incorporation or other acts specifically relating thereto.—Cooper v. Alden, H. 72.

¶ 90. The fact that a village has no power under its charter to assess a tax on forest products in transit to a point without the state is immaterial where a statute gives such power.—Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

¶ 91. Municipal authorities possess only the powers expressly conferred or necessarily implied.—Sullivan v. Bailey, 125 Mich. 104.

¶ 92. No city could be administered upon the merely expressed powers of its charter, without the aid of some implications.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 93. A grave doubt as to the power of a municipality to pass an ordinance should be resolved against the existence of the power and the ordinance declared invalid.—Timm v. Common Council of the Village of Caledonia Station, 149 Mich. 323.

§ 23. Provision of public improvements.

Limitations on power to incur debts in providing improvements, see post § 122.

Power under the constitution to engage in internal improvements, see Constitutional Law § 282.

Local improvements within constitutional sanction, see Constitutional Law §§ 285, 286.

Power of municipal council to make local improvements, see Local Improvements §§ 5, 6.

Power of municipal council to require property owner to make improvement, see Local Improvements § 7.

Power of city to determine size and limits of assessment district for local improvement, see Local Improvements § 62.

Duty to construct, erect, or repair bridges and highways, see Bridges, V; Highways, IV, XII.

Street opening proceedings in cities and villages, see Highways, II, B, 5.

Authority of municipal council to choose newspaper for publication of notice of street opening proceedings, see Highways ¶ 269.

¶ 94. The legislature is not prohibited by section 14, article 10 of the State Constitution inhibiting the state from engaging in works of internal improvement from authorizing a city of the fourth class to erect and maintain public wharves.—Nicholls v. Charlevoix Circuit Judge, 155 Mich. 455.

§ 24. Provision of public buildings and offices.

¶ 95. A city council has power to put up suitable public buildings for the purpose of city offices if the provisions of the charter do not prevent it.—Torrent v. Muskegon Common Council, 47 Mich. 115.

§ 25. Power to provide for public service or to operate utilities.

Public ownership and operation, see post § 109.

Power to grant franchises for public service of light and water, see post § 26.

Waterworks Act as addition to charter, see ante ¶ 43.

Prospective or retrospective operation of enabling acts, see also ante ¶ 44.

Power and other utility plants beyond limits of city, see post § 29.

Passage of preliminary resolution nunc pro tunc, see post ¶ 123.

Construction and effect of contracts for lighting or water supply, see post § 120.

Power to issue special utility bonds, see Municipal Bonds § 3.

¶ 96. Charter provisions empowering the common council to regulate the lighting of public lamps and to employ a suitable person to superintend them (How. St. § 4191), do not confine the management of the lighting apparatus or of any part of it to the city government, nor exclude the use of gas or electricity controlled from a central point. Such provisions are neither exhaustive nor imperative.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 97. The common council of a city has the legal discretion to select any system of lighting that will furnish light of the required brilliancy at the lowest rates.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 98. Under Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.), a city council has the authority and the power to contract for electric lighting.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 99. Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.), being a general act relating to public lighting contracts, is not affected by Act No. 115 passed earlier but to take effect later, and which authorized cities to acquire works for supplying public lighting.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 100. The corporate power of a city to own and operate a municipal electric plant and supply its inhabitants at prescribed rates, light, heat and power is conferred by the Constitution, art. VIII, § 23, and Comp. L. 1897, chap. 88, § 3258, How. St., 2nd Ed., § 5784.—Andrews v. City of South Haven, 187 Mich. 294.

¶ 101. A city, in its operation and business management of an electric light plant, has the right and power to do those things naturally connected with and belonging to the running of such a business which a private corporation would have in the same connection.—Andrews v. City of South Haven, 187 Mich. 294.

¶ 102. A city may make a contract with a company to construct and maintain a system of waterworks and to furnish water to the city at stated prices.—Alpena City Water Co. v. City of Alpena, 130 Mich. 518.

¶ 103. There is nothing in Pub. Acts 1895, No. 215, chap. XXVI, § 1, How. 2nd Ed., § 5773, providing that cities of the fourth class may construct, or purchase waterworks, which limits its operation to cities having no water system.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

§ 26. ——Granting of franchises.

Necessity of ordinance or resolution to make grant, see also post § 30.
Franchises and granting of same in general, see Franchises.
Limitations on power to grant irrevocable franchises, see Const. art. VIII, § 25.
Limit of duration of franchises grantable by municipality, see Const. art. VIII, § 29.

¶ 104. The special charter of the city of Escanaba (Local Acts 1883, No. 245) expressly prohibited the city from granting exclusive franchises.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

¶ 105. The mere granting of a franchise by a city does not amount to an implied contract on the part of the city that it will do nothing to impair the value of the franchise or that it will not grant a rival franchise to a competing company or enter into competition itself in reference to the subject of the franchise.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

§ 27. Engagement in trade, commerce, or manufacturing.

Power to own and operate public utility plants, see also ante § 25; post § 109.

¶ 106. A city has no implied power to engage in the manufacture of brick to be used in the paving of its streets.—Attorney General v. Detroit Common Council, 150 Mich. 310.

¶ 107. City authorities have the right, through the board of poor commissioners, to provide fuel for needy citizens, and in an emergency, when a coal famine seems imminent, are authorized to purchase such amount of fuel in any market as is in their opinion necessary for that purpose; but a city cannot enter into a commercial enterprise, such as buying and selling coal to its citizens as a business, thereby entering into competition with dealers in coal, such use of money being held to be not for a public purpose.—Baker v. City of Grand Rapids, 142 Mich. 687.

¶ 108. The furnishing to customers taking electricity the necessary devices or equipment to produce heat, power or light from the current is incidental to and an implied power connected with the business of operating a municipal electric light plant, and supplying light, heat, power, and transportation.—Andrews v. City of South Haven, 187 Mich. 294.

§ 28. Extraterritorial powers.

¶ 109. A city or other municipal corporation cannot usually exercise its powers beyond its own limits; and if it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it.—City of Coldwater v. Tucker, 36 Mich. 474.

§ 29. ——Extra-limitary works and properties.

Constitutional power to acquire extra-limitary properties and works, see Const. art. VIII, § 22.

¶ 110. The authority of a city to provide sewerage beyond the city limits may be implied from the existence of a state of facts which renders it actually necessary or manifestly desirable, as where a city, though bounded by a stream, is required by its charter to preserve the stream from pollution, and prevent the depositing of filth therein, and no other outlet is reasonably available except through means of ditches extending beyond the limits.—City of Coldwater v. Tucker, 36 Mich. 474.

¶ 111. Where the drainage of a city requires an outlet beyond the city limits, and the surroundings are such as to raise the implication of authority in the city to conduct the works beyond its limits, the city must be permitted to retain some discretion as to arrangements by which it shall accomplish the purpose; and there is no legal obstacle to its undertaking to do this work by its own servants or contractors, instead of employing the owner of the premises to do it.—City of Coldwater v. Tucker, 36 Mich. 474.

¶ 112. The right of a city to take possession of, and improve as a public park, lands lying outside of its limits, comes only by sovereign grant, and so far as concerns the city is a public franchise.—Thompson v. Moran, 44 Mich. 602.

¶ 113. A city may hold and own lands for a public park, and cause them to be improved, not in its public capacity as an agency of the government and subject to state control, but as a corporate individual having private rights which the people have a constitutional right to enjoy undisturbed.—Thompson v. Moran, 44 Mich. 602.

¶ 114. Under the Constitution, art. VIII, §§ 22, 23, a city may acquire and operate a power plant outside its limits for the purpose of supplying itself and its inhabitants with electricity.—City of Traverse City v. Township of Blair, 190 Mich. 313.

¶ 115. A city by charter was given the right to establish a hospital for infectious diseases, outside of its limits. The general health law of the state, Comp. L. 1897, §§ 4436, 4437, 4459, 4471, provides that no infected person shall be brought into a township without the permission of its health authorities. Held, the power of the city to establish such a hospital outside its limits is subject to the consent of the township.—Township of Summit v. City of Jackson, 154 Mich. 37.

§ 30. Mode and organs for exercising power; ordinance or resolution.

Manner of councilmanic procedure in meetings and in voting on ordinances and resolutions, see post § 35 et seq.

Mode of official action on behalf of city, see post § 193.

Name in which to sue or defend, see post § 212.

Submission to electors of proposals to contract or incur debts, see post § 115; Municipal Bonds § 4.

Mode of action necessary to accept dedication, see Dedication §§ 8-11.

Procedure and acts incident to making public improvements, see also Local Improvements.

¶ 116. The municipal authorities are the duly constituted representatives of the people of the city and are the only governmental agencies provided for conserving the interests of the public.—City of Detroit v. Detroit United Ry., 172 Mich. 136, aff'd in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

¶ 117. It seems that action by a common council is not void merely because taken by motion instead of by resolution as the charter provides.—Bishop v. Lambert, 114 Mich. 110.

¶ 118. The provision of Pub. Acts 1895, No. 215, chap. 8, § 7, that no resolution appropriating money shall be adopted by the council except by ordinance or resolution cannot be evaded by embracing such action in the form of a motion to employ public servants at a specified salary. The motion is a resolution.—Bishop v. Lambert, 114 Mich. 110.

¶ 119. Under Pub. Acts 1895, No. 3, chap. 5, § 5, a contract for supplying water to a village need not be put into the form of an ordinance, but may be entered into by resolution, so that the form in which it was entitled or published is immaterial.—Lewick v. Glazier, 116 Mich. 493.

¶ 120. A charter provision that when the common council shall have decided upon making any public improvement, it shall so declare by resolution, whereupon the board of public works shall make an estimate of the cost, is substantially complied with where the council by resolution recited the intention and understanding that an act would be introduced at the next legislature to authorize the issue of bonds for a bridge, and directed plans, specifications and estimates to be made, and other similar resolutions were subsequently acted upon and passed.—Kundinger v. City of Saginaw, 132 Mich. 395.

¶ 121. Though under Comp. L. 1897, § 6446, the right to construct and maintain street car lines in cities and villages can be granted only by ordinance, the right to change a curve in the track may be given by resolution or motion, though the ordinance granting the rights in the streets did not mention curves, it being reasonable to suppose that this was one of the incidentals of the construction of the road which was to be under the control of the common council.—Mannel v. Detroit, Mt. C. & M. City Ry., 139 Mich. 106.

¶ 122. Under an ordinance granting a street railway rights in a street and providing that the location of poles, and the location and construction of sidetracks, spurs and switches should be under the control of the common council, a change in the location of a curve in the track may be authorized by resolution or motion and the duty of the council, being ministerial, may be delegated to the committee on streets or to a proper official.—Mannel v. Detroit, Mt. C. & M. City Ry., 139 Mich. 106.

¶ 123. Where the charter of a city requires that a resolution determining the expediency of a project be adopted by the board of aldermen before the common council shall have power to enter into the construction of a lighting plant, the adoption of such resolution of expediency after the letting of contracts for construction of the plant is of no avail, being an attempt made after an act to supply the necessary preliminary power to do the act.—Bay City Traction & Electric Co. v. Bay City, 155 Mich. 393.

¶ 124. Where at an election regularly petitioned for, ordered, and held under Laws 1891, Act No. 186, entitled "An act to authorize the cities and villages of this State to provide for the lighting of their streets and other public places therein by means of electric or other lights," a majority of the qualified electors of a city votes in favor of "constructing works" for public lighting, it is not within the power of the city council wholly to set aside that action, and at once let a "contract for furnishing of light" to private parties for a term of years.—George v. Wyandotte Electric Light Co., 105 Mich. 1.

¶ 124a. Failure of village council to pass and record formal resolutions requiring and approving new bond from treasurer which is voluntarily executed by him and accepted by council, held no defense in suit on bond against principal and surety.—Evart v. Postal, 86 Mich. 325.

§ 31. Distribution of power and authority among councils, officers, and citizens.

Delegability of power, see post § 32.
Power through adoption of freeholders' charter to confer authority on councils or officers or to change their relative powers, see ante § 18.
Power over offices and officers, see post XV.
Investigations of official doings by council, see post § 195.
Purpose and necessity of approval by council of contract for public work, see Public Contracts, II.
Powers of health officers, see generally Health.
Powers of water boards, see Waters, VI.
Power of health board to compel enlargement of city sewer in order to abate nuisance caused by its deficiency to carry sewage from other city lawfully discharged into the sewer, see Health ¶¶ 24, 25.
Jurisdiction of drain commissioner to lay drain within city territory, see Drains § 24.

¶ 125. The citizens of a municipality cannot confer upon the common council functions not left with them by the charter.—Torrent v. Muskegon Common Council, 47 Mich. 115.

¶ 126. A city council, if authorized by statute, can take action involving the expenditure of public money, without the approval of any other body, whether of taxpayers alone or of electors generally; and while it is proper and legal to provide that it may do so with approval of the taxpayers, such a provision is not required by the constitution.—Callam v. City of Saginaw, 50 Mich. 7.

¶ 127. The commissioners of parks and boulevards of the City of Detroit are the proper administrative body to carry out ordinances, providing for the care, custody, and keeping of the streets and other highways of the city, and may hire necessary employees who are subject to their provision and control.—Commissioners of Parks, etc. v. Common Council of Detroit, 80 Mich. 663.

¶ 128. The Detroit park commissioners have administrative power under ordinances enacted by the common council over the bridge leading to Belle Isle Park, but Local L. 1889, Act No. 388, § 11, providing that such commissioners "may make all suitable and needful rules and regulations respecting the use of said bridge," undertaking to give them legislative power of regulation, is so far invalid.—Commissioners of Parks, etc. v. Common Council of Detroit, 80 Mich. 663.

¶ 129. Where the legislative control of the streets is vested in the common council and the administrative control in a board of public works, the board of public works is the proper body to authorize and permit a street railway company to put in such turnouts, etc., as are necessary.—Detroit Citizens' St. Ry. Co. v. Board of Public Works of Detroit, 126 Mich. 554.

¶ 130. In view of the provision of Pub. Acts 1901, No. 222, § 12, that the board of estimates and common council "shall annually insert in their tax levy a sufficient sum to meet the expenditures incurred under the provisions of this act," there was no power conferred on the cities to make the payment of fees for plumbing inspections under such act a condition precedent to the doing of plumbing work otherwise conformable to the regulations of the plumbing board; and this construction is strengthened by the provision of section 4 of the act that a fee of two dollars be charged for each person applying for examination under the act.—People v. Decker, 141 Mich. 304.

§ 32. Delegability of power or authority.

See also ante ¶ 122.
Appointment of committees by councils, see post § 35.
Delegation of control over litigation to mayor, see also post ¶ 828.

¶ 131. While the common council of a city may not delegate all the power conferred upon it by the legislature, like any other corporation, it may do its ministerial work by agents.—City of Flint v. Stockdale's Estate, 149 Mich. 214.

¶ 132. The acts of the mayor of a city in signing a claim of appeal and an appeal bond in an action in which the city was interested were mere ministerial acts which may properly be delegated to him by the city council.—City of Flint v. Stockdale's Estate, 149 Mich. 214.

¶ 133. A common council cannot delegate to a street committee the power to grade and ditch a street according to their discretion.—Chilson v. Wilson, 38 Mich. 267.

¶ 134. Power lodged by statute in a city council to make reasonable regulations in regard to the use of poles erected in the city for electric lighting cannot be delegated to a committee.—Citizens' Electric Light & P. Co. v. Sands, 95 Mich. 551.

§ 33. Estoppel to assert or deny power or exercise thereof.

Act of officer as estoppel on city, see post § 192.
Issuance of warrant as estoppel on city, see post § 160.
Capacity of parties to become bound by estoppel, see also Estoppel § 3.
Nonestoppel by resolution not acted on and then rescinded, see also Estoppel ¶ 212.
Estoppel to question validity of bonds, see Municipal Bonds § 17.
Rights under executed ultra vires public contracts, see Public Contracts, V.

¶ 135. A municipal corporation cannot be estopped by an act void in its inception and wholly ultra vires.—Bogart v. Township of Lamotte, 79 Mich. 294.

¶ 136. A city which retains the benefits of a contract that is neither malum prohibitum or malum in se, though in part ultra vires, and which has been fully performed by the other party, is estopped from denying the validity of the contract on the ground of defective execution.—Coit v. City of Grand Rapids, 115 Mich. 498.

§ 34. Judicial interference or control.

In matters of councilmanic procedure, see post § 35.
Grounds for interference with tax levies, see also post ¶ 578.
Interference with discretion to settle and compromise claim, see post ¶ 696.
Declaring ordinances void for unreasonableness, see post § 57.
Propriety of suit by attorney general, see also post § 208.
Remedy for diversion or misuse of public funds, see also post § 146.
Occasion and propriety of injunctions against acts of municipality or its officers, see Injunctions, II, D.
Irreviewableness of decision letting contract, see Public Contracts, II, VI.

¶ 137. Courts do not look with favor upon injunction bills to restrain or hinder the completion of public improvements unless there is proof of fraud or of such exorbitant prices that fraud may be inferred.—Kundinger v. City of Saginaw, 132 Mich. 395.

¶ 138. Courts cannot interfere with the discretion of municipal bodies in the expenditure of public funds unless it has been plainly abused and practically exceeded under pretense of keeping within their charter powers.—Torrent v. Muskegon Common Council, 47 Mich. 115.

¶ 139. The discretionary power under city charter of determining how many officers are required for certain duties is one of a legislative character, which can neither be reviewed nor made the basis of an action against the city. The number fixed must be assumed to be all that was needed for the proper care of the interests intrusted to them.—Dewey v. City of Detroit, 15 Mich. 307.

¶ 140. Equity cannot interfere with municipal contracts on the ground that they are improper or unwise, but only on the ground that they exceed the powers granted the municipality by its charter.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 141. Courts of equity cannot stand between citizens and municipal authorities to shield them from abuses and extravagant action, unless they exceed their powers; since it is one of the incidents of popular government that the people must bear the consequences of the mistakes of their representatives.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 142. The power of the state through its attorney general to file informations involving the validity of municipal action is an exercise of its visitorial authority to enjoin municipal corporations from doing those acts which are prohibited or which are in excess of their corporate powers, and the essence of such informations is necessarily the averment of such transgression of law by the municipality or its officers.—Attorney General ex rel. McRae v. Thompson, 167 Mich. 507.

¶ 143. Private citizens cannot dictate through the courts what shall be done in the line of a city's public duty.—Bauman v. Campau, 58 Mich. 444.

¶ 143a. The courts cannot review the decision of the common council of a city in accepting and approving of work done under a contract where neither fraud nor mistake is charged.—Motz v. City of Detroit, 18 Mich. 495.

IV. MEETINGS, VOTES, PARLIAMENTARY PROCEDURE, AND RECORDS.

§ 35. In general; councilmanic procedure.

Calling of meetings, notices, and proofs of notices, see post § 36.
Votes and voting and majorities, see post §§ 37-42.
Minutes and records, see post § 43.
Procedure on resolution to submit freeholders' charter to electors, see ante § 20.
Resolution or ordinance as better mode of exercising powers, see ante § 30.
Power to delegate performance of duties, see ante § 32.
Character and representative nature of office of alderman or councilman, see post § 163.
Concurrence or assent to appointments to office, see post § 166.
Procedure before council for removal of officer, see post § 171.
Time for making tax levy, see post § 139.
Mandamus to compel attendance at council meetings, see Mandamus ¶¶ 522-524.
Mandamus to compel declaration of vote on resolution, see Mandamus ¶ 532.
Libel or slander based on statements contained in official reports or communications, see Libel and Slander, § 36.

¶ 144. The courts will not disturb a ruling of the council on a question of parliamentary law.—Davies v. City of Saginaw, 87 Mich. 439.

¶ 145. A resolution directing city officers to proceed with a proposed bond issue pre-

viously directed, but which there had been an abortive attempt to rescind, is not new business, subject to postponement on objection by one member of council.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 146. Saginaw City Charter provided that the common council should prescribe the rules for the transaction of its business and for its proceedings, which rules should have the effect of law. Among the rules adopted was one providing that no resolution or proceeding imposing taxes or assessments, or requiring the payment, expenditure, or disposition of money, or creating a debt or liability therefor, should be passed at the same meeting at which it was introduced, if objection should be made by any member. The council, proceeding upon the theory that a prior resolution had limited to $90,000 the present issue of bridge bonds theretofore duly authorized in the sum of $200,000, adopted a resolution providing for the issue of $165,000 of such bonds, and directing the manner of their disposition. Held, that said resolution was not new business, within the prohibition of the rule.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 147. A common council of a city may choose its own method for collecting information, and may conduct investigations through a committee of outsiders or through the mayor, provided the investigation is made in its behalf, in accordance with its directions, and subject to its control, and the results reported to it for its action.—Attorney General ex rel. Maguire v. Wayne Circuit Judge, 157 Mich. 615. (Brooke, Hooker and Moore, JJ., dissenting.)

¶ 148. A presiding officer cannot arbitrarily adjourn a meeting in defiance of the majority present. So held, where at a meeting of the Detroit common council after the yeas and nays were legally demanded on a motion to adjourn, the president, without calling the roll or putting the question, declared the council adjourned, and left the chair.—Dingwall v. Common Council of Detroit, 82 Mich. 568.

§ 36. Calling, notices, and proofs of notice of meetings.

Power to adjourn meetings, see ante § 35.
Presumptions as to notice of meeting where record is silent, see post ¶ 312.

¶ 149. The appointment or call of a special meeting of the council of a village incorporated under Pub. Acts 1895, No. 3, need not be in writing or state the object of the meeting, nor need it be filed or made matter of record. Chapter 5, § 4, of the act merely requires that "notice" of the meeting must be in writing, etc.—Lewick v. Glazier, 116 Mich. 493.

¶ 150. Evidence sufficiently shows that notice of a special meeting of a village council was properly served, and that the meeting was lawful, where the president testified that he called the meeting, the marshal that he served notice of it on all the members of the council that he could find and left notices at the houses of the others six hours before the meeting and then told the president of his doings and filed his return with the clerk, and where such a return is in the record book pasted there, and all the testimony is corroborated.—Lewick v. Glazier, 116 Mich. 493.

¶ 151. Proof of the service of notice of a special meeting of a village council is not to be held defective merely because the village clerk pasted the return upon the page of the journal of the council's proceedings instead of filing it.—Lewick v. Glazier, 116 Mich. 493.

¶ 152. Action taken at a special meeting of a city council is not invalid for want of proof of due notice of the meeting, where it appears from the record of the vote taken that all of the members were present.—Auditor General v. Hutchinson, 113 Mich. 245.

§ 37. Votes and voting; majority or number required.

For passage of appropriation or revenue bills, see post § 38.
For passage over veto, see post § 39.
For reconsideration, see post § 40.
Disqualification to vote by interest in subject or result, see post § 41.
Casting off tie votes, see post § 42.
"Majority" required for appointment to office, see post § 166.
Vote required for removal of officer, see post § 171.
Recording of ayes and nays of vote, see post § 48.
Ratification of insufficient vote by later action, see post § 67.
Presumption as to character of vote or majority, see post § 70.
Votes necessary to authorize issuance of bonds, see Municipal Bonds § 4.

¶ 153. The charter of Detroit declares that the common council shall have power by a two-thirds vote to authorize the board of police commissioners to offer a reward for the detection and apprehension of any one found guilty of offenses against the city ordinances or of high crimes and misdemeanors within the city. Held, that in view of this provision the council has no power by a majority vote, and independently of the police commissioners, to authorize the mayor to offer rewards for the conviction of incendiaries.—Loveland v. Detroit, 41 Mich. 367.

¶ 154. The charter of Port Huron requires a majority vote of the whole council for the appointment of officers, and provides that appointees shall hold for one year. It elsewhere, and by subsequent enactment, provides for a board of police commissioners to hold office four years. Held, that a practical

construction by the council which applies to these officers the same requirement of a majority vote will not be disturbed.—Baker v. Port Huron Police Com'rs, 62 Mich. 327.

¶ 155. General provisions of a city charter regulating the enactment of ordinances and resolutions do not apply to the performance of the duty imposed upon the common council by How. St. § 2283d1, as to the approval of liquor bonds; and in the absence of contrary provisions in the charter a majority vote of the members present at a legal meeting of the council is sufficient for approval.—O'Halloran v. Jackson, 107 Mich. 138.

¶ 156. There is no acceptance of an attempted dedication of a street where out of fifteen members of the common council seven voted for the resolution accepting the deed and six voted against it and the charter, Local Acts No. 131, section 74, provides that no resolution shall be passed except by the vote of the majority of all members elected. —Gregory v. City of Ann Arbor, 127 Mich. 454.

§ 38. ——Revenue, appropriation or tax bills.

Vote required to rescind or reconsider two-thirds vote, see post § 40.

Right of mayor to cast off tie vote, see post § 42.

¶ 157. Where a village charter provides that the president and six trustees shall constitute the common council, and that no tax shall be ordered except by a two-thirds vote of the members, a vote of five members is required for a resolution ordering an assessment.—Whitney v. Hudson Common Council, 69 Mich. 189.

¶ 158. Where a city is incorporated under the general law (How. St. ch. 80), any resolution or ordinance of its common council incurring a liability that must be met by taxation requires a concurring two-thirds vote of all the aldermen-elect.—Tennant v. Crocker, 85 Mich. 328.

¶ 159. The common council of a city, incorporated under How. St. ch. 80, by a tie vote of the aldermen-elect, and the casting vote of the mayor, who claimed the right to break the tie, assumed to pass a resolution authorizing the mayor and city clerk to enter into a contract for the purchase of a designated parcel of land at a stated price, to be used in widening a city street. Held that, by entering into said contract pursuant to such resolution, a liability would be at once incurred not provided for in said annual appropriation bill, and which the council are prohibited from incurring without a vote of the electors under How. St. § 2706, for which reason the action of the mayor in declaring the resolution carried cannot be upheld; and that, were the council not so prohibited, a concurring vote of two-thirds of all the aldermen-elect would be required under How. St. § 2515, providing that no private property shall be taken for public use, except by a concurring vote of two-thirds of the aldermen.—Tennant v. Crocker, 85 Mich. 328.

¶ 160. A resolution fixing an officer's salary is one making it obligatory that there be an appropriation of money; and so is within a charter provision requiring a majority vote of all the aldermen-elect to adopt a resolution appropriating money.—Fournier v. Mayor, etc., of West Bay City, 94 Mich. 463.

¶ 161. The employment of firemen by a city council, at a specified monthly salary, constitutes an appropriation of money, within the meaning of a charter provision (Pub. Acts 1895, No. 215, chap. 8, § 7), that such action can only be taken by a majority vote of the aldermen-elect.—Bishop v. Lambert, 114 Mich. 110.

¶ 162. The action of the common council of a city of the fourth class, incorporated under Pub. Acts 1895, No. 215, in adopting, by a bare majority vote, a motion providing for the employment of firemen at a specified salary per month, is invalid, unless the necessary funds are already provided, under chapter 8, section 7 of that act, requiring the concurrence of two-thirds of the aldermen-elect to impose a tax.—Bishop v. Lambert, 114 Mich. 110.

¶ 163. A resolution of the city council of St. Clair as to the use of money borrowed for a specific purpose and attempted to be devoted to another purpose, adopted by a tie vote of the aldermen, with the affirmative vote of the mayor cannot create an obligation on the part of the city to be met by taxation or to lay a tax; and is invalid unless it amounted to a mere distribution of funds already on hand to the purpose for which the funds were raised, since the charter requires a two-thirds vote to transfer funds.—Vossen v. City of St. Clair, 148 Mich. 686.

¶ 164. Where a city charter authorized the council to restrain, license and regulate saloons, and the council passed an ordinance by a majority vote (a two-thirds vote is required for imposing a tax) to restrain, license, and regulate saloons and other places where intoxicating liquors are sold and prescribing locations thereof, and requiring persons desiring to engage in such business to make written application to the council for a license, to pay $500, and containing an agreement on the part of the applicant that he will accept the license upon the condition that it may be revoked by the council at its will, but giving him opportunity to be heard before revocation, and providing punishments for violation of any requirements of the ordinance, such ordinance must be held to be for the purpose of regulation and not revenue and may be sustained in so far as the amount of the license fee is concerned,

and need not have been passed by a two-thirds vote.—Wells v. Torrey, 144 Mich. 689.

§ 39. ——On vetoed bills and resolutions.

Adoption of resolution tantamount to adoption of original resolution as passage of original over veto, see post ¶ 185.

¶ 165. Under § 103, Detroit Charter, requiring a two-thirds vote of all the members elected of the common council to pass an ordinance over the mayor's veto, the affirmative vote of 22 members is not sufficient where 34 were elected and one had died and one resigned.—Pollasky v. Schmid, 128 Mich. 699.

§ 40. ——On reconsideration or revocation of previous vote.

Ratification or revocation of vote by later action, see post § 67.

¶ 166. A corporate act which can only be taken by a majority vote of all of the aldermen-elect cannot be rescinded except by a like vote.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 167. Where, by the charter, a two-thirds vote is required to pass a resolution ordering a tax, it cannot be reconsidered or rescinded except by a like vote.—Whitney v. Hudson Common Council, 69 Mich. 189.

¶ 168. Under a charter authorizing the city council to cause a new assessment to be made for a public improvement in place of an invalid one, a majority of the council has power to rescind their action in ordering the original assessment; and where the reassessment is ordered to be made by a vote of two-thirds of all the aldermen-elect, as required by the charter, the proceedings cannot be attacked because the original assessment was ordered by a greater number of the members of the council.—Townsend v. City of Manistee, 88 Mich. 408.

§ 41. ——Right to vote and disqualification by interest.

Disqualification of mayor to cast off tie, see post § 42, ¶ 173.

Invalidity of contracts with public affected with personal interest of officer officiating, see Public Contracts.

¶ 169. The vote of an alderman, as such, for a public improvement for which, as an individual, he was a petitioner, is not void.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 170. That one of the trustees of a village is related to a person to whom a contract for supplying the village with water is proposed to be given, does not disqualify such trustee from voting upon the matter.—Lewick v. Glazier, 116 Mich. 493.

¶ 171. A contract for supplying water to a village cannot be held invalid because some of the village's trustees are interested as stockholders in an electric light company that is to furnish power for pumping the water, where it is shown that only one of the four trustees is so interested.—Lewick v. Glazier, 116 Mich. 493.

¶ 171a. A member's liability to materialmen because of failure to take a bond from a public contractor disqualifies such member to vote on a claim for work presented to the council.—Smith v. Hubbell, 142 Mich. 637.

¶ 171b. Unless a petitioner for mandamus to compel recognition as officer elected by vote of the council shows that he was elected without his own vote as councilman, his petition must be denied.—Tinker v. Board of Public Works of City of Jackson, 97 Mich. 616.

§ 42. Tie vote and casting vote.

Insufficiency of majority made by casting vote, see ante § 38.

¶ 172. Under Pub. Acts 1895, No. 215, chap. 8, § 7, providing that no money shall be appropriated by cities incorporated thereunder except by ordinance or resolution of the council, and that no resolution shall be passed or adopted "except by the vote of a majority of all the aldermen elected to office, except as herein otherwise provided," and section 2, giving the mayor the casting vote in case of a tie, the mayor may vote, in case of a tie, upon a resolution appropriating money.—Bishop v. Lambert, 114 Mich. 110.

¶ 173. A mayor who employed an attorney to bring action to prevent the diversion of public funds by the city council, in which proceeding the mayor's contention prevailed, is not precluded from casting the deciding vote on a resolution to pay the attorney so employed where the vote was a tie, the mayor not having a "direct personal interest" which would prevent him from voting where he had expressly avoided any personal liability to the attorney.—Smedley v. Kirby, 120 Mich. 253.

§ 43. Minutes and records.

Publication and recording of ordinances and resolutions, see post § 48.

Presumptions and evidence as to vote and passage, see post § 70.

Proofs of notice of meetings of councils, see ante § 36.

Record of action taken by board or officer, see post § 193.

Records of meetings and votes on bond issues, see Municipal Bonds § 4.

Mandamus to compel proper keeping of records, see Mandamus § 104.

General law of public records, see Records.

Police records and "rogues' gallery," expunging of matter on discharge of person arrested, see Records.

Power of court to cause prosecuting attorney to surrender public city records held for use as evidence, see Records.
Minute books and records as documentary evidence, see Evidence § 534.
Record required by charter as best evidence, see Evidence § 121.
Parol evidence to contradict or vary or explain records, see Evidence § 195.

¶ 174. Village councils are required by §§ 2731-2752, Comp. L. 1897, §§ 5950-5971, How. St., 2nd Ed., to keep a record of their proceedings which is the best and in most cases the only lawful evidence of official acts.—Labadie v. Village of Ford, 185 Mich. 402.

¶ 175. In matters involving the discretion or judgment of the city council where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show want of knowledge or good judgment.—Davies v. City of Saginaw, 87 Mich. 439.

V. ENACTMENT, FORM, AND REQUISITES OF ORDINANCES AND RESOLUTIONS.

§ 44. In general.

Titles, enacting clauses and other formal parts, see post § 45.
Approval or veto and passage over veto, see post §§ 46, 47.
Publication and recording of ordinances, see post § 48.
Meetings and votes of councils, see ante IV.
Nature, construction, validity, operation and effect of ordinances and resolutions, and proof of them, see post VI.
Proper subjects of regulation and ordinances within powers of city, see post IX.
Vote required for passage, see ante §§ 37-40.
Requirement of reasonableness, see post §§ 50, 57.
Requisite determinations to support tax levies, see post § 139.
Declination to consider motives of council for purpose of avoiding ordinances, see post § 57.

§ 45. Titles, enacting clauses, and other formal parts.

¶ 176. An ordinance is not void for containing matters not expressed in its title; the constitutional provision relating to titles of statutes does not apply to city ordinances.—People v. Hanrahan, 75 Mich. 611; People v. Wagner, 86 Mich. 594.

¶ 177. The omission of the enacting clause from an ordinance does not necessarily nullify the ordinance, particularly if the charter does not so provide (Local L. 1877, p. 213, § 17).—People v. Murray, 57 Mich. 396.

§ 46. Approval or veto.

Immateriality of veto of rescinding resolution which lacked sufficient vote, see also post ¶ 297.
Vote required on vetoed bills and resolutions, see ante § 39.
Sufficiency of occasion for president of council to act as vice mayor, see post § 178.

¶ 178. Where a city charter requires that any resolution of the council must be approved by the mayor in writing, he must write his approval upon the resolution and sign it, and his mere oral approval of the resolution or the approval of the journal containing the resolution is not a compliance with the charter.—Whitney v. City of Port Huron, 88 Mich. 268.

¶ 179. Where the charter provides that the resolutions of the city council shall be submitted to the mayor and "if the mayor approve thereof * * * thereupon such resolution shall go into effect" (Local Acts 1879, No. 408), an assessment for public improvements, undertaken in accordance with the provisions of a resolution which has not been so submitted, is invalid.—Twiss v. City of Port Huron, 63 Mich. 528.

¶ 180. Where labor was performed under a contract with the city of Detroit before the charter of 1857 took effect, and the common council, after the new charter, passed a resolution for the settlement of the contractor's claim, it was held that the resolution did not require the approval of the mayor.—Chaffee v. Granger, 6 Mich. 51.

¶ 181. The charter of Detroit provides that certain resolutions, etc., of the common council before taking effect shall be presented by the clerk to the mayor, who may either approve or disapprove them, and if he neglects to approve or return the same at the next regular meeting after they shall have been presented to him the same shall go into effect; held, that the mayor has until the first regular meeting of the common council, after the clerk has presented such resolutions, to approve or disapprove, and the clerk by withholding the resolutions over a regular meeting cannot thereby deprive the mayor of his right or make them effective, nor does it matter what length of time may intervene between the date of the passage and presentation and the next regular meeting.—City of Detroit v. Moran, 46 Mich. 213.

¶ 182. Where the charter of a city (Local Acts 1897, No. 442, chap. 5, § 3) empowers the council to "appoint one chief of police and such other number of policemen * * * as they shall deem necessary" a resolution which not merely selects an additional policeman but determines whether there shall be such an officer is subject to veto by the mayor, whether the power to veto an election exists or not.—Kindermann v. City of West Bay City, 117 Mich. 516.

¶ 183. A contention that a resolution recommending the transference of money from a contingent fund to other funds is not subject to veto by the mayor, cannot be sus-

tained as the statute (Pub. Acts 1895, No. 215, chap. 9, § 3) applying to cities of the fourth class and providing that no ordinance or resolution shall have any force or effect though passed by the council, if a veto message is interposed, unless the same is passed over the veto by a two-thirds vote, applies to all ordinances and resolutions.—Baar v. Kirby, 118 Mich. 392.

¶ 184. Pub. Acts 1895, No. 215, chap. 9, § 3, applying to cities of the fourth class, and requiring a mayor who vetoes an ordinance or resolution to lodge it in the office of the city clerk within three days, is sufficiently complied with where a mayor goes to the city clerk's office, and finding it closed, delivers the veto to the clerk at his residence about seven o'clock in the evening of the last day.—Baar v. Kirby, 118 Mich. 392.

§ 47. Passage over veto.

¶ 185. Where, upon the delivery to a city council of a message of the mayor refusing to approve a resolution appointing a sidewalk inspector, a motion that the resolution be again adopted, notwithstanding the veto, is declared lost for want of the necessary vote, and an appeal from the decision of the mayor, refusing to treat as properly before the council a demand for a second roll-call, is sustained, and a motion to proceed to the election of a sidewalk inspector is carried by the vote necessary to the adoption of the vetoed resolution, and a resolution appointing the same candidate to said office is carried by a like vote, the proceedings amount to a passage of the first resolution over the veto.—Caswell v. Marsac, 99 Mich. 417.

§ 48. Publication and recording of ordinances and resolutions.

Effect of failure to record, see also post ¶ 228.

Exclusiveness of record as evidence, see post § 70.

Presumptions and evidence as to vote and passage of ordinance, see post § 70.

Right to recover on implied contract for printing ordinances, see Public Contracts, V.

¶ 186. The charter of Hudson provides that no ordinance shall take effect until it has been published once in each week for two weeks successively. Held, that two full weeks must elapse between the passage of the act and the date of its taking effect.—Van Alstine v. People, 37 Mich. 523.

¶ 187. The time during which a publication of village ordinances must be continued cannot be fixed by any mere ministerial officer without express authority, but must be fixed by the legislative body of the village, which would also have authority to designate the paper in which the publication must be made.—Thornton v. Village of Sturgis, 38 Mich. 639.

¶ 188. Where a city charter requires that "all ordinances shall be published for three successive days, and shall take effect in ten days after their enactment, provided, however, that the council may fix and prescribe a different period, and that no ordinance shall take effect before one publication thereof," an ordinance which provides that it shall take immediate effect, and which is approved August 2, 1889, may be enforced for a violation committed August 10, 1889, publication having intervened.—People v. Keir, 78 Mich. 98.

¶ 189. If a city charter provides that no ordinance shall take effect unless published at least one week in the official paper of the city, publication as often as the paper is issued is sufficient, and it is immaterial that the paper has no Monday issue.—Richter v. Harper, 95 Mich. 221.

¶ 190. Sections 3086, 3087, Comp. L. 1897, How. St., 2nd Ed., §§ 5608, 5609, do not make publication of a penal ordinance adopted by a city of the fourth class a prerequisite to its validity.—Vernakes v. City of South Haven, 186 Mich. 595.

¶ 191. A common council, in levying taxes, can act only by resolution or by-laws adopted at a meeting, and the proceedings of such meeting cannot be left in parol.—Moser v. White, 29 Mich. 59.

¶ 192. Where the charter of Bay City declared that the recorder "shall keep a record of any ordinance enacted, and of the time of its publication, which record shall be signed by the mayor and recorder," it was held that the omission of such a ministerial duty did not defeat an ordinance lawfully adopted by the common council; otherwise the mayor and recorder would have a veto power not contemplated by the charter.—Stevenson v. Bay City, 26 Mich. 44.

¶ 193. The East Saginaw charter (Laws 1859, Act No. 246) required that in certain cases the vote of a city council should be entered at large on their minutes; the ayes and nays on each resolution embraced within the terms of the act must be so entered to show who voted, and how. The record that a resolution "was adopted unanimously on call," the names of those voting not appearing otherwise than by the statement as to who were present at the opening of the session, is not a compliance with the statute.—Steckert v. City of East Saginaw, 22 Mich. 104.

¶ 194. As there is no other legal way of determining whether a majority of all the aldermen have voted on the passage of an ordinance, the record should set forth the yeas and nays. The importance of accuracy in city records commented on.—McCormick v. Bay City, 23 Mich. 457.

¶ 195. A city ordinance admittedly presented to the mayor and signed and approved by him in time, then recorded in the "Record of Ordinances" according to statute by the clerk and therein certified by him as published, the original ordinance being signed and indorsed, is valid. The city clerk's failure to record it in the council's journal does not avoid it.—Boehme v. Monroe, 106 Mich. 401.

VI. NATURE, INTERPRETATION, OPERATION, AND PROOF OF ORDINANCES AND RESOLUTIONS.

§ 49. In general; nature and force of ordinances.

Scope of power to enact ordinances and character and subject-matter for regulation within powers, see post IX.
Nonliability for action or neglect in legislative capacity, see post § 125.
Order of city council as judgment amounting to res adjudicata, see also Former Adjudication ¶ 20.

¶ 196. The ordinances of a city are no more nor less than by-laws of a corporation.—People v. Jackson, 8 Mich. 110.

¶ 197. City ordinances are not "laws"; that term is properly applicable only to enactments of the general legislature.—People ex rel. Fennell v. Bay City Common Council, 36 Mich. 186.

¶ 198. City by-laws and ordinances are entirely of local application, and are intended for local benefit.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422.

¶ 199. Municipal ordinances are general, and impose duties which in particular cases may not be important; their purpose is public, and their violation is to be redressed by legal penalties.—Cook v. Johnston, 58 Mich. 437.

§ 50. Construction in general.

Construction of various kinds of ordinances and regulations, see post §§ 51-55.
Validity and time of taking effect, see post §§ 56-60.
Effect of partial invalidity, see post § 62.
Repeal, amendment, abrogation, and revocation, see post §§ 65-67.
Rights of persons accepting and acting on provisions of ordinances, see post § 68.
Liability for violation, see post § 69.
Evidence and proof of ordinances, see post §§ 70, 71.
Law and fact questions relating to ordinances, see post § 72.
Effect of one resolution to rescind another, see also post ¶ 298.
Implication as to repeal by later ordinance or statute, see post §§ 65, 66.
Construction of resolutions and ordinances fixing salaries, see post § 197.
Construction of ordinances and regulations as laws offensive to the constitution, see Constitutional Law.
General law of statutory construction, see Statutes, V.
Resolutions by council as evincing intent to accept or reject dedication offer, see Dedication § 26.
Breach of ordinance as negligence, see Negligence ¶ 36.

¶ 200. A municipal ordinance must be given such a reasonable construction if it can be consistently done, as will sustain it.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 201. Ordinances and by-laws must be reasonable; and their reasonableness is, in general, to be tested by the intention of the authority granting the charter, and the good of the corporation erected by the charter.—Welch v. Stowell, 2 D. 332.

¶ 202. Ordinances may be construed in the light afforded by the known times and conditions in the city when and where they were intended to operate.—People v. Detroit Citizens' St. R. Co., 116 Mich. 132.

¶ 203. A resolution of the council approving the estimates of the board of education is not final where such estimates are on the next day submitted by the council to the board of estimates, the report of which board is approved and the reduced amount specified therein ordered to be levied.—Board of Education of Detroit v. Common Council of Detroit, 80 Mich. 548.

¶ 204. By the charter of Detroit (Laws 1873, Act No. 392, § 8), supervision of sewers is given to the board of public works, and no one can make sewer connections without the consent of the board. By terms of a subsequently enacted ordinance consent of the common council, on written application therefor, is required. Held, that the ordinance does not seek to divest the board of its statutory authority in the premises, but only determines the circumstances under which the council will permit the work to be done, and the board then controls the time and manner of doing it; and it is unlawful to make such connection without the council's consent.—Zube v. Weber, 67 Mich. 52.

§ 51. ——Sanitary and police regulations.

¶ 205. When there is added to a police regulation the statement that a compliance with the prescribed conditions shall not be deemed to be also a license to violate some other law or laws, nothing is thereby added to the command of the regulation, and violation of the other enumerated laws is not a violation of the regulatory ordinance.—City of Lansing v. Brown, 172 Mich. 50.

¶ 206. A city ordinance prohibiting the accumulation by livery-stable keepers of more than two cart-loads of manure in or near their stables and stable yards during certain months does not operate to except such persons from a provision against the depositing of refuse matter in alleys.—People v. Bennett, 83 Mich. 457.

¶ 207. A city ordinance prohibiting the depositing of refuse matter in alleys, and providing for the removal of such matter by the lot-owner within twenty-four hours after notice, is violated when such matter is deposited; and the violation is not cured by complying with the order of removal.—People v. Bennett, 83 Mich. 457.

§ 52. ——Trade, business and license regulations.

Effect of later ordinance to repeal earlier, see post § 65.
Clause in ordinance negativing implied license, see also ante ¶ 205.
Ordinances amounting to interstate commerce regulation, see Commerce §§ 7-10.

¶ 208. An ordinance prohibiting farmers, hucksters, etc., from "standing" their wagons within a certain region of 500 feet around a central market does not prevent the enjoyment by licensed peddlers of the right under another ordinance of peddling in the streets with a proviso that they keep their vehicles in motion except when selling, and that they then draw up to the curb.—People v. Keir, 78 Mich. 98.

¶ 209. One who goes from house to house with rugs, making contracts for leasing them for a specified sum, to be paid in instalments, the title to pass when the whole amount of the rental shall have been paid, is a "peddler," within the meaning of an ordinance requiring peddlers to procure a license.—People v. Sawyer, 106 Mich. 428.

¶ 210. One who goes from house to house, selling his wares, is a "peddler," within the meaning of an ordinance, although he does not cry or offer his goods for sale upon the street.—People v. Baker, 115 Mich. 199.

¶ 211. An ordinance prohibiting hawking and peddling without a license is violated by going without a license from door to door and leaving articles on approval to be paid for by another agent of the owner.—City of Muskegon v. Hanes, 149 Mich. 460.

¶ 212. An ordinance of a city of the fourth class requiring a license for a saloon, and designating as such "all resorts or places where intoxicating liquors are sold or drank as a beverage" must be construed as applying only to saloons where intoxicating liquors are sold, and being an attempt to license the sale of intoxicating liquors contrary to Comp. L. 1897, § 3107, subd. 14, is invalid, because thereby forbidden and beyond the power conferred.—Fitzpatrick v. Weaver, 147 Mich. 382.

§ 53. ——Street and travel regulations.

Power to regulate or prevent processions and assemblages in streets, see post § 92.
Construction of permissive ordinance allowing use of street, see also Street Railways, I, IV.

¶ 213. An ordinance of Detroit prohibited the driving of any horse, carriage, sleigh or other vehicle through any street or avenue in the city at a faster rate than six miles per hour. An ordinance subsequently adopted gave to every ambulance or other vehicle used for the transportation of sick and wounded persons and animals the right of way over all other vehicles; held, that the first ordinance includes ambulances and is not modified by the second.—People v. Little, 86 Mich. 125.

¶ 214. The discretion of a city council in passing an ordinance regulating the operation of street cars will not be interfered with where the ordinance can fairly be said to tend toward a better and safer condition.—People v. Detroit United Ry., 134 Mich. 682.

¶ 215. An ordinance requiring cars to slacken speed when rounding curves or approaching switches "in order that said car shall be run with the least possible danger to the passengers upon said car," is regulatory in character and is intended for the protection of travelers upon the streets as well as passengers upon the car.—Brown v. Detroit United Railway, 179 Mich. 404.

§ 54. ——Peace regulations and quasi-criminal ordinances.

Reasonableness of ordinance, see post § 57.
Power to define and punish offenses, see post §§ 96, 97.
Ordinance penalizing failure to remove refuse, see post ¶ 926.
Principals and accessories to violations, see also post ¶ 925.
Persons within terms of ordinance, see also post ¶¶ 925, 930.
Sufficiency of allegations in complaint for violation, see post § 221.
Evidence as to violation, see post § 227.
Acts regarded as within criminal statutes, see Crimes, II.
Noncriminal nature of violations of ordinances, see Crimes § 8.

¶ 216. Pool-selling is not punishable as the offense of maintaining "a lottery for disposing of money," within the meaning of a municipal ordinance against keeping any "lottery, policy, bucket-shop, board of trade or any other scheme or place for drawing or disposing of money, wheat or other property within the city."—People v. Reilly, 50 Mich. 384.

¶ 217. An ordinance (Detroit Rev. Ord. 1884, ch. 64, § 3) providing that no person shall maintain "any lottery, policy, pool, bucket-shop," etc., prohibits the keeping of a policy-shop.—People v. Hess, 85 Mich. 128.

¶ 218. An ordinance providing that "no person shall make any indecent exposure of his or her person in the streets, lanes, alleys or elsewhere in the city" does not include an exposure purely accidental.—City of Grand Rapids v. Bateman, 93 Mich. 135.

¶ 219. The general rule that intent is an ingredient of every offense is not universally true, but an act of volition is implied in the offense of indecent exposure under a city ordinance.—City of Grand Rapids v. Bateman, 93 Mich. 135.

¶ 220. A section of a village ordinance which provides that "any assemblage of persons, in any place in said village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, shall be deemed, and is hereby declared, a disorderly assemblage," is not limited in its scope by a prior section of the same ordinance which provides that "every assemblage of persons in any street, lane, alley, or public place in said village, and upon any sidewalk or crosswalk thereof, and upon the street corners, and in front of or adjacent to any of the churches, hotels, business houses, or public buildings in the said village, engaged in noisy, boisterous, contentious language or conduct, shall be deemed a disorderly assemblage," so as to make it inapplicable to a disorderly assemblage of persons in a saloon in said village.—Village of Vicksburg v. Briggs, 102 Mich. 551.

¶ 221. An improper or unlawful purpose is not an essential element of the offense charged under an ordinance of "indecent, insulting, and immoral conduct and behavior in any public street or elsewhere" within the city.—City of Grand Rapids v. Williams, 112 Mich. 247.

¶ 222. A city ordinance providing that persons wandering about the streets either by day or night, without any lawful means of support, or without being able to give any satisfactory account of himself or herself, shall be deemed disorderly, was not void as constituting an unreasonable or unwarranted abridgment of liberty.—In re Stegenga, 133 Mich. 55.

¶ 223. The fact that persons may have an abstract right to carry red flags, does not entitle them so to carry them in a parade as to arouse the indignation of the public which believes them to be symbols of anarchy, and thereby, in violation of an ordinance, create a public disturbance.—People v. Burman, 154 Mich. 150.

§ 55. ——Ordinances granting franchises, privileges, and permits.

Validity of regulations, see post § 61.
Rights of grantee and acceptance by grantee, see post § 68.
Reserved power to regulate, see also post ¶ 412.
Repeal of ordinance as nonactionable breach of contract, see post ¶ 492.
General law of franchises and construction and effect of franchises, see Franchises.
Relative public and private rights in streets, see Highways, X, XI.
Effect of ordinance enfranchising street railway as a contract restricting power to change character of service required, see also Street Railways, I.
Applicability of ordinance to successor of gas company, see Gas ¶ 3.
Construction of ordinance fixing gas rate, see also Gas ¶ 10.

¶ 224. Ordinances containing grants are construed liberally in favor of the public.—City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 225. All rights asserted against a municipality by reason of granting ordinance must be clearly defined and not raised by inference or presumption.—City of Detroit v. Detroit United Ry., 172 Mich. 136. Affirmed in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

¶ 226. The reservation in an ordinance granting a franchise of the right to impose further conditions involves the right to provide for the enforcement of such conditions by fine in cases of disobedience.—City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 227. Ordinances conferring grants to the use of streets are construed liberally in favor of the public.—Traverse City Gas Co. v. Mayor, etc., Traverse City, 130 Mich. 17.

§ 56. Validity, effect, and time of operation.

Validity as dependent on power of municipality to make the regulation in question, see post IX.
Reasonableness and motives of councils, see post § 57.
Uniformity and discrimination, see post § 59.
Effect of obsoleteness or laxity in enforcement, see post § 60.
Validity and reasonableness of licensing ordinances, see post § 58.
Validity in part, see post § 62.
Effect of omission of enacting clause, see ante ¶ 177.
Necessity of approval before effective, see ante § 46.
Sufficiency of publication to become effective, see also ante § 48.
Effect of ministerial omission to make record of ordinance, see also ante § 48.
Extension of operativeness by annexation of territory, see ante § 8.

Construction and interpretation, see ante §§ 50-55.
Resolution of doubt as to power to ordain against validity of ordinance adopted under doubtful power, see ante ¶ 93.
Nature of ordinances as laws or by-laws, see ante § 49.
Conclusiveness of resolution that it would be inexpedient to own and operate public utility, see also post ¶ 466.
Repeal of earlier ordinance by implication, see post § 65.
Ordinance making improper expenditures, see also post ¶ 613.
Validity of Detroit ordinance increasing salaries of judges of recorder's court as an invasion of state affairs, see Municipal Courts ¶ 15.
Statutes fixing salaries of Detroit police court justices and clerk as excluding ordinance on same subject, see Municipal Courts ¶¶ 16, 17.
Validity of sale of estrays found running at large after enactment of estray ordinance and before designation of prohibited area, see also Animals ¶ 21.

¶ 228. Under How. St. § 2534 et seq., the time when ordinances are to take effect is not made to depend upon the certificate of the clerk on the journal of the proceedings of the council or on the ordinance, but is fixed by the ordinance itself, and where the original ordinance bears the approval of the mayor and is subsequently acted on by the council, the failure of the city clerk to perform a duty incumbent on him relating to it will not invalidate it.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 229. A town ordinance applies to all territory within the corporate limits at the time of its passage, and becomes effective in additional territory when such is attached.—Deneen v. Houghton County St. Ry. Co., 150 Mich. 235.

¶ 230. An ordinance which commands a violation of law is invalid.—People v. Kent, 151 Mich. 134.

¶ 231. A municipal ordinance cannot exceed the limits prescribed by the charter of the city.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

§ 57. ——Reasonableness or motives for enactment.

Reasonableness of licensing regulations and license fees, see post § 58.
Reasonableness of penal ordinances, see also post § 96.
Validity of regulation as to use of stated kind of brakes on cars, see post ¶ 358.
Reasonableness of building regulation, see also post ¶ 337.
Presumptions and evidence as to reasonableness or motives, see post § 71.
Tests for reasonableness, see ante ¶ 201.

¶ 232. An ordinance or regulation to be void for unreasonableness must be plainly and clearly unreasonable.—Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551.

¶ 233. Where the power to legislate upon a given subject is conferred, but the mode of its exercise is not prescribed, the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid.—People v. Armstrong, 73 Mich. 288.

¶ 234. An ordinance which is unreasonable on its face will be declared void.—People v. Gibbs, 186 Mich. 127.

¶ 235. An ordinance will be declared void when its unreasonableness is shown by evidence.—People v. Gibbs, 186 Mich. 127.

¶ 236. It is only when a municipal ordinance is clearly and manifestly unreasonable or oppressive in its operation, that it will be declared void.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 237. A municipal ordinance will not be declared invalid merely because it is unreasonable in an isolated case.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 238. The rule that motives of a legislature or of its members cannot be inquired into for the purpose of determining the validity of its laws applies to the adoption of an ordinance by a city council even though there may be an allegation of fraud.—People v. Gardner, 143 Mich. 104.

¶ 239. The motives of a common council in passing an ordinance will not be considered by the court in determining its validity.—People v. Gibbs, 186 Mich. 127.

¶ 240. Regular actions of a municipality, in form for the raising of money by a bond issue, which on their face appear to be lawful and evince no bad purpose, will be characterized by the purpose with which they are done, it being unlawful.—Bates v. City of Hastings, 145 Mich. 574.

¶ 241. An ordinance forbidding under penalty of $100 and costs, with six months in the house of correction if not paid, for the offense of "giving away" any handbill or card of any description in any street or alley of Detroit was held unreasonable.—People v. Armstrong, 73 Mich. 288.

¶ 242. A city ordinance providing that no person shall "permit drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons to congregate, assemble, visit, or remain" in "his or her house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business," is unreasonable, and beyond the power conferred upon the council to enact ordinances

to prevent vice and immorality, to preserve the public peace and good order, and to prohibit and suppress the keeping of houses of ill-fame or for the resort of prostitutes, in that it is not limited in its application to places requiring police regulation, or to assemblages of immoral persons, and does not make knowledge of the reputation of the persons so congregating or visiting, or an unlawful purpose on their part, an ingredient of the offense.—City of Grand Rapids v. Newton, 111 Mich. 48.

¶ 243. The smoke-nuisance ordinance of the city of Detroit, § 1, and § 6, prohibiting ferryboats from emitting dense black or gray smoke from their smokestacks, is unreasonable, as applied to marine practice, since there is no known device utilizable to prevent such emission.—People v. Detroit, Belle Isle & Windsor Ferry Co., 187 Mich. 177.

§ 58. ——Licensing and trade regulations.

Invalidity because of unequal or nonuniform operation, see post § 59.
Scope and extent of powers, see post IX, C.
Power to make trade regulations, see post IX, C.
Power to regulate hawking and peddling, see post § 85.
Proper test for ascertaining amount of fee, see also post ¶¶ 349, 350.
Regulations of size, weight, or quantities to be offered for sale, see also post § 86.
Effect of regulation of peddlers as invasion of right under letters patent to make and vend article, see also Patents.

¶ 244. The courts will not treat a fee as unreasonable when there has been no abuse of municipal discretion.—Van Baalen v. People, 40 Mich. 258.

¶ 245. Where the power to fix a license fee is given by law to a municipal council, its discretion in fixing the amount is not reviewable by the courts.—Wolf v. City of Lansing, 53 Mich. 367.

¶ 246. Under section 3108, Comp. L. 1897, providing that a city council may require payment of such reasonable sum for any license as they deem proper, cities are restricted to reasonable license fees, whether imposed for regulation or revenue, and their reasonableness is a question for judicial determination.—People v. Grant, 157 Mich. 24.

¶ 247. Under sec. 3108, Comp. L. 1897, a city of the fourth class is given discretion in fixing a reasonable sum for licenses and unless it clearly appears this discretion has been abused, the courts will not interfere.—O'Hara v. Collier, 173 Mich. 611.

¶ 248. Under a city charter authorizing the regulation of the subject of peddlers' licenses by ordinance, but not purporting to give discretion to the city officers in fixing a license fee, an ordinance prohibiting the sale of all commodities upon the streets or from house to house without a license, but failing to fix the license fee to be paid for the privilege of selling tea is insufficient to sustain a conviction for selling tea without a license.—City of Mt. Clemens v. Sherbert, 122 Mich. 674.

¶ 249. A municipal ordinance requiring peddlers to pay a tax of $15 a year is not invalid as requiring a fee that is clearly excessive, though the charter gives powers merely to "license and regulate" peddlers, not to tax them.—People v. Russell, 49 Mich. 617.

¶ 250. Where, under its charter, a village has the right to exact a license fee as compensation for the expense of the supervision of a lawful business or trade carried on therein, the exaction of a fee of $10 per month is excessive and unreasonable, and therefore void.—Chaddock v. Day, 75 Mich. 527.

¶ 251. A city ordinance licensing and regulating pawnbrokers, junk dealers, and dealers in second-hand goods, is not unreasonable because it requires the payment by the pawnbroker of a license fee of $50 per annum, and the execution of a bond in the penal sum of $5,000, and the payment by the other persons named in the ordinance of a fee of $25, and the execution of a bond in a penalty of $2,000; or because it prohibits the licensee from purchasing or taking any goods, articles, or things offered him from any person under the age of 16 years, or from any intoxicated person or habitual drunkard; or because it reserves in the license the power of revocation by the common council at any time for such period as the council shall have prescribed therefor.—City of Grand Rapids v. Braudy, 105 Mich. 670.

¶ 252. An ordinance vesting in the common council the right to impose a license fee of not to exceed $15 per day for hawking and peddling will not be held void as unreasonable, where a uniform fee of $30 a year has been fixed by the council thereunder; nor can such ordinance be regarded as imposing a tax.—City of Grand Rapids v. Norman, 110 Mich. 544.

¶ 253. A city ordinance requiring hawkers and peddlers to pay a weekly license fee of five dollars is not unreasonable.—People v. Baker, 115 Mich. 199.

¶ 254. An ordinance of the city of Detroit prohibiting the business of hawking or peddling without a license, and prescribing licenses for a year or such portion of a year as intervenes from the issuance of a license to the next ensuing June 1st, and fees of five dollars for peddling on foot or from a stand, twenty-five dollars if from a conveyance drawn by one animal, and fifty dollars if from a conveyance drawn by more than one

animal, is not unreasonable or excessive or in restraint of trade.—People v. Hotchkiss, 118 Mich. 59.

¶ 255. A license fee for revenue on transient traders of two dollars per day for each day less than a week, ten dollars a week, twenty-five dollars for a month, fifty dollars for three months, and two hundred dollars for a year, exacted by ordinance, is not oppressive, unjust, or unreasonable.—People v. Grant, 157 Mich. 24.

¶ 256. A city ordinance providing that before a person may sell flour from house to house, he must first obtain a license and pay a fee of $4.00 a day, or $100 a year, is not unreasonable, nor an abuse of authority by the city council.—O'Hara v. Collier, 173 Mich. 611.

¶ 257. An ordinance prohibiting sales at auction by licensed auctioneers between the hours of 6 p. m. and 8 a. m. is unreasonable and void.—People v. Gibbs, 186 Mich. 127.

¶ 258. An ordinance of the City of Grand Rapids granting the common council power to provide for the removal of garbage and to contract and grant licenses for the removal thereof, construed as not granting a monopoly and not being unreasonable in attempting to regulate the disposition of wholesome substances by the householder.—City of Grand Rapids v. De Vries, 123 Mich. 570.

¶ 259. Under a charter provision authorizing the council to regulate and license saloons, an ordinance requiring an annual tax of from $300 to $500, and a bond for $2,000, from any person keeping a saloon, is valid.—People v. Blom, 120 Mich. 45.

¶ 260. A city ordinance regulating saloons and places where intoxicating liquors are sold and prescribing locations thereof, requiring persons who desire to engage in such business to make written application to the common council for a license, fixing the amount of the license, containing provisions that the applicant will agree to accept the license on the condition that it may be revoked by the council at its will, but giving him an opportunity to be heard on such an application, cannot be said to be invalid as being unreasonable, excessive, and oppressive, nor to be an attempt to license the sale of intoxicating liquors not authorized by the charter, nor to inflict unreasonable penalty and forfeiture of property, nor is it invalid because it does not permit a hearing on the facts nor assure him of a hearing which can be examined by any competent court in case of capricious abuse, and permits the same persons to be the judges of the proper causes of rejection as well as the fitness of the persons, the provisions of the ordinance itself answering these objections.—Wells v. Torrey, 144 Mich. 689.

§ 59. ——Uniformity and discrimination.

See also post ¶ 414.
Exception from rule of uniformity where power is reserved in franchise, see post ¶ 278.
Constitutional requirements of uniformity, equality, and generality in laws, see Constitutional Law; Statutes, II.

¶ 261. Ordinances must not only be reasonable and within the power of the municipality but must affect each member of the community alike.—People v. Lewis, 86 Mich. 273.

¶ 262. All individuals of a certain class within a municipality under its legislation must be treated alike and without discrimination.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

¶ 263. A municipal ordinance for the regulation of persons selling goods from house to house is invalid where it does not apply equally to local storekeepers, who sell goods from house to house, as to other persons who perform such acts.—Allport v. Murphy, 153 Mich. 486.

¶ 264. An ordinance forbidding farmers, hucksters, etc., from standing in the streets adjacent to the Central market is not void as creating a monopoly of the trade by hucksters occupying stands in the market.—People v. Keir, 78 Mich. 98.

¶ 265. An ordinance of a village requiring the payment of a license fee of $10 per month for the privilege of selling fresh meat on the village streets, in less quantities than one-quarter of the slaughtered animal, is in restraint of trade, and is invalid.—Chaddock v. Day, 75 Mich. 527.

¶ 266. An ordinance of Bay City requiring hawkers and peddlers travelling on foot to pay $10 license for the first day and $5 for each subsequent day, and those travelling with one horse $20 and $15, and with two or more horses $25 and $15, and which practically exempts residents of the city from its provisions, is invalid because unreasonable, and because unjustly discriminating between residents and nonresidents.—Brooks v. Mangan, 86 Mich. 576.

¶ 267. An ordinance which provides that licenses thereunder "are to be for one year from June 1st, or such portion of the year as may intervene between the date of the granting of the license and the first day of June next ensuing," is uniform in that it provides for a license by the year or parts of the year.—People v. Hotchkiss, 118 Mich. 59.

¶ 268. An ordinance of the city of Detroit prohibiting any person from following within the city limits the business of a hawker or peddler without a license, grad-

nating the license fees and providing that such licenses shall be for one year from June 1st or for such portion of the year as may intervene between the date of the granting of the license and the 1st day of June next ensuing, is uniform in its operation.—People v. Hotchkiss, 118 Mich. 59.

¶ 269. An ordinance requiring license of peddlers and hawkers, excepting from its application persons selling "vegetables, fish, meat, or farm produce, or bakers delivering bread and pastry to their customers at their dwellings," is not invalid as discriminating against others.—People v. Smith, 147 Mich. 391.

¶ 270. An ordinance requiring license fees for peddlers is not invalid for discrimination in fixing fees of $10 per week and $50 per year for teas, coffees, spices, etc., $2 per week, $5 per month and $25 per year for general groceries, $3 per day, $15 per week for jewelry, $1 per day, $3 per week, $10 per month and $25 per year for other articles.—City of Muskegon v. Zeeryp, 134 Mich. 181.

¶ 271. Whether a municipal ordinance which assumes to regulate the business of transient dealers is not unreasonable in requiring the payment of a license fee of $10 a day, and whether, if restricted to nonresidents of the city, it is not open to the further objection of being in restraint of trade, quære.—City of Saginaw v. Saginaw Circuit Judge, 106 Mich. 32.

¶ 272. Under a city charter (Local Laws 1883, p. 612, § 50) authorizing the common council to license and regulate hawkers and peddlers, an ordinance requiring peddlers to take out a license is valid though it is made inapplicable to mechanics and farmers engaged in selling their own products.—People v. Sawyer, 106 Mich. 428.

¶ 273. Under a charter authorizing the municipality to license and regulate the business of transient dealers, an ordinance imposing a license fee upon nonresidents of the city only is invalid.—City of Saginaw v. Saginaw Circuit Judge, 106 Mich. 32.

¶ 274. A regulating and inspection charge of 50 cents per annum for each pole inspected, when the actual cost of inspection is about five cents only, is unreasonable.—City of Saginaw v. Swift Electric Light Co., 113 Mich. 660.

¶ 275. A municipal ordinance which prohibits the establishment or use of any building within a restricted area for the purpose of buying, selling and storing junk, and excepting from its operation any business of that kind theretofore established in that area, is unreasonable, unlawful, discriminating, and void.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

¶ 276. The smoke ordinance of the city of Detroit, Rev. Ord. City of Detroit, 1890, ch. 64, § 2, held not invalid as unreasonably discriminating between classes of persons, although exempting from its operation dwelling-houses and steamboats.—People v. Lewis, 86 Mich. 273.

§ 60. ——Nonenforcement or obsoleteness.

Nonenforcement as a defense, see also post ¶¶ 927, 928.

Inadmissibility of evidence of laxity of enforcement in other cases, see post ¶ 961.

¶ 277. The mere fact that the officials of a city do not enforce an ordinance does not affect its validity, nor eliminate the necessity of compliance therewith.—Wedgewood v. Jorgens, 190 Mich. 620.

§ 61. Validity of franchise regulations.

Right and power to grant franchises in streets, see also post § 110.

Onerous and unreasonable regulations under guise of reserved power to regulate, see also post ¶ 412.

Construction of grants, see ante § 55.

Rate regulations in general, see Public Service; Street Railways, I, IV, A; Electricity § 3; Gas § 2.

¶ 278. The rule that ordinances shall be general in their nature and impartial in their operation does not apply to regulations enacted by virtue of a reservation in an ordinance granting a franchise, which partakes of the character of a contract.—City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 279. A resolution by the common council of a city empowering an individual engaged in electric lighting to use the poles of an electric light company pursuant to a reservation in its franchise was unreasonable and void because it did not definitely fix the manner and extent of such use.—Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551.

§ 62. Partial validity; separableness of void parts.

Rules as to statutes void in part, see Statutes, V.

¶ 280. Unauthorized provisions do not invalidate the whole ordinance, if they can be separated from the rest of the ordinance without so mutilating it as to render it inoperative.—People v. Armstrong, 73 Mich. 288.

¶ 281. Inasmuch as an ordinance may be good in part although bad in part, the fact that its penal provisions are invalid does not necessarily destroy the rest.—City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 282. A city ordinance may be valid in part, although invalid as to some of its provisions; and where as to some of its provisions it is self-executing, it is as to such provisions valid, though it has affixed an invalid penalty or no penalty at all.—Johnson v. Common Council of City of Bessemer, 143 Mich. 313.

¶ 283. An ordinance establishing saloon limits and providing that no license shall be granted except within those limits is not wholly void because no penalty was provided therein for its enforcement, and the execution and its enforcement rest with the common council; and the council may refuse to approve a liquor bond, the ordinance being self-executing in this matter.—Johnson v. Common Council of City of Bessemer, 143 Mich. 313.

§ 63. Right and occasion to question validity.

Estoppel to question validity, see post § 64.

Right to urge invalidity of contract as defense to prosecution for violation of garbage ordinance, see post ¶ 929.

¶ 284. One who, under a city ordinance which defines as disorderly persons all keepers of bawdy-houses, all vagrants, persons guilty of assault and certain other persons, is convicted of being a disorderly person in that he kept a bawdy-house, cannot complain that the ordinance defines certain acts as disorderly which are not recognized as such under the law of the state; How. St. § 1985, defining the keeper of a bawdy-house as a disorderly person.—City of St. Ignace v. Snyder, 75 Mich. 649.

¶ 285. An objection that a city ordinance providing for licensing hawkers and peddlers, which purported to be amendatory of an ordinance that had previously been repealed, had rendered the law so uncertain as to make it impossible for peddlers to determine their exact rights, is not available to one convicted of violating a subsequent ordinance which covered the entire subject, and which operated to repeal all prior ordinances.—City of Grand Rapids v. Norman, 110 Mich. 544.

§ 64. Estoppel to assert or deny validity.

Right to raise question of invalidity, see ante § 63.

Effect of laxity and nonenforcement, see ante ¶ 277.

¶ 286. A mayor, resisting a mandamus to compel him to revoke his action in declaring a motion carried by his casting the deciding vote, cannot contend that the action attempted by the motion was valid because it was not in form of a resolution to appropriate money, where, if that be true, the attempted action of the mayor was invalid in that the motion actually effected an appropriation with no formal resolution.—Bishop v. Lambert, 114 Mich. 110.

§ 65. Repeal or amendment by later ordinances.

Abrogation of ordinance by charter or statute, see post § 66.

Amendment of ordinance, see also ante ¶ 213.

Rescinding effect of later resolution, see post ¶ 298.

Repeal and amendment of statutes, see Statutes, IV, VII.

¶ 287. Where two ordinances are inconsistent in their operation the later repeals the earlier.—Lenz v. Sherrott, 26 Mich. 139.

¶ 288. An ordinance providing for the licensing of scavengers by the mayor and regulating such occupation, is repealed by a subsequent ordinance regulating the collection of garbage, offal, dead animals and other refuse matter, which places the matter under the board of health and authorizes the mayor to issue a license only upon recommendation of such board.—DeLano v. Doyle, 120 Mich. 258.

§ 66. Abrogation, amendment, or revival by charter or statute.

Abrogation of penal ordinances, see post § 99.

¶ 289. The enactment of a new charter renders inoperative any previous ordinance inconsistent with its provisions.—People v. Brill, 120 Mich. 42.

¶ 290. A city council was by charter vested with the power to appoint, regulate, and maintain a police force, and, as well, with the power to determine and regulate the compensation of all officers, elective or appointive. Under this charter, the council adopted an ordinance providing for the appointment of certain police officers, and fixing their salaries. Afterwards, by an amendment of the charter, the general control of the police department was transferred to a board of commissioners, but the power to fix salaries was not conferred upon the board or taken from the council. Held, that the amendment did not operate to repeal the provisions of the ordinance in relation to salaries, and, no other action having been taken by the council upon that subject, an appointee of the commissioners was entitled to receive the salary fixed by the ordinance.—Ruell v. City of Alpena, 108 Mich. 290.

¶ 291. An ordinance adopted under a charter is not repealed by a charter amendment transferring from the council to a board control of the subject-matter of the ordinance.—Ruell v. City of Alpena, 108 Mich. 290.

¶ 292. Conviction under an ordinance prohibiting the sale of unwholesome meat cannot be sustained where a charter subsequently enacted authorizes punishment only where such food is "knowingly" sold.—People v. Brill, 120 Mich. 42.

¶ 293. An ordinance giving rights to a telephone company in a highway is invalid when in conflict with a later statute.—Boland v. Washtenaw Home Tel. Co., 161 Mich. 315.

¶ 294. The general liquor act of 1887, Comp. L. 1897, § 5397, repealed all village ordinances upon the subject and the reenactment in 1895 of the provision of the general village incorporation act, Comp. L. 1897, § 2769, subd. 7, again giving the right of regulation to villages did not revive such ordinances.—Village of Sparta v. Boorom, 129 Mich. 555.

§ 67. Ratification or revocation by later action.

¶ 295. Where a city charter requires that resolutions be passed only by a majority of all members of the council, and a resolution is passed authorizing the purchase of voting machines by a majority of the aldermen present, but by less than a majority of all the aldermen elected, such action is valid and binding on the city where at a later meeting, by a majority of all aldermen elected, it authorizes the issuance of certificates in payment of said purchase.—Darling v. City of Manistee, 166 Mich. 35.

¶ 296. The charter of Pontiac requires the votes of all members of the council in relation to any act, proceeding or proposition had at any meeting to be entered at large upon the minutes, especially where it relates to the assessment or taxation of property. Held, that a city tax, voted without observing this requirement, was invalid; and that amendatory resolutions adopted by a later council, of which less than a majority of the old council were members, could not make it valid.—City of Pontiac v. Axford, 49 Mich. 69.

¶ 297. What was the effect of a veto of a rescinding resolution and of a vote rescinding the rescission, is not material where the original resolution remains in force because of the fact that the first attempted rescission failed of a majority.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 298. A resolution authorizing bonds to be issued to a certain amount is not rescinded by a subsequent resolution limiting the "present" issuance and sale to a smaller sum.—Naegely v. City of Saginaw, 101 Mich. 532.

§ 68. Rights under and acceptance of ordinances and resolutions.

Disability of city to restrict its police powers by grant, see also post ¶ 330.

¶ 299. An ordinance fixing the charges to be made by a public utility corporation, when accepted by it, becomes binding where it confers some valuable rights clearly beyond those which it could claim under any general law.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 300. Where a corporation has no right to act except under the conditions of an ordinance granting permission, its action implies its acceptance of the conditions in full.—City of Detroit v. Detroit City Ry. Co., 37 Mich. 558.

¶ 301. Where the rights granted by a municipality to a corporation have lapsed, the municipality can impose whatever conditions it pleases upon a renewal of them.—City of Detroit v. Detroit City Ry. Co., 37 Mich. 558.

¶ 302. An ordinance conferring certain rights upon a street railway company to the use of streets, but stipulating that it shall be of no effect unless accepted in writing within thirty days, confers no rights when not accepted as stipulated.—Rapid Ry. Co. v. City of Mt. Clemens, 118 Mich. 133.

§ 69. Liabilities for violating ordinances.

Construction of ordinances to ascertain what acts are violative, see ante § 50 et seq.

Prosecutions for violation and actions for penalties, see post XVI, B.

Violation of ordinance as actionable negligence, see Negligence § 14; and see particularly Highways §§ 370, 374; Railroads, VIII; Street Railways, IV.

¶ 303. An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises.—Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74.

¶ 304. Where the charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that a lot owner shall be liable to the city for all damages which the city may be compelled to pay for his default in neglecting to observe such regulations, no action against the lot owner can arise, if at all, until the city has been held liable in a suit against it.—Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74.

§ 70. Evidence and presumptions as to ordinances and resolutions.

As to reasonableness and validity, see post § 71.

Necessity that ordinance be clearly unreasonable to be held void, see ante § 57.

Conclusiveness of records, see also ante § 43.

Rule as to judicial notice of ordinances, see Evidence § 26; Indictment § 129.

Best evidence of ordinances, see Evidence § 121; Indictment § 185.

Printed books and records of ordinances as evidence, see Evidence § 532.

Admissibility of charter as evidence in action against officer for false arrest made under its provisions, see False Imprisonment ¶ 117.

Admissibility of ordinance penalizing acts as evidence in action against officer for false imprisonment in arresting for violation, see False Imprisonment ¶ 116.

¶ 305. Under the charter of Bay City, an ordinance cannot be passed except by the vote of a majority of all the aldermen. But where it appears that nine out of ten were present at the submission of the ordinance, and the entry, instead of merely reciting its passage, declares it to have been passed by "a majority vote," it will be presumed that such a majority is meant as was required by the charter.—McCormick v. Bay City, 23 Mich. 457.

¶ 306. Where a city charter required the board of public works to keep a record of its proceedings, evidence of oral instructions, in open session, to the street commissioner, regarding the construction of a drain claimed by plaintiff to have been improperly built, and which were not recorded, is inadmissible.—Davis v. City of Jackson, 61 Mich. 530.

¶ 307. It will not be presumed that the members of a city council were or will be actuated by improper motives in the passage of an ordinance prescribing the frequency with which street cars should be run, but, on the contrary, it will be presumed that such action was taken in the exercise of a judgment based upon an acquaintance with all the facts; and such judgment, as embodied in the ordinance must control, and will preclude all inquiry as to the reasonableness of such ordinance, until it is shown to have been improperly exercised.—People v. Detroit Citizens' St. R. Co., 116 Mich. 132.

§ 71. ——As to reasonableness and validity.

Presumptions as to motives, see also ante ¶ 307.

¶ 308. Since a municipal ordinance is presumed valid, the duty of establishing the contrary rests on the one asserting its invalidity.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 309. An ordinance is presumptively reasonable unless the contrary appears from its face.—People v. Gibbs, 186 Mich. 127.

¶ 310. An ordinance on its face a safeguard against danger is presumed valid.—People v. Detroit United Ry., 134 Mich. 682.

¶ 311. Where the accused was prosecuted for the violation of a municipal ordinance relative to the disposition of garbage, evidence that the ordinance was adopted for fraudulent purposes and to create a monopoly of the garbage business in the hands of the contractor is inadmissible.—People v. Gardner, 143 Mich. 104.

¶ 312. City taxes voted at a special meeting of the common council of the city of Ironwood cannot be held void because the record does not show the members were duly notified of the call for the meeting, not all being present; if the charter (Local Acts 1893, No. 235, chap. 9, § 1) requires that proof be made of the summoning of members, such proof is not required to appear upon the record, and under the curative provisions of the Tax Law, § 99, it cannot be presumed not to be on file, or not to have been properly filed if not shown to be on file.—Auditor General v. Sparrow, 116 Mich. 574.

¶ 313. In support of a resolution employing firemen at a stated salary it will be presumed, in the absence of a contrary showing, that the council had provided a fire-department fund, which was prerequisite, and which Pub. Acts 1895, No. 215, chap. 30, § 2, authorized it to do; and that the expenditure was designed to be made from moneys already raised by taxation and apportioned to such fund.—Bishop v. Lambert, 114 Mich. 110.

¶ 314. Evidence that air brakes are in use on the larger types of electric cars, that they have been used on the smaller cars, together with judicial notice of the efficacy of such brakes, is sufficient to establish the reasonableness of an ordinance requiring all street cars to be so equipped.—People v. Detroit United Ry., 134 Mich. 682.

¶ 315. Evidence that a light street car could be as effectively handled by a hand brake and that air brakes are less reliable does not render an ordinance requiring air brakes on all street cars invalid, where it is not shown that proper supervision and skilled motormen would not insure effective air brakes at all times, and the evidence, as well as common experience, shows air brakes to be safer.—People v. Detroit United Ry., 134 Mich. 682.

§ 72. Law and fact questions as to validity.

¶ 316. Whether an ordinance is within the power of a municipal corporation is always a question for the courts.—People v. Gibbs, 186 Mich. 127.

¶ 317. Whether an ordinance is reasonable is always a question for the courts.— People v. Gibbs, 186 Mich. 127.

VII. RELIEF AGAINST INVALID ORDINANCES, RESOLUTIONS, AND ACTS.

§ 73. In general.

Judicial noninterference with or control over municipal discretion and functions, see ante § 34.

Right to question or estoppel to assert invalidity of ordinance, see ante §§ 63, 64.

Presumptions and evidence and law and fact questions as to validity, see ante §§ 70-72.

Injunctions against acts of municipalities, see Injunctions, II, D.

Injunctions against execution of invalid ordinances, see Injunctions, II, H.

¶ 318. The attorney general may proceed in equity to enjoin a substantial abuse of corporate power, such as the appropriation of corporate funds in a manner not justified by law, or the award of a paving contract contrary to the city charter.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 319. Mere failure of a municipal council to follow strictly the provisions of the charter in making a public contract does not warrant the state in interfering by its attorney general to set aside the contract.—Attorney General v. City of Detroit, 55 Mich. 181.

VIII. ADMINISTRATIVE, MINISTERIAL, AND PROPRIETARY FUNCTIONS AND THEIR EXERCISE.

§ 74. In general.

Judicial noninterference with or control over functions, see ante § 34.
Council as municipal legislative body, see also post ¶ 708.
Delegability of powers of councils to committees or officers, see ante § 32.
Nature of council proceedings to remove officers, see post § 171.
Furnishing electric light as nongovernmental function, see also post ¶ 541.
Nonliability for injury done in governmental capacity, see post § 125 et seq.
Tort liability dependent on nature of act producing injury, see post §§ 125, 126.
Repeal of ordinance as nonactionable breach of contract, see post ¶ 492.
Nature of powers under act of congress to lay out plan of Detroit, see also post ¶¶ 445, 446.

¶ 320. An electric light plant erected for commercial purposes is proprietary in character and the municipality is not relieved from liability for the neglect of its employees on the theory that the business relates to local governmental functions.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 321. Where a city contracts with a gas company to supply gas at given rates to its inhabitants as a condition to entering its streets, it is exercising not its governmental powers, but its business or proprietary powers.—Boerth v. Detroit City Gas Co., 152 Mich. 654.

¶ 322. To reconstruct a sewer outlet above its proper grade and thereby to obstruct the discharge of sewage which the sewer carried is a ministerial act and not one involving legislative or discretionary power.—Defer v. City of Detroit, 67 Mich. 346.

¶ 323. A city, in the exercise of its proprietary or business powers through its officers is governed by the same rules which control a private individual or business corporation.—Andrews v. City of South Haven, 187 Mich. 294.

IX. POLICE POWER AND SUBJECTS OF REGULATION.

A. IN GENERAL.

§ 75. Scope and limitations of powers.

[Note. It is not the purpose to treat here the entire question of police power, but only the scope of and the limitations upon the police power of cities and villages. In specific topics like Health; Food; Highways; Intoxicating Liquors, will be found cases on the regulations and statutes concerning them. The constitutional limitations on the police power in general are treated in Constitutional Law. See cross-references herewith and in the sections following.]

Disability to limit powers by contract, see generally post XI, especially ¶¶ 491, 496.
Disability to make contract putting rates beyond power to regulate them, see post ¶ 362.
Invalidity of ordinance in excess of charter powers, see ante § 56.
General powers other than regulative or police powers, see ante III, post X-XIV.
Officers and organs for exercise of power, see post XV.
Powers respecting health, sanitation and public safety, see post IX, B.
Powers respecting inspection, licensing, and regulation of business, see post IX, C.
Powers of control over streets and public places and buildings, see post IX, D.
Power to define offenses and penal procedure, see post IX, E.
Exercise of police power as impairing contract, see Constitutional Law § 175.

¶ 324. Municipal corporations derive all their power from legislative acts, and can pass no ordinance which conflicts with the terms of the charter.—People v. Armstrong, 73 Mich. 288.

¶ 325. A village ordinance cannot go beyond the charter in providing penalties for offenses.—Sheldon v. Hill, 33 Mich. 171.

¶ 326. A city common council has an implied power to make ordinances or by-laws to carry into effect its charter powers.—Williams v. City of Detroit, 2 Mich. 560.

¶ 327. Where a city charter specifically enumerates various powers which the common council may render effectual by the imposition of penalties, such enumeration is an implied exclusion of the right to impose penalties in other cases.—City of Grand Rapids v. Hughes, 15 Mich. 54.

¶ 328. The charter of a village organized under Act No. 278 of the Acts of 1909 did not refer to Comp. L. 1897, § 2769, but adopted the identical language of subdivision 7 of this section. Held, that the charter had practically adopted the provisions of the section and that the common council of the

village was thereby constituted authority to legislate upon the subject of general police power.—Vernier v. Village Council Grosse Pointe Shores, 170 Mich. 656.

¶ 329. The police power of a city cannot be bargained away or abridged by contract.—Petz v. City of Detroit, 95 Mich. 169; City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 330. A municipality cannot surrender or circumscribe its right to exercise general police power when it grants franchises and privileges to public utility corporations to maintain their roads in its streets.—City of Detroit v. Detroit United R. Co., 172 Mich. 496.

¶ 331. The common council of a city has not the power to prescribe new definitions for terms which already have legal definitions.—Allport v. Murphy, 153 Mich. 486.

§ 76. Relative powers of municipality and state.

Powers within principle of local self-government under the constitution, see Constitutional Law, II, C.

Police power of the state in general, see Constitutional Law, III.

§ 77. Matters of general law or covered by existing statute.

See also post ¶ 398.

Invalidity of ordinance opposed to law, see also ante ¶ 230.

Regulation of peddling as affected by existence of general laws, see post ¶ 368.

Existence of general laws as affecting power to control and regulate streets, see post § 88.

Regulating poles and wires on streets, see post ¶ 409.

Crimes and offenses covered by general law, see post § 96.

¶ 332. A city or village cannot by ordinance make the general laws of the state inoperative.—People v. Kirsch, 67 Mich. 539.

¶ 333. Where there is doubt about the existence of power to pass an ordinance suspending the general law, such doubt should be resolved against the existence of the power.—People v. Blom, 178 Mich. 508.

B. HEALTH, SANITATION AND PUBLIC SAFETY.

§ 78. In general.

Inspection of poles and wires in interests of safety, see post ¶ 411.

Construction of sanitary and police regulations, see ante § 51.

General regulative powers of the state through its subdivisions and officers to conserve and regulate health, see Health.

Regulations by boards of health, see Health § 1.

Invalidity of health regulations broader than enabling statute, see Health ¶ 2.

Food regulations and inspection in general, see Food.

¶ 334. The obligation and the power of a city council to act as a board of health and prevent the spread of contagion is not lessened by its omission to create a separate board of health, and its power is a police power, and is commensurate with its duty.—Rae v. City of Flint, 51 Mich. 526.

¶ 335. A city may enforce public safety regulations reasonably adapted to such end, notwithstanding a large financial outlay is required of a street railway company to comply.—People v. Detroit United Ry., 134 Mich. 682.

¶ 336. A village incorporated under the general law for the incorporation of villages, authorizing it to provide for the preservation of public property and to adopt ordinances and make other regulations for the safety and general welfare of the inhabitants, had power to offer a reward for testimony securing the conviction of persons who had set fire to buildings within its limits.—People ex rel. Attorney General v. Village of Holly, 119 Mich. 637.

§ 79. Building and fire protection regulations.

Offering reward for arrest and conviction of incendiary, see ante ¶ 336.

Police power respecting buildings in fire limits, see also Buildings § 2.

Legality of building permit, see Buildings § 2.

¶ 337. A municipal ordinance requiring a clear unobstructed space of not less than fifteen feet in the rear of all tenement houses across the entire width of the lot, is not so unreasonable as to be invalid.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

¶ 338. The common council of Detroit has power to establish fire limits, and forbid the rebuilding or repair of wood buildings within the limits.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

¶ 339. A municipality, in pursuance of its delegated authority to fix fire limits and to direct the manner of constructing buildings within such limits, may provide by ordinance that a building not so constructed shall be deemed a nuisance and authorize its abatement as such without a judicial determination that it is a nuisance.—Micks v. Mason, 145 Mich. 212.

§ 80. Nuisances and noisome occupations and places.

Declaring combustible buildings to be nuisances, see ante ¶ 339.

¶ 340. A power to make reasonable regulations for the prevention of nuisances will

not authorize that to be declared a nuisance which is not such.—Wreford v. People, 14 Mich. 41.

¶ 341. The authority vested by statute in a city council to compel the owners and occupants of slaughter-houses, etc., to cleanse or abate them whenever necessary for the health, comfort or convenience of the inhabitants of the city, can only be exercised to do away with what are legally nuisances, and cannot authorize the council to interfere with what is not a nuisance in fact. Such authority would not empower the council to prohibit the slaughtering of animals on one's own premises, except in a building devoted to that business.—Wreford v. People, 14 Mich. 41.

¶ 342. A statutory authority to prevent future erections or locations of slaughter-houses, etc., within the city, would not authorize the council to put an end to any existing establishments if not nuisances in fact.—Wreford v. People, 14 Mich. 41.

¶ 343. The common council of Detroit, under the power given by the charter to prevent and suppress houses of ill-fame, are not authorized, by ordinance and resolution, to require the city marshal to demolish a house occupied as a house of ill-fame, and adjudged by the council to be a common nuisance.—Welch v. Stowell, 2 D. 332.

§ 81. Garbage disposal and scavenging.

Reasonableness of regulations, see ante § 58.
Public contracts for garbage disposal, see Public Contracts.

¶ 344. The collection and disposal of garbage, which of itself is a nuisance, in a city may be regulated under its police power.—Board of Health of Grand Rapids v. Vink, 184 Mich. 688.

¶ 345. Since garbage is of itself a nuisance its collection and disposal may be regulated by ordinance under the police power of a city.—Board of Health of Grand Rapids v. Vink, 184 Mich. 688.

¶ 346. An ordinance requiring that garbage shall be removed through and out of the city in water-tight, closed carts or wagons, marked "garbage," is a reasonable regulation; and is authorized by a provision in the city charter (Local L. 1889, p. 819), empowering the common council to regulate the handling of garbage.—People v. Gordon, 81 Mich. 306.

¶ 347. Under the charter of Grand Rapids granting the common council power to abate nuisances, compel the removal of unwholesome, nauseous or offensive substances, and to provide for the preservation of the general health, an ordinance regulating the removal of garbage and offal and defining the terms as including every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables, is valid.—City of Grand Rapids v. De Vries, 123 Mich. 570.

C. INSPECTION, LICENSING, AND REGULATION OF BUSINESSES.

§ 82. In general; scope of powers.

[Note. The term "police power," as used in discussing the power of the legislative branch of the state to regulate matters affected with a public interest, is treated in Constitutional Law. As used here it means the regulative powers of the municipality under the charter and statutes.]

Distribution of power over licensing and regulation of occupations, see also ante § 31.
Construction of police regulations, see ante § 51.
Construction of licensing ordinances and regulations, see ante § 52.
Reasonableness and validity of licensing and trade regulations, see ante § 58.
Sufficiency of majority vote to enact licensing measures, see ante § 38.
General law of licenses, see Licenses.
License distinguished from tax or other charge, see Licenses § 2.
Power to impose or grant license, see Licenses § 3.
Graduating license fees in general, see Licenses § 4.
Withdrawal or revocation of license in general, see Licenses § 6.
Power to tax business which may not be licensed, see also Intoxicating Liquors § 31.

¶ 348. A municipal corporation has no inherent power to grant licenses or to exact license fees, but must derive its authority from the state, and the power must come by direct grant and cannot be taken by implication.—Wells v. Torrey, 144 Mich. 689.

¶ 349. Where a license fee is imposed by cities for revenue, the extent of the tax is left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised, but it is not warranted in imposing fees so heavy as to be prohibitory.—People v. Grant, 157 Mich. 24.

¶ 350. When license fees are imposed by cities for the purpose of regulation, and not for revenue, the fee should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business covered by it.—People v. Grant, 157 Mich. 24.

¶ 351. The power to regulate business as conferred by municipal charter means the power to adjust by rule, method, or established mode; to direct by rule or restric-

tion; to subject to governing principles or laws.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

¶ 352. Section 3108, Comp. L. 1897, How. St., 2nd Ed., § 5630, permits the common council of a city of the fourth class to revoke at pleasure a license granted a transient trader for a term of one year.—Vernakes v. City of South Haven, 186 Mich. 595.

¶ 353. The storing or keeping of old junk is necessarily incident to the business of buying and selling junk, and may be regulated by a charter power to regulate and license the keepers of junk shops, and the buying and selling of old junk.—Weadock v. Judge of Recorder's Court of Detroit, 156 Mich. 376.

¶ 354. Under a charter providing that the common council of a city may enact and enforce such ordinances not inconsistent with the constitution or the general laws of the state as they shall deem the public safety and welfare of the city require, an ordinance may be enacted and enforced requiring any person who desires to take charge of or operate any steam engine or boiler to take an examination for a license before a board of examiners, except in certain cases and making it unlawful for any person to take charge of or operate any steam engine or steam generating apparatus without a license except as specified.—People v. Fournier, 175 Mich. 364. (Ostrander and McAlvay, JJ., dissenting.)

¶ 354a. One peddling a patented article cannot complain that the demand of a license fee is an interference with his rights, under the United States statute, to vend a patented article.—People v. Russell, 49 Mich. 617.

¶ 354b. A city charter gave the council power to regulate the weights and measures of merchants, in accordance with the standards fixed by the statute of the state. Held, that a city sealer could not be given power under such a charter to condemn scales which weigh correctly, on the ground that a device attached to them for the convenience of the dealer in computing prices was not strictly accurate.—Parker, Webb & Co. v. Austin, 156 Mich. 573.

¶ 355. A municipal ordinance prohibiting sales at auction by licensed auctioneers between the hours of 6 p. m. and 8 a. m. is unreasonable and void.—People v. Gibbs, 186 Mich. 127.

§ 83. Carriage, transportation, and shipping.

Motor vehicle licenses, see also post ¶ 405.
Transportation of garbage through streets, see ante § 81.
Public service regulations, see post § 84.
Power to regulate railroad and street railroad uses of streets, see post § 90.
Street railway regulations in general, see Street Railways, IV, A.
Construction of ordinance relating to rates of fare, see also Carriers §§ 3, 4.
Regulative power over ferries in general, see Ferries § 2.

¶ 356. The ordinance of the common council of Detroit which provides that no person shall keep a ferry or boat for transporting persons and property across to the Canada shore without a license therefor from the mayor, and imposes a penalty for its violation, is valid.—Chilvers v. People, 11 Mich. 43.

¶ 357. A city may regulate the business of a street car company to the extent of requiring responsible safeguards against danger.—People v. Detroit United Ry., 134 Mich. 682.

¶ 358. An ordinance requiring air or electric brakes on all street cars is not invalid because electric brakes are shown to be unreliable.—People v. Detroit United Ry., 134 Mich. 682.

¶ 359. A municipality may, under its police power, enact an ordinance requiring drivers of public moving-vans to keep a record of their transactions and make a weekly report thereof to the police commissioner.—Lawson v. Judge of Recorder's Court of City of Detroit, 175 Mich. 375.

¶ 360. Arrangements made by railroad companies with omnibus companies for the delivery of passengers and their baggage, not unlawful in themselves, and made on the cars or premises of the companies, are exempt from municipal interference, and city ordinances which attempt such interference are void.—Napman v. People, 19 Mich. 352.

¶ 361. A city cannot pass ordinances to preserve private wharves from encroachment any more than other private property. Such protection must usually be sought from the general laws of the land, and not from city by-laws.—Horn v. People, 26 Mich. 221.

§ 84. Public service, rates, and fares.

Regulations other than rate and service regulations, see ante § 83.
Public service regulations in general, see Public Service.
Validity of gas regulations, see also Gas § 3.

¶ 362. A municipal corporation cannot by contract with a public utility corporation, fix its rates so as to place them beyond state control except where power to do so is clearly and expressly delegated to it.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 363. The city of Kalamazoo has power under the Constitution, art. VIII, § 28, providing that the right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is reserved to such cities, villages and townships,

to fix rates as a condition to the use of streets by a gas company.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 364. A city is not incapacitated from fixing gas rates because of the fact that it is a user of gas.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 365. A city, in the absence of charter or other authority delegating the power by express terms or by necessary implication, may not regulate the price of gas to the consumer.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 366. Where a city by its charter is given no express power to regulate the rates at which a gas company shall furnish gas to its inhabitants, but where it is given, by statute and by charter, broad powers as to fixing the conditions upon which gas companies shall enter its streets, it is impliedly authorized to prescribe rates as a condition to giving its consent to the gas company to so enter its streets.—Boerth v. Detroit City Gas Co., 152 Mich. 654.

§ 85. Markets and street vending or peddling.

Reasonableness of license regulations, see ante § 58.
Discrimination and nonuniformity, see ante § 59.
Power to prohibit or regulate use of streets by vendors or peddlers, see post § 93.
Regulation of food selling outside of markets or street sales, see post § 86.

¶ 367. The power to regulate the business of hawking and peddling has too long been recognized to be now questioned.—City of Alma v. Clow, 146 Mich. 443.

¶ 368. The fact that the legislature has passed general laws in relation to the business of peddling and hawking will not prevent a municipality from legislating upon the same subject.—City of Alma v. Clow, 146 Mich. 443.

¶ 369. Chapter 66, § 11, of the ordinances of Detroit, as amended April 5, 1889, prohibiting sales of any articles on the Central market except from stalls or stands leased or occupied by the sellers, and confining farmers and gardeners with their vehicles to the Cass and hay markets, is void, and prosecutions thereunder may be restrained by writ of prohibition.—Hughes v. Recorder's Court of Detroit, 75 Mich. 574.

¶ 370. Under a city charter which authorizes ordinances to license peddlers, etc., and to regulate peddling (directly or by canvassing for subscriptions) the council may forbid the soliciting of orders for merchandise to be delivered later, without a license.—City of Muskegon v. Zeeryp, 134 Mich. 181.

¶ 371. Under Comp. L. 1897, § 3107, subd. 39, authorizing the council of a city of the fourth class to "license" transient traders, but containing no provision with respect to their regulation, such cities may license transient traders for revenue purposes but not for regulative purposes.—People v. Grant, 157 Mich. 24.

¶ 372. A city, under a power to license and regulate the sale, by peddling, of goods, by persons going from place to place in the city, has power to provide that any person or persons who shall go about from house to house or place to place, and sell or offer to sell any article of trade or commerce to be delivered then or in the future, shall be deemed to be a hawker and peddler.—Allport v. Murphy, 153 Mich. 486.

¶ 373. A city charter providing that the common council may require transient dealers to obtain license before engaging in business, and may regulate the terms of issuing the same, does not confer authority to tax the business, but merely to license it, to the end that it may be regulated.—City of Saginaw v. Saginaw Circuit Judge, 106 Mich. 32.

§ 86. Sales and vending of food.

Power to collect fees from vendors at public markets, see also post ¶ 452.
Street vending and markets, see ante § 85.
Municipal regulation, prescribing weight of loaves and seizure of short-weight, as a "taking" for public use, see Eminent Domain ¶ 83.

¶ 374. The Detroit ordinance prohibiting the keeping of stalls for the sale of fresh meats outside of the public markets, without license from the mayor, and requiring payment of a license fee of five dollars, is valid.—Ash v. People, 11 Mich. 347.

¶ 375. An ordinance of the city of Detroit providing that all bread manufactured shall be made into loaves of one, two and four pounds and no other weight, and prohibiting the sale of bread deficient in weight, is valid.—People v. Wagner, 86 Mich. 594.

¶ 376. An ordinance of the city of Detroit providing that all bread manufactured shall be made into loaves of one, two and four pounds, and no other weight, does not prohibit the sale of bread by weight if it overruns, nor does it prohibit the exaction of an increased price by reason of the additional weight.—People v. Wagner, 86 Mich. 594.

§ 87. Saloons, intoxicants, inns, and places of entertainment.

Vote required to license or approve bond, see ante ¶ 155.
Reasonableness of regulations, see ante § 58.
Discretion of councils in acting on applications for liquor licenses and bonds, see Intoxicating Liquors §§ 6, 12.

¶ 377. The power of village councils under Comp. L. 1897, § 2769, subd. 7, to suppress

saloons and bars for the sale of intoxicating liquors is not repealed by Act No. 291, Pub. Acts 1909.—Boos v. Scudder, 163 Mich. 678.

¶ 378. The charter of a village organized under Act No. 278, Pub. Acts of 1909, contains a provision that the common council shall have power to pass ordinances to regulate the sale of intoxicating liquors and the number of licenses to be issued therefor. Held, that this provision of the charter is not an invalid delegation to the council of a power reposed in electors by section 25 of said act; and that an ordinance suppressing all saloons in the village is valid.—Vernier v. Village Council of Grosse Pointe Shores, 170 Mich. 656.

¶ 379. A village incorporated under section 2941, Comp. L. 1897, has power under subd. 7, § 2769, Comp. L. 1897, to suppress saloons for the sale of intoxicating liquors.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 380. Authority given to a village council, at a time when the constitution forbade liquor licenses, "to license saloons, taverns and eating-houses," does not authorize it to license the sale of liquors.—Village of Mount Pleasant v. Vansice, 43 Mich. 361; Dewar v. People, 40 Mich. 401.

¶ 381. Even while the constitution prohibited licensing the sale of liquor, a municipality might license a "saloon." A saloon is not necessarily or exclusively a place for liquor-selling.—Kitson v. City of Ann Arbor, 26 Mich. 325; Wolf v. City of Lansing, 53 Mich. 367.

¶ 382. Under the general village incorporation act, Comp. L. 1897, § 2769, subd. 7, giving villages the power to suppress saloons and section 50, defining the word "saloon," a village does not have the power to enlarge the meaning of the word so as to include a single sale at any place and a complaint setting out such a sale states no offense.—Village of Sparta v. Boorom, 129 Mich. 555.

¶ 383. Charter power to a municipality to "suppress" or "prohibit" saloons does not authorize an ordinance establishing saloon limits.—Timm v. Common Council of the Village of Caledonia Station, 149 Mich. 323.

¶ 384. Where the power to regulate and prescribe the location of saloons is expressly given to a municipality, an ordinance fixing a saloon district is a valid exercise of the power.—Timm v. Common Council of the Village of Caledonia Station, 149 Mich. 323.

¶ 385. The legislature, and not the common council, has the right and has exercised the duty of determining on what terms liquor may be sold, and therefore such council may not pass upon the lawfulness or unlawfulness of the traffic.—Potter v. Common Council of Village of Homer, 59 Mich. 8.

¶ 386. A city incorporated under the general law has no authority to pass an ordinance providing for the payment of an annual fee for a saloon license, to be paid on or before the 1st day of May of the year in which the business is to be conducted, since Comp. L. 1897, section 3109, provides that no license shall be granted for any term beyond the first Monday in June next thereafter.—City of Albion v. Boldt, 145 Mich. 285.

¶ 387. A village established under the general village law (Comp. L. 1897, chap. 87), has no power to establish saloon limits and prohibit the sale of liquors outside such limits.—Timm v. Common Council of the Village of Caledonia Station, 149 Mich. 323.

¶ 388. Under Comp. L. 1897, § 3107, cities of the fourth class have the right to enact an ordinance establishing saloon limits, and providing that no license shall be granted except within those limits.—Johnson v. Common Council of City of Bessemer, 143 Mich. 313.

¶ 389. The charter of Ann Arbor requires saloonkeeping to be prevented, except as licensed. It contains nothing to interfere with the right to raise revenue by means of licenses, and an ordinance requiring a heavy license fee for keeping a saloon is a legitimate means of taxation, and valid unless unreasonable.—Kitson v. City of Ann Arbor, 26 Mich. 325.

¶ 390. A city charter empowering the common council "to enact such ordinances, by-laws and regulations as they deem desirable, * * * to restrain, license and regulate saloons, and to regulate and prescribe the location thereof," and prohibiting persons from engaging in such occupation in the city without license, authorizes an ordinance requiring an application for a license to be made to the common council, and prescribing the conditions precedent to its consideration by the council; and it empowers the council to determine each individual application so far as the location and suitableness of the place are concerned.—Sherlock v. Stuart, 96 Mich. 193.

¶ 391. It is competent for the common council to permit the keeping open on Sunday of saloons for the purpose of furnishing meals, and to forbid it for other purposes.—Lynch v. People, 16 Mich. 472.

¶ 392. Act No. 291, Pub. Acts 1909, relating to the regulating, taxing and licensing of the sale of liquors, does not repeal Comp. L. 1897, § 2769, subd. 7, which gives villages the power to suppress saloons.—Lake v. Village of Cedar Springs, 162 Mich. 569.

¶ 393. Where the state law prohibits a wholesale liquor dealer to sell whisky in

quantities less than three gallons, and by a municipal charter the power is conferred to regulate and license or prohibit, in pursuance of which an ordinance was passed prohibiting the sale of whisky in quantities less than one pint, held, in an action against a wholesale dealer for selling by the pint, that the charter provision did not supersede the state law, but merely gave the city power to further regulate the liquor traffic. —People v. Blom, 178 Mich. 508.

¶ 394. Under a power to license and regulate the sale of intoxicating liquors, a city has power to establish saloon limits, although there is no express provision in its charter giving it power to regulate and prescribe the location of saloons or places where intoxicating liquors are to be sold or given away, and no express provision conferring the power to suppress saloons.—Churchill v. Detroit Common Council, 153 Mich. 93.

D. CONTROL OF STREETS AND PUBLIC PLACES AND BUILDINGS.

§ 88. In general.

Distribution of powers over streets, power of department of public works or street department, see ante § 31.

Construction of street and travel regulations, see ante § 53.

Construction of ordinances for peace and order in streets and public places, see also ante § 54.

Construction of ordinances granting franchises and permits, see ante § 55.

Building and fire protection regulations, see ante § 79.

Transportation of garbage through streets, see ante § 81.

Construction of ordinance and charter respecting sewer connections, see ante ¶ 204.

Power and duty relative to construction and repair of streets and bridges, see Highways, IV.

Power and duty as to grades and changes of same, see Highways, V.

Power respecting vacation or closing of streets, see Highways, VI.

Power to vacate or abandon streets, see Highways § 125.

Extent of general power over streets and highways, see also Highways ¶ 545.

Police power of municipality to remove street obstructions summarily as nuisances, see also Highways, IX.

Power respecting removal of obstructions from alleys, see also Highways § 193.

What included in "street," see Highways ¶ 544.

Disability of courts to control official administration and regulation of streets, see also Highways ¶ 547.

Judicial review of municipal action in allotting portion of street for travel, see Highways § 114.

Right to pass ordinances allowing bicyclists to use sidewalks, see Highways § 366.

Inhibition on legislative vacation or alteration of streets, alleys, or public grounds in cities and villages, see Const. art. VIII, § 27.

¶ 395. The power of city authorities to regulate streets does not include the power to pass ordinances that affect injuriously public or private rights.—People v. Carpenter, 1 Mich. 273.

¶ 396. Under section 28 of art. VIII of the Constitution of 1909, cities and villages may make such reasonable regulations regarding the use of their streets and public places as are not in conflict with the general laws of the state.—People v. McGraw, 184 Mich. 233.

¶ 397. The fact that the obstruction of streets and highways is forbidden by section 6301, Comp. L. 1897, How. St., 2nd Ed., § 6656, does not prevent a city under §§ 3173, 3183, 3186, Comp. L. 1897, How. St., 2nd Ed., §§ 5695, 5705, 5708, from enacting an ordinance on the same subject.—City of Owosso v. Michigan Cent. R. Co., 183 Mich. 688.

¶ 398. The fact that a municipal ordinance prohibiting the obstruction of streets by railroad trains, imposes a greater penalty than that prescribed by § 6301, Comp. L. 1897, How. St., 2nd Ed., § 6656, for the same offense, does not render the ordinance void.—City of Owosso v. Michigan Cent. R. Co., 183 Mich. 688.

¶ 399. The reservation by § 28 of art. VIII of the Constitution of 1909, to cities and villages of the reasonable control of their streets and public places, is not limited to their use by public service corporations.—People v. McGraw, 184 Mich. 233.

¶ 400. The charter of Detroit confers full authority upon the common council to pass and enforce ordinances to prohibit and prevent the incumbering of streets and obstructions to public travel over the streets and public places in the city, by vehicles or otherwise, outside of the market limits.—Hughes v. Recorder's Court of Detroit, 75 Mich. 574.

¶ 401. An ordinance, and a charter provision authorizing it, whereby all persons owning or occupying realty are required to maintain sufficient sidewalks in front of such realty or adjacent thereto, and imposing a fine or imprisonment for failure to do so, are void, for indigent persons cannot comply therewith.—City of Port Huron v. Jenkinson, 77 Mich. 414.

¶ 402. Neither power to provide for "cleaning" the streets of "dirt, mud, filth," etc., nor to prohibit obstructing or incumbering of streets, etc., nor to control and regulate the "use" of streets, nor to prohibit practices tending to frighten horses, will justify an ordinance of the city of Detroit,

in so far as it prohibited the distribution of circulars, etc., in streets and alleys.—People v. Armstrong, 73 Mich. 288.

¶ 403. The laying of street railway tracks in a street cannot be considered as a part of the pavement of the street, so as to bring it within the power of the city to pave the street.—Attorney General v. Detroit Common Council, 148 Mich. 71, per Blair, J., Grant, Ostrander, Montgomery, and Moore, JJ., concurring.

¶ 404. Although a municipal council can institute proceedings for the abatement of a sidewalk opening as a public nuisance, it cannot decide that it is so, since the maintenance of a nuisance, being a public offense, must be tried on proper accusation in court. —Everett v. City of Marquette, 53 Mich. 450.

§ 89. Motor vehicle regulations.

Power to regulate motor vehicles, see also Highways § 411.

¶ 405. A provision for the registration and numbering of automobiles which requires the payment of a fee only sufficient to pay for the numbers which the city furnishes, if it is a license at all, is a mere means of regulation, and hence authority to regulate carries with it the right to so license, if this be necessary for effectual regulation.—People v. Schneider, 139 Mich. 673.

§ 90. Operation of railroads and street railways.

See also ante ¶ 335.

Power to regulate carriage and transportation, see ante § 83.

Power to allow or regulate laying of tracks in streets, see post § 91.

Construction of grants, franchises, and permits to railroads and street railways, see Railroads, I; Street Railways, I.

Regulations of street railway uses of streets, see Street Railways, IV, A.

Constitutional provision for municipal consent to use of streets for public utilities, see Const. art. VIII, § 28.

¶ 406. The legislature has granted to municipalities the power to grant the right to construct and operate a street railway with all necessary poles, wires, sidetracks, etc., along the public streets, and the location and construction of the road and changes relative thereto are subject to the control and approval of the municipal authorities, provided that the railroad so authorized and constructed does not become a public nuisance, or for any special reason requires the interference of a court.—Mannel v. Detroit, Mt. C. & M. City Ry., 139 Mich. 106.

¶ 407. Under §§ 3173, 3183 and 3186, Comp. L. 1897, How. St., 2nd Ed., §§ 5695, 5705 and 5708, a city may by ordinance prohibit the obstruction of its streets by railroad trains.—City of Owosso v. Michigan Cent. R. Co., 183 Mich. 688.

§ 91. Poles, wires, tracks, and the like in streets.

Power to regulate operation of railroads and street railways, see ante § 90.

Rights of telegraph and telephone lines in streets, see also Highways, X; Telegraphs.

General conditions and regulations upon use of streets for poles and wires, see Electricity § 1; Telegraphs.

Power of municipal corporation to allow one electric light company to use poles of another, see also Electricity ¶ 4.

Validity and construction of conditions in ordinances and franchises, see Street Railways, I; Telegraphs; Railroads, I.

¶ 408. The police power of the city to make reasonable rules and regulations for the erection and maintenance of poles and wires by telephone and telegraph companies, does not authorize the city to arbitrarily prohibit such a company from extending its system, by refusing to provide the rules and regulations governing the extension.—Michigan Tel. Co. v. City of St. Joseph, 121 Mich. 502.

¶ 409. While municipalities may not annul the general statute relating to the use of highways by telephone companies by arbitrarily refusing to permit the use of their streets to them, they may have under their charters controlling authority within reasonable limits, within the exercise of their police power, to direct upon which streets and in what manner the lines are to be installed, and may prohibit entirely the erection of poles on streets and in places that will injure or incommode the public.—City of Traverse City v. Citizens' Tel. Co., 195 Mich. 373.

¶ 410. An ordinance of a city requiring a telegraph company to remove its wires and place them underground within a business district is within the police powers of the municipality where the use of telegraph poles interferes with traffic and with the effective work of the fire department.—City of Monroe v. Postal Tel. Co., 195 Mich. 467.

¶ 411. A city ordinance providing for a reasonable inspection of all poles used by an electric light company within the city, to ascertain whether the same are secure, and making the cost of such inspection a charge against the company, is valid, where the statute under which the company was organized gives to the municipal authorities the right to prescribe "reasonable regulations" for the conduct of its business.—City of Saginaw v. Swift Electric Light Co., 113 Mich. 660.

¶ 412. A city cannot justify the imposition of unreasonable burdens upon an electric light company, to which it has granted by

ordinance the right to erect its poles in the streets upon conditions stated, under the power reserved to it in a subsequent ordinance relating to such company to amend, alter, or repeal the latter ordinance.—City of Saginaw v. Swift Electric Light Co., 113 Mich. 660.

§ 92. Assemblages and processions.

Construction of ordinance against "red flag" processions, see ante ¶ 223.

¶ 413. Municipalities may regulate, but cannot prohibit or punish, public and popular demonstrations so long as they are harmless, nor leave it to the sole discretion of a mayor or council to permit them; and this is so of a parade of the Salvation Army with music.—In re Frazee's Case, 63 Mich. 396.

¶ 414. Regulation of public demonstrations must operate uniformly under the same conditions, and by-laws for that purpose must be reasonable, impartial and general, and must fix conditions expressly and intelligibly, without leaving them to any one's caprice.—In re Frazee's Case, 63 Mich. 396.

¶ 415. Under the Detroit charter, chapter 7, § 34, giving power to the city council to control, prescribe and regulate the manner in which streets and public grounds shall be used, council has the power to enact an ordinance prohibiting the making of a public address within a half mile of the City Hall without a permit.—Love v. Judge of Recorder's Court of Detroit, 128 Mich 545.

¶ 416. An ordinance prohibiting the making of a public address within a half mile of the City Hall without a permit is a reasonable exercise of a power vested in the common council to prescribe and regulate the manner in which streets and public grounds shall be used.—Love v. Judge of Recorder's Court of Detroit, 128 Mich. 545.

§ 93. Vending or peddling on streets.

Power to regulate or license vending or peddling as a business, see ante § 85.

¶ 417. Under the provision of the Detroit charter empowering the council to "prohibit and prevent encumbering or obstructing of streets," etc., "with vehicles, animals, etc.," the council has power to enact an ordinance forbidding farmers, hucksters, etc., from standing with their vehicles in the streets adjacent to the Central market within five hundred feet thereof, the region being one of dense traffic and restricted space.—People v. Keir, 78 Mich. 98.

§ 94. Animals at large or estray.

General regulations concerning estrays and animals at large, see Animals.

Validity of estray ordinance omitting to provide penalty, see also Animals § 5.

¶ 418. The village ordinance of April 8, 1870, "relative to the restraining and impounding of animals," passed by the common council of Wenona, held valid and authorized by the village charter.—Grover v. Huckins, 26 Mich. 476.

¶ 419. Where a village charter empowered the common council "to establish one or more pounds and regulate and restrain the running at large of cattle, etc., in the streets and public places in said village," it was held to include authority to use the customary means of prevention, such as the sale of the animals for the costs and expenses of impounding and keeping.—Grover v. Huckins, 26 Mich. 476.

§ 95. Navigable waters and harbors and water supply.

Public control over navigable waters, see Navigable Waters, II.

¶ 420. The common council of the village of Spring Lake has no power to establish harbor lines in Grand river.—People v. Kirsch, 67 Mich. 539.

¶ 421. A city cannot, under the police power, prohibit a riparian owner on an inland lake from bathing in the waters of the lake, though the city is also a riparian owner drawing its water supply from the lake.—People v. Hulbert, 131 Mich. 156.

E. DEFINING PENAL OFFENSES AND PROCEDURE TO PUNISH SAME.

Prosecutions for violations of ordinances, see post XVI, B.

§ 96. In general; matters covered by general law.

Charter as limitation on power to enact ordinances, see also ante § 75.

Enlarging statutory definition of offense, see post ¶ 430.

Construction of ordinances, see ante § 54.

Effect of ordinance on same subject as general law of state, see also Crimes § 3.

Effect of legislative enumeration of acts constituting disorderly conduct as limiting power to make other acts such, see Crimes ¶ 9.

Vagrancy as state crime notwithstanding city ordinance on same subject, see also Counties ¶ 162.

¶ 422. To render ordinances reasonable they must tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred; and the question of reasonableness is not determined by the enormity of the offense sought to be punished, but by the actual operation of the ordinance in all cases that may be brought thereunder.—People v. Armstrong, 73 Mich. 288.

¶ 423. A city ordinance prohibiting the creation or maintenance of a nuisance is not

invalid or unconstitutional because the general statutes of the state provide for the conviction and punishment of those guilty of the like offense.—People v. Detroit White Lead Works, 82 Mich. 471.

¶ 424. Municipal penalties must be fixed and not fluctuating; a common council cannot properly turn over to an inferior court, without limitation or classification, the full power of fixing penalties conferred upon it by charter. And no by-law can impose a penalty, sliding or fixed, that exceeds a reasonable sum.—In re Frazee's Case, 63 Mich. 396.

¶ 425. The authority to prescribe penalties for violations of city ordinances, conferred upon the common council of Detroit by the Charter of 1893, § 257, is not limited to such ordinances as are adopted under the police power of the council, but includes those that may be enacted by virtue of contract relations existing between the city and the owner of a public franchise.—People v. Detroit Citizens' St. R. Co., 116 Mich. 132.

§ 97. Particular offenses.

Power to declare house of ill fame to be nuisance, see ante § 80.

Power to suppress, prohibit, or regulate saloons, see ante § 87.

¶ 426. An ordinance declaring the keeper of a bawdy-house a "disorderly person" is not beyond the power of a city to enact, being within the statutory definition.—City of St. Ignace v. Snyder, 75 Mich. 649.

¶ 427. Detroit's Charter, § 35, ch. 7, which provides that the common council may provide for the prohibition and prevention of any disorderly noise or disturbance in the streets or elsewhere in said city, confers power upon the common council to pass an ordinance punishing "any person who shall make any disturbance by which the peace and good order of the neighborhood are disturbed," etc.—In re Bushey, 105 Mich. 64.

¶ 428. A charter provision authorizing the common council of Detroit to prohibit "all lotteries for the drawing or disposing of money or any other property whatsoever" authorizes the prohibition of policy shops and of the game of policy, which is a lottery. —People v. Hess, 85 Mich. 128.

¶ 429. It is within a city police's power to pass an ordinance making it an offense indecently to expose the person without reference to the intent which accompanies the act.—City of Grand Rapids v. Bateman, 93 Mich. 135.

¶ 430. The statutory definition of vagrancy cannot be enlarged by municipal ordinance.—In re Way, 41 Mich. 299.

¶ 431. A village ordinance which provides that any assemblage of persons, in any place in said village, engaged in any noisy, etc., language or strife, shall be deemed disorderly, is not rendered unconstitutional by the fact that its scope is not limited to public places.—Village of Vicksburg v. Briggs, 102 Mich. 551.

§ 98. Arrests, procedure, and punishment.

Prosecutions for violations, see post XVI, B.

Noncriminal nature of the prosecution, see post § 217.

General law of arrests and prosecutions for crime, see Arrest; Indictment.

¶ 432. A provision of a city charter authorizing police officers to arrest without process all persons engaged, in the arresting officer's presence, in violating any ordinance of the city, is valid.—Burroughs v. Eastman, 101 Mich. 419.

¶ 433. Whether a municipal ordinance can justify arrests without process where common-law principles do not, quære.—Quinn v. Heisel, 40 Mich. 576.

¶ 434. An ordinance providing for confinement of violators of municipal ordinances in the house of correction is not unreasonable because the legislature has seen fit to permit felons to be sentenced to the same place in the absence of any showing that minor offenders, civil debtors, etc., are confined with the greater criminals and lower characters.—In re Cox, 129 Mich. 635.

§ 99. Abrogation or amendment of penal ordinance by statute or charter.

General rule as to abrogation by statute, see ante § 66.

¶ 435. An ordinance of the city of Adrian regulating the sale of intoxicating liquors, enacted under a charter passed prior to the general liquor law of 1887, was repealed by the latter.—People v. Furman, 85 Mich. 110.

¶ 436. Laws 1887, Act No. 34, making the offense of keeping a house of ill-fame a felony, and punishable as such, does not repeal by implication the provision of the charter of the city of Detroit authorizing the common council to prohibit, prevent and suppress the keeping of such houses.—People v. Hanrahan, 75 Mich. 611.

¶ 437. A city charter provision giving authority to enact ordinances to restrain, license and regulate saloons, and prescribe the location thereof, did not abrogate Comp. L. 1897, § 5395, requiring saloons to be closed on legal holidays, as it contained no language in terms suspending the operation of the general law, and therefore the city had no power to pass an ordinance permitting saloons to remain open on July 4th.—Moore v. Kelley, 136 Mich. 139.

X. PUBLIC PROPERTY, BUILDINGS, PLACES, AND WORKS; GRANTS, TITLES, AND CONVEYANCES.

§ 100. Property and titles in general.

Various classes of public properties, buildings, and facilities, see post §§ 101-108 and the cross-references found in those sections.

City plats and plans, see post § 101.

Condemnation of property, see post § 102.

Donations or diversions of property to county or state uses, see post § 103.

Powers of cities to provide for public improvements, buildings, and utilities, see ante §§ 23-26.

Works and properties beyond city limits, see ante § 29.

Municipal regulative powers and control over public places, streets, and buildings, see ante IX, D.

Liability for misuse or injurious use of property, see post XII.

Effect of annexation or division on property rights, see ante § 9.

Reformation of lease with city as judicial interference with contractual functions, see also post ¶ 481.

Boards and departments in charge of public property and works, see also post § 179 et seq.

Title to public property by adverse possession, see Adverse Possession §§ 2, 3.

Adverse possession by city against private person, see Adverse Possession § 29.

Sufficiency of adverse possession of lands bought in by city for taxes, see Adverse Possession § 28.

Limitation of action to recover from city land in public use, see Limitations § 25.

Laches against county seeking land occupied by city, see Equity ¶ 169.

Prescriptive rights in waters, drainage and water rights, see Waters.

¶ 438. The city of Flint, under power granted in its charter, Local Acts 1901, Act No. 346, ch. 1, sec. 2, and also by its inherent power, has power to purchase and hold real estate for its proper municipal needs.—Berston v. City of Flint, 176 Mich. 266.

¶ 439. The erection of a drinking fountain is a proper municipal purpose and a city may take a devise therefor.—Hosmer v. City of Detroit, 175 Mich. 267.

¶ 440. Under a charter authorizing a city "to provide for public squares and parks" land may be purchased for such purposes.—City of North Muskegon v. Rodgers, 188 Mich. 93.

¶ 441. A city, having the general power to purchase, take, accept and hold real estate for park purposes may, in the absence of a charter provision limiting its action, purchase property for such purposes at a tax sale.—City of North Muskegon v. Rodgers, 188 Mich. 93.

¶ 442. Complainant bought one of ten lots advertised as in a residence street, and restricted to that purpose by the contract of sale. The vendor sold one of the lots to the city, which proceeded to put up a fire department building. Held, the city was bound by the restrictions, and could be enjoined from erecting the building until by condemnation it acquired the interests of the other lot owners.—Allen v. Wayne Circuit Judge, 159 Mich. 612.

§ 101. Plats, plans, and dedications.

Sufficiency of vote to accept dedication, see also ante ¶ 156.

Adoption of plans as a condition precedent to issuance of public improvement bonds, see also Municipal Bonds § 5.

Dedication to public use and acceptance of same, see Dedication.

Effect of agreement variant from resolution accepting dedication and imposing conditions, see Dedication ¶ 52.

¶ 443. The power to lay out the town of Detroit, given to the governor and judges by the act of congress of April 21, 1806, was fully exercised and executed by them on the 27th of April, 1807, as shown by the recorded order then passed.—People v. Carpenter, 1 Mich. 273.

¶ 444. The interior open spaces in the original plan of the city of Detroit were, by the acts of the governor and judges, and the early legislation of the territory, set apart to such uses as the city council of Detroit, in its legislative capacity, might "at any time" provide. The land board had no further power or control in the matter, and subsequent attempt by them to confine the dedication was void.—Riggs v. Detroit Board of Education, 27 Mich. 262.

¶ 445. The acts of the common council of Detroit, as a land board under the acts of congress, were under a different authority from their legislative acts under the state or territorial laws, and could not be legally identical with the latter.—Riggs v. Detroit Board of Education, 27 Mich. 262.

¶ 446. The control of the uses of the interior open spaces in the original plan of Detroit was vested in the common council as a legislature, and was to be exercised from time to time, and the uses were variable. One council could not prevent legislative action by a subsequent council to change a former use.—Riggs v. Detroit Board of Education, 27 Mich. 262.

¶ 447. The use for a public library of a triangle in the old city plan is within the original purposes of the dedication, as well as within the power of the city under its authority to vacate open spaces for public improvements.—Riggs v. Detroit Board of Education, 27 Mich. 262.

¶ 448. By Act of Congress of August 29, 1842, a grant of land was made to Detroit,

from which was excepted "the court-house"; held, that this term covered the ground on which that building stood, viz., the triangular block bounded by State, Griswold and Rowland streets, and that the city's power over this block is one of legislation and regulation, and not that of a proprietor; also that, under existing legislation the occupancy of it by the board of education is not such a tenancy as the city can terminate by a notice to quit.—Board of Education v. City of Detroit, 30 Mich. 505.

¶ 449. The triangular lot bounded by State, Griswold and Rowland streets, in Detroit, having been reserved by an act of congress in 1807 "for public wells and pumps, for markets, for public schools, for houses for the reception of engines or other articles for the extinguishment of fires and for the preservation of the property of the inhabitants, for houses for the meeting of religious, moral, literary or political societies, or other useful associations, *and generally for such purposes of utility or ornament as the city council of Detroit may at any time by law provide*," etc., the common council cannot proceed to open a street through it on the ground that this merely changed the uses of public grounds from an educational to some other purpose, for the change is from a use specified in the act to one not there laid down. The italicized words refer to the purposes of the same general nature as those specifically enumerated, and cannot embrace those which are so different as to annihilate the very parks which congress, by this act, sought to establish and perpetuate. The act contemplates, for some of the purposes set forth, a dedication to public uses that are to be wrought out through corporations or associations of citizens, and by means of buildings and improvements erected by the expenditure of their own funds; it clearly does not contemplate that these corporations are to be mere tenants at will of the city, subject to dispossession and deprivation of the benefit of their expenditures on no more notice than the statute requires to be given to a tenant at sufferance.—Board of Education v. City of Detroit, 30 Mich. 505.

§ 102. Condemnation of property for public use.

Necessity of two-thirds vote to appropriate property, see ante ¶ 159.

Liability for trespass for taking without condemnation, see post ¶ 551.

Right to open street by condemnation notwithstanding contract to refrain from opening, see post ¶ 491.

General law of eminent domain, see Eminent Domain.

Street opening proceedings and change of grade proceedings, see Highways, II, B, V.

Right to condemn land for railroad purposes in street of city without franchise, see Eminent Domain ¶ 22.

Erection of fire engine house in disregard of building restriction as a "taking" of property beyond police power, see Eminent Domain § 24.

Authority of city by its charter providing condemnation jury of "twelve inhabitants," see Eminent Domain ¶ 271.

¶ 450. Proceedings in the City of Detroit to acquire lands for public use are governed by Act No. 541, Local Acts 1903.—City of Detroit v. Weil, 180 Mich. 593.

§ 103. Donating or providing property or buildings for county or state use.

Contracts for providing county buildings, see also post ¶ 495.

Validity of act authorizing erection of county buildings by city, see also Counties ¶ 51.

Invalidity of law authorizing city to be reimbursed for cost of county buildings erected by it, if county seat should be removed, see Counties ¶ 102.

¶ 451. Although a city cannot be compelled to bear the whole expense of a county building, yet it may do so if authorized and if it sees fit.—Callam v. City of Saginaw, 50 Mich. 7.

§ 104. Public buildings, markets, commons and parks.

Uses to which open spaces on Original Plan of Detroit may be devoted, see ante § 101.

Modes in which lands may be acquired, see ante § 100.

Building restrictions as binding on city, see ante ¶ 442.

Liability for injuries in and about buildings, see post § 127.

Power to regulate markets and merchandising, see ante IX, C.

Liability for injury from defectively planned market, see post ¶ 545.

Power to rent or to buy premises for markets, see also post ¶ 497.

Proper funds and objects of funds, see post § 142.

[Note. Parks and commons, though usually within or adjacent to a city or village, are for the general public and the law relating to them is general and not merely a municipal incident. Therefore the separate topic, Parks and Commons, has been created to treat such matters.]

"Public building" bonds as excluding bonds for garbage reduction plant, see also Municipal Bonds ¶ 11.

Dedications for buildings, markets, parks or other specific uses, see Dedication.

General law of buildings not dependent on their public character, see Buildings.

Constitutional power to acquire, own, establish, and maintain parks, boulevards, cemeteries, hospitals, almshouses, and all other works which involve the public health or safety, see Const. art. VIII, § 22.

¶ 452. A city has a right to establish and maintain a public market on premises duly condemned for that purpose, even though it be an incidental consequence that market wagons from which sales are made collect in the neighborhood and to some extent cause the obstruction of the streets. And no private right of action arises against the city for such obstruction, especially where it is under police regulation; and it is proper, for paying the expenses of such regulation, to collect fees from those who sell goods from such wagons.—Henkel v. City of Detroit, 49 Mich. 249.

¶ 453. The city of Detroit having built a market building, under a special statute authorizing it to do so, with the proceeds of bonds sold for the purpose, such statute directing that the rents of the building should be applied to the payment of interest and toward the establishment of a sinking fund to pay the bonds, held, that the city would be restrained from discontinuing, prior to the maturity of the bonds, the use of such building for market purposes.—Attorney General v. City of Detroit, 71 Mich. 92.

¶ 454. The fact that the city owns the fee of the land upon which the market is situated does not authorize it to deprive the public of the franchise; nor does the fact that the city has neglected its duty to keep up a separate market "sinking fund" affect the principles involved.—Attorney General v. City of Detroit, 71 Mich. 92.

¶ 455. It seems that a city may change the location of public markets where such change will not injuriously affect public rights, but that it cannot capriciously destroy such markets unless the charter gives it power to do so.—Attorney General v. City of Detroit, 71 Mich. 92.

¶ 456. The city of Detroit, after it has paid bonds issued by it to erect the central market building, and after it has established other markets, may discontinue the central market on finding it is no longer indispensable.—Petz v. City of Detroit, 95 Mich. 169.

¶ 457. A city may exercise its right to discontinue a market regardless of the interests of tenants whether yearly or monthly.—Petz v. City of Detroit, 95 Mich. 169.

¶ 458. History of the central market-place of Detroit reviewed.—Attorney General v. City of Detroit, 71 Mich. 92; Cooper v. City of Detroit, 42 Mich. 584.

§ 105. Libraries, museums, and schools.

Use of space on original plan of Detroit for library, see ante ¶ 447.

Expenditure for museum of art as improper object, see post § 144.

General law of schools and education, including libraries, museums, and the like having an educational object, see Schools and Education.

Devises, bequests, and trusts for schools, libraries, museums, and the like, see Wills, VI; Trusts; Charities.

¶ 459. The transfer by the Detroit Museum of Art, a private corporation, of its property to the City of Detroit, with the retention of the minority representation on the board of directors, does not convert it into a municipal agency.—Detroit Museum of Art v. Engle, 187 Mich. 432. (Brooke, C. J., and Moore, J., dissenting.)

§ 106. Highways, streets, bridges, and waterways.

[Note. It is the plan of this digest to treat in specific topics such as Highways, Navigable Waters, Bridges, the law pertaining to such subjects. The fact that many of the cases originate with the limits of a municipality or involve incidentally an assertion of liability against a municipality does not afford a sufficient reason for including them in Municipal Corporations as bearing on the law relating to that subject. The first search should therefore be made in the topics mentioned.]

Use of streets incident to markets, see also ante § 104.

Contracts properly incident to opening streets, see also post § 118.

General law of highways and highway bridges accessory to highways, see Highways.

General law of bridges, see Bridges.

General law of navigable and nonnavigable waters, see Waters; Navigable Waters.

Mode of procedure to open and acquire streets, see Highways, II, B, 5.

Nature of the public's estate in streets and roads, see Highways § 156.

Proper uses and servitudes in streets, see Highways § 157.

Powers of city or village officials to grant exclusive rights in streets, see also Highways § 156.

Right to grant permission to construct private sewer in street, see also Highways ¶¶ 607, 608.

Leases or grants of streets and street spaces for buildings, see also Highways § 157.

County, city or township as responsible controller of bridge, see Bridges, II; Highways, IV, IX, XII.

Burden of expense of bridges as between several public divisions, see Bridges, V; Highways, VIII.

Duty and liability as to maintenance of streets in safe condition, see also Highways, XII.

Use of paving materials left in street as conversion by city, see Conversion ¶ 62.

Obstruction, encroachment and unauthorized uses of street, see Highways, XI; Nuisances.

¶ 460. One who has bought soil removed from a street in process of grading cannot defend an action for the price by the munici-

pality which sold it by a claim that the right to the soil was not in the city but in the abutters, where they made no objection and it could not be identified as belonging to any one of them.—Griswold v. Bay City, 35 Mich. 452.

§ 107. Sewers and drains.

Adopting of sewer plans and grades and management of sewers as administrative or discretionary action, see ante § 74.

Contracts for sewers and ditches and use of land for same, see post § 118.

Liability for injuries from sewers and drains, see post § 131.

General law of surface drains as distinguished from sewerage systems, see Drains.

¶ 461. Where the Village of Highland Park was permitted by decree of a court of chancery to empty sewage into the sewers of the City of Detroit on making compensation therefor, held that payment on an acreage basis was equitable, and was sustained by the testimony.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 462. A decree respecting the right of the Village of Highland Park to empty its sewage into a sewer of the City of Detroit and requiring the enlargement of such sewer, held to impose the cost of such alteration upon the village and not upon the city.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

§ 108. Water and lighting works and equipment.

Power to provide for lighting and water supply, see ante § 25.

Supplying light or water as proprietary acts, see ante § 74.

Public ownership and operation, see post § 109.

Contracts for supply to the public, see post § 120.

Rights and liabilities incident to the operation of public service plants and not involving the particular law of municipalities, see Electricity; Gas; Waters, VI.

General law of public water supply, see Waters, VI.

General law relating to the operation of electric plants and works, see Electricity.

Nonleviability of lighting plants affected with a public interest, see Executions § 28.

§ 109. Public ownership of public service facilities.

Governmental or proprietary character of operation, see also post § 125.

Rules governing city in proprietary capacity, see ante § 74.

Attempt by council to contract for service after vote for public ownership, see also ante ¶ 124.

Implied authority to purchase site for works, see post ¶ 826.

Construction of act for public operation and ownership as cumulative to power to provide supply of water by contract, see also post ¶ 506.

Constitutional provision for acquiring, owning, and operating public utilities for water, light, heat, power, and transportation, see Const. art. VIII, § 23.

¶ 463. Following the rule of George v. Wyandotte Electric Light Co., 105 Mich. 1, a special election properly held by the city on the question of constructing an electric plant by the city of Negaunee under its charter and Pub. Acts, 1891, as amended, is lawful.—Mitchell v. City of Negaunee, 113 Mich. 359.

¶ 464. Under sections 23, 24, art. 8, of the Michigan Constitution, authorizing municipally owned public utilities, the resolution of a city council providing for the erection of a municipal electric lighting plant is not unconstitutional by reason of the fact that such a course will result in competition against a private company which has an unexpired permit to use, but not exclusively, the city's streets for lighting purposes.—Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331.

¶ 465. Where a charter provides that the city council shall have power to construct an electric lighting plant "whenever two-thirds of the aldermen elect shall by resolution declare that it is expedient," etc., the meaning is plain that the power of the council to carry out the purpose depends upon its first adopting a resolution determining the expediency of the purpose.—Bay City Traction & Electric Co. v. Bay City, 155 Mich. 393.

¶ 466. A city of the fourth class which, under its special charter, had no power to grant an exclusive waterworks franchise, did not, by adopting a resolution declaring it expedient for waterworks to be constructed but inexpedient for the city to construct them, preclude itself from subsequently constructing its own waterworks and make it necessary, in case it desired to operate its own system, to purchase the works of the company that, under franchise, had been supplying it with water, even conceding that by the adoption of the resolution the Waterworks Act (Pub. Acts 1869, No. 113), under which the water company was incorporated but which gave the company no exclusive rights in express terms, became a part of the city charter.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

§ 110. Franchises or permits to use streets.

Propriety of making provision for public service by granting franchises, see also ante § 26.

Local and state power to grant franchises, see Franchises § 1.
Implications of franchise granting power, see Franchises ¶ 4.
Power to make grant of gas franchise without specifying streets covered, see Franchises ¶ 5.
Taking indemnity bond for reconditioning of streets from grantee of franchise, see Franchises ¶ 15.
Right to retain liquidated damages for failure to exercise granted franchise, see Franchises ¶ 17.
Validity of option to city to purchase plant for public ownership, see Street Railways, I.
Granting franchise to endure beyond corporate grantee's existence, see Corporations § 84.
Right of corporation to take franchise under its charter as question exclusively for state and not for city, see Corporations § 98, ¶ 355.
Particular franchises and permits for use of streets, see Railroads, I, III; Street Railways, I; Gas § 1; Electricity § 2; Waters, VI.
Estoppel of municipality to deny incorporation of grantee of franchise to use streets and serve public, see Corporations § 12.

¶ 467. A provision in an ordinance, granting a right of way to a street railway company, that the city shall pay for the concrete foundation of the tracks in unpaved streets is not ultra vires of the city.—City of Detroit v. Detroit Ry., 134 Mich. 11.

§ 111. Protection of public property from injury.

Injuries to highways and bridges and liability to public by reason thereof, see Highways § 192; Bridges §§ 23-25.

¶ 468. Where a defendant private corporation is engaged in constructing a tunnel under a city water main, and fails to supply men to watch and protect said main, the city has a right to supply such protection at defendant's expense.—Board Water Com'rs City of Detroit v. Butler Bros. Const. Co., 168 Mich. 137.

¶ 469. Where a private corporation undertakes the building of a tunnel under a city water main and it is necessary that such main be watched during the process of construction of said tunnel, it is a question of fact for the jury and not a question for the court, whether the defendant exercised proper care in watching said main and whether the city supplied an unnecessarily large number of men to look after the main, the suit being by the city to recover for the services of the men supplied by it for said purpose.—Board Water Com'rs City of Detroit v. Butler Bros. Const. Co., 168 Mich. 137.

XI. CONTRACTS AND INDEBTEDNESS.

[Note. The general law of contracts by or with the public is treated in Public Contracts, which see. The present division is restricted to matters of public contract law which are peculiarly applicable to municipalities. These treatments are correlative of each other, however, and ordinarily both should be searched.]

§ 112. In general; power to contract and purpose or legality of contracts.

Notice to other party of limitations on contract powers, see post § 113.
Mode of contracting, see post §§ 114, 115.
Construction and effect of contracts, see post § 116.
Particular purposes and objects of contracts, see post §§ 117-121.
Borrowing money and incurring debts, see post §§ 121-123.
Noninterference by courts with municipal discretion, see ante § 84.
Disability to bargain away municipal police power, see ante ¶ 329.
Disability to place rates for public service beyond police power, see ante ¶ 362.
Authority of officers to bind city or to make contract for it, see post § 186.
Proper claims and charges against municipality, see post § 147.
Contract to pay officer or employee overtime, see post ¶ 900.
Contract for purchase of land for public use, see also ante ¶ 159.
Power and authority to make public contracts in general, see Public Contracts, I.
Necessity of existing fund or appropriation, see also Public Contracts, I, II.
General law of legality and public policy respecting contracts, see Contracts, IV.
Power to issue bonds, see Municipal Bonds § 1.
Validity of contract where subsequent legislation forbids, see also Contracts § 43.
Validity of aid or bonus contract looking toward similar aid from municipality, see Contracts § 55, ¶ 229.
Liability of city for benefits received under illegal contract, see Public Contracts, V.
Rights of holders of illegal or defective bonds, see Municipal Bonds, III.
Exclusive contracts as monopolies, see Combinations § 5.
Contracts to indemnify against or to pay taxes for another, see Taxes, III.
Agreement to indemnify waterworks proprietor against liability for taxes, see Indemnity § 2.
Actions and suits on public contracts, see Public Contracts, VI.

¶ 470. The acts and contracts of a common council are only binding on the city when the council keeps within the scope of its authority.—Dermont v. City of Detroit, 4 Mich. 435.

¶ 471. The contracts of a municipal corporation, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes.—Thomas v. City of Port Huron, 27 Mich. 320.

¶ 472. A municipal corporation has no general authority to exchange promises with other corporations or persons.—Thomas v. v. City of Port Huron, 27 Mich. 320.

¶ 473. The power to make expenditures for entertainment is not within the scope of general municipal powers, but must be expressly conferred.—Black v. Common Council of Detroit, 119 Mich. 571.

¶ 474. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of a city in the absence of special charter provision.—Wheeler v. City of Sault Ste. Marie, 164 Mich. 338.

¶ 475. An order of a court in which a person has been convicted of crime, remanding him to the police station under suspended sentence to be detained until the trial of a criminal case wherein he is to be a witness for the people, is void, because not according to the statutory mode of committing witnesses, and cannot be made the basis of a valid contract for the board of such prisoner.—Tucker v. Common Council of Grand Rapids, 104 Mich. 621.

¶ 476. Clear authority from the legislature is needed to enable a city to make a contract by ordinance with a street railroad for the reduction of fares.—City of Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

¶ 477. It is competent for a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract.—City of Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

§ 113. Notice of limitations.

¶ 478. All persons contracting with a municipal corporation are bound to take notice of the limitations by law upon their power to contract.—Tennant v. Crocker, 85 Mich. 328.

¶ 479. The rule that all who deal with a municipal corporation must see that the contracts upon which they rely are within its powers, applied as against a contractor who furnished supplies which a city used in the entertainment of guests, where the money for such entertainment was directed to be paid out of a fund which the common council had no power to use for that purpose.—Black v. Common Council of Detroit, 119 Mich. 571.

§ 114. Mode of contracting and form of contract.

Vote required to pass resolution or ordinance involving appropriation, see ante § 38.
Submission to electors of proposal to contract, see post § 115.
Mode and manner of signing contract for city, see post § 194.
Estoppel to deny legal execution of contract, see also ante ¶ 136.
Grant of franchise as a contract by city not to impair its value by subsequent action, see ante ¶ 105.
Inviting bids, initiating, forming, and executing public contracts in general, see Public Contracts, II.
Necessity of preliminary estimate of cost, see Public Contracts, II.
Necessity and sufficiency of invitation and specifications and plans to inform bidders, see Public Contracts, II.
Statutory and other necessary provisions in public contracts in general, see Public Contracts, III.
Rule against implication of contract against the public, see Public Contracts, V.
Measure of quantum meruit on implied contracts, see Implied Contracts §§ 22-24.
Requisites and form of bonds, see Municipal Bonds, II.
Meetings and votes to authorize issuance of bonds, see also Municipal Bonds § 4.

¶ 480. A village corporation is bound by a contract which it alone can properly make, but which has been officially made by some of its authorities who have power to contract on its behalf, and have, in making it, declared themselves and their successors in office bound by its conditions.—Gale v. City of Kalamazoo, 23 Mich. 344.

¶ 481. A lease with a city may be reformed in equity to eliminate a phrase inserted through mistake of the scrivener, though the charter of the city disables it to sell or dispose of any real estate or interest therein unless by ordinance or resolution, where the necessary record of municipal action exists to show what contract was intended; such decree does not encroach on a legislative function or rest on an oral contract which the city could not make.—Bronk v. Standard Mfg. Co., 141 Mich. 680.

¶ 482. Pub. Acts 1891, No. 186, § 2, relating to erection of public lighting plants, should be reasonably construed; it is designed only to provide for the erection of municipal plants and cannot be held to prescribe a method of contracting for electric light, which other sections cover and control without requiring the declaration of expediency or other formality required in making a contract, such as section 2 controls.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 483. Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.), relating to contracts for

public lighting contains no requirement as to competitive bidding.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 484. Even if the action of the common council in approving a contract by the city with a water supply company was not equivalent to the adoption of a resolution declaring the expediency of having waterworks constructed and the inexpediency of having the municipality build such works, as required by How. St. § 3110; the city was after 16 years of action under the contract in question, and after the making of large expenditures on the strength of it, estopped to raise such objection.—Ludington Water Supply Co. v. City of Ludington, 119 Mich. 490.

§ 115. ——Submission to electors.

General law of elections, see Elections.

¶ 485. A proposition to borrow a certain sum for the "construction and maintenance" of waterworks is improperly submitted to a vote of the electors of a village, since it does not indicate what proportion of the sum is for construction, and what for maintenance, and the statute does not authorize money to be borrowed for the maintenance of waterworks.—Richardi v. Village of Bellaire, 153 Mich. 560.

¶ 486. Under a statute requiring that a proposition to borrow money must have the approval of "two-thirds of the electors voting" at a general election, or at a special election called for that purpose, an affirmative vote equal to two-thirds of the whole number voting at the election, and not merely a two-thirds vote of those voting upon the particular proposition, is necessary to authorize the loan.—Daniels v. Long, 111 Mich. 562.

¶ 487. Contracts entered into by the public lighting commission of Detroit, under Local Acts 1893, No. 294, § 4, for the purchase of lands, machinery, and appliances necessary for an electric lighting plant, must be submitted to the common council for approval. The provision of Detroit Charter 1893, § 190, that no contract for any public work shall be let "until the contract therefor has been duly approved and confirmed by the common council" applies, since Act No. 294 is itself a part of the charter, and especially since that act also contemplates by express words that the council "shall" or "may" direct the commissioners to enter into certain contracts respecting lighting.—Detroit Common Council v. Detroit Public Lighting Commission, 101 Mich. 362.

¶ 488. The General Village Incorporation Act, chap. 7, § 1, subd. 16 (How. St. § 2847), which authorizes the village council to make ordinances for the organization and regulation of the fire department, and for the prevention and extinguishment of fires, and chapter 10, § 2, of the same act (How. St. § 2959), which provides that "the council may purchase and provide suitable fire engines and apparatus for the extinguishment of fires, and may sink wells and construct cisterns and reservoirs in the streets, public grounds, and other suitable places in the village, and make all necessary provisions for a convenient supply of water for the use of the [fire] department," empower the village to contract with private individuals to furnish a water supply for the prevention of fires, and for the use of the fire department, without a vote of the electors.—East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201.

¶ 489. Pub. Acts 1895, No. 3, chap. 11, § 4, prohibiting any village from borrowing money for waterworks, unless authorized by a two thirds vote of the electors, applies wherever a general water supply is contemplated; and is not overcome by the provisions of chapter 8, section 1, and chapter 10, sections 1-3, which chapters relate respectively to "improvements and assessments" and to "fires and fire department," authorizing the council to purchase and provide "engines and apparatus * * * for a convenient supply of water for the use of the department."—Savidge v. Village of Spring Lake, 112 Mich. 91.

¶ 490. The provision in the charter of the city of Belding, Local Acts 1893, No. 313, chap. 29, § 14, limiting the incurring of liability to be paid during the year unless sanctioned by a vote of the electors, does not forbid a contract for lighting under Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.); if payment for lighting is forbidden during the year it is a matter between the contracting parties.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

§ 116. Construction, operation, performance, and breach.

[Note. The construction, operation and effect of contracts to which a municipality is a party may depend on the general law of contracts (see Contracts, VI) or on the rules specially applicable to all public contracts (see Public Contracts, IV), or on the rules specially applicable to particular kinds of contracts (see Building Contracts; Sales, II; Municipal Bonds; etc.). Only such decisions as seem to turn on the municipal character of a party have been retained in this classification.]

Contracts looking to acquisition of public buildings, works, and facilities, see post §§ 117, 118.

Contracts for right of use or connection with sewers, see post § 119.

Construction of village bond in which obligor is described as "board of trustees," see Municipal Bonds ¶ 59.

Succession of franchised corporation to franchise rights in reincorporated city, see ante § 11.
Invalidity of contract in which public officer is interested, see Public Contracts, IV.
Effect on contract as a whole of invalidity of part of it, see Public Contracts, IV.
Agreement embodied in franchises and permits to use streets for character of service and rates of fare, see Street Railways, I; Public Service.
Mandamus to compel performance of contracts, see Mandamus ¶ 665.

¶ 491. A contract between a city and a railroad company whereby the city, in consideration of the erection of a railroad station on a part of a street, agrees not to open such street, cannot prevent condemnation proceedings for such opening if the public necessity requires it.—City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42.

¶ 492. Where the breach of a contract made by village authorities lies in the repeal of an ordinance the village cannot be held liable; such action is only the exercise of a legislative discretion vested exclusively in the municipal authorities, and upon the continuous and unlimited possession and exercise of which neither they nor any other authority than the legislative power of the state can impose any restraints or limitations.—Gale v. Village of Kalamazoo, 23 Mich. 344.

¶ 493. As to the effect of an agreement to exempt lands from taxation for the "maintenance" of a sewer, where the contract provides for exemption from assessment to construct the sewer, it being separable, quære.—Coit v. City of Grand Rapids, 115 Mich. 493.

¶ 494. The inclusion in a garbage collection and disposal contract of provisions that the commissioner of public works shall designate the stations at which garbage when collected is to be delivered is not objectionable as enlarging the powers of the commissioner beyond those given in the act conferring powers on him, but is to be regarded as making him the agent of the contracting city for that purpose.—Detroit Reduction Co. v. Blades, 143 Mich. 591.

§ 117. Public buildings, markets, and grounds.

Public rights and titles, see ante §§ 100, 104.

¶ 495. No constitutional objection to legislation authorizing a city to take upon itself alone the entire expense of a county building can be based on the probability that such action may affect the subsequent removal of the county seat.—Callam v. City of Saginaw, 50 Mich. 7.

¶ 496. A village corporation will not be bound by a contract made by village authorities which tends to divest the corporation of a portion of its legislative authority, and to create a monopoly in favor of the other contractor. Such a contract is one which transfers the control of a public market to such contractor, confines sales to certain limits, excludes other market-houses from the village for a specified time, and provides that the stalls shall be rented at such rates as shall be fixed by the corporation and the contractor. The last-mentioned provision, though a village ordinance declares that the stalls shall be let by auction, still tends to create a monopoly in the absence of any provision in the contract binding the contractor to assent to the rent offered at auction, or precluding him from arbitrary discriminations among bidders.—Gale v. Village of Kalamazoo, 23 Mich. 344.

¶ 497. A village with the usual charter powers may provide itself with the proper building for a public market, either by renting or buying it, or contracting for its erection, and its contract therefore binds it to the extent to which an individual's contract would bind him in a matter pertaining to his private business.—Gale v. Village of Kalamazoo, 23 Mich. 344.

§ 118. Contracts for providing streets, sewers, bridges, and like conveniences.

Contracts for use of sewers or other public service facilities, see post § 119.
Modes of acquiring streets and highways, see Highways, II.
Power of municipal corporation to contract to exempt land from local assessments, see Taxes, III; and see also Local Improvements § 59.

¶ 498. A city which needed an outlet for its drainage led its sewer to the city limits, where the sewer emptied into a county ditch, which was found to be inadequate. It therefore made a contract with the adjoining proprietor to enlarge and straighten the ditch through his premises, so as to provide for carrying off all the water without overflowing or saturating his land, agreeing to keep the ditch in repair, not to injure or obstruct the cross-ditches, and to maintain a good bridge across it on his premises. Held, that the work undertaken by the city could not be regarded as repugnant or foreign to the purposes of its charter, and that the contract was not beyond the corporate powers.—City of Coldwater v. Tucker, 36 Mich. 474.

¶ 499. A private owner proposed to the common council to open a public street across his land if the city would help bridge a stream which it would cross. Held, that if the charter did not hinder, the council could accept such a proposition, and that the mere fact that the measure would benefit the lands of the owner made no difference.—Long v. City of Battle Creek, 39 Mich. 323.

¶ 500. A claim based on an agreement by a city in consideration of a grant of a right of way to construct a street through a tract of land cannot be defeated on the ground

that the obligation is ultra vires as creating a debt in excess of a legal limit already reached, where the city has obtained a deed to the street and has removed a large amount of earth for use in other streets and made no attempt to put the plaintiff in statu quo.—Spier v. City of Kalamazoo, 138 Mich. 652.

¶ 501. A city in acquiring land to be used for widening a public street has no authority, in the absence of a special charter provision, to agree to move a building located on such land as a part of the compensation to be paid to the owner and to assume the risks to persons and property incident to such work.—Wheeler v. City of Sault Ste. Marie, 164 Mich. 338.

§ 119. Contracts relating to use of sewers, water supply, or other public service.

Contracts for supply to the public, see post § 120.

Liability for cutting off connections, see post § 131.

Decree respecting right of village to use adjoining city sewers, see ante ¶ 462.

¶ 502. The payment of a sum annually by an individual for the privilege of connecting his drain with a public sewer is evidence of a license only, and not of an undertaking and guaranty on the part of the city to furnish ample drainage for his premises.—Dermont v. City of Detroit, 4 Mich. 435.

¶ 503. The board of water commissioners of Detroit do not exceed their powers in contracting to furnish and put in water pipe in private property, in a case which they regard, in good faith, as a proper one for the exercise of their discretion in using means to prevent waste and insure security.—Hale v. Houghton, 8 Mich. 458.

¶ 504. Where the superintendent and engineer of the board contracted in the name of the board to put in water pipe upon private premises, and put the same in accordingly, and the board refused to confirm the contract, held, that such refusal did not take from the owner of the premises the right to the pipe, but amounted to an election on the part of the board to look to the superintendent for payment, and the latter might sue and recover upon the contract in his own name.—Hale v. Houghton, 8 Mich. 458.

§ 120. Contracts for lighting or water.

Power to contract for lighting or water supply service, see ante § 25.

Estoppel by contracting for water to deny power to so contract, see ante ¶ 43.

Mode of contracting, see also ante § 114.

Submission of questions to electors, see ante § 115.

Effect of relationship of councilman to person contracting with municipality, see ante ¶¶ 170, 171.

Agreements for annual payments as creative of debts in excess of debt limit, see post § 123.

Receiving additional bids after opening, see Public Contracts, II.

Sufficiency of specifications in bids and proposals, see also Public Contracts, II.

Implication of power to issue necessary bonds, see Municipal Bonds ¶ 9.

Contracts for providing sewers, streets, and like facilities, see ante § 118.

Contracts for private water service from public water works, see Waters, VI.

Rights in property devoted to public supply and public ownership and operation, see ante §§ 108, 109.

¶ 505. Under How. St. § 4191, and under charter provisions authorizing the city council of Manistee to light the public grounds within the city, and giving the council control over the placing of telegraph and other poles in or over the streets, the city has power to contract for electric lighting with individuals as well as with corporations.—Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551.

¶ 506. The provisions of How. St. §§ 2970-2980 authorizing the construction, maintenance and protection of water-works in villages incorporated under the general act, were designed to govern the council's proceedings in purchasing or establishing such works to be owned by the village, and do not preclude the power to lease or purchase from individuals a water supply for protection from fire.—East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201.

¶ 507. A city of the fourth class, under Pub. Acts 1895, No. 215, chap. 26, § 11, authorizing such contracts for a period of time not less than 10 years, has the power, through its common council, to contract with a water company for a supply of water for public uses and purposes for five years, for a stipulated sum per month, payable on bills to be presented monthly to the common council, provided that the amount so contracted for will not bring the aggregate amount of the general taxes in the city for the purpose of defraying the general expenses, etc. (exclusive of taxes for schools and schoolhouse purposes), to exceed in one year 1¼ per cent of the assessed valuation of such city, contrary to chapter 30, § 5 of said act.—Monroe Water Co. v. Heath, 115 Mich. 277.

¶ 508. A village incorporated under the general act (Pub. Acts 1895, No. 3) has power to contract with one person exclusively for a supply of water for fire and other purposes, and the contract is not rendered void by the fact that the entire territory incorporated in the village is not, under such contract, to be furnished with water.—Lewick v. Glazier, 116 Mich. 493.

¶ 509. The fact that the council might, in the exercise of power given by Pub. Acts,

No. 215, chap. 26, § 11, to make a contract for not more than 10 years for a water supply, tie up the revenues of the city for 10 years for the benefit of the water fund, to the prejudice of other funds, presents a legislative, not a judicial, question, and does not invalidate the contract.—Monroe Water Co. v. Heath, 115 Mich. 277.

¶ 510. Comp. L. 1897, § 2908, providing that village councils may contract from year to year, or for any period not exceeding 10 years, for gas, electric or other lights, does not give a village power to contract for electric lighting during the existence of a contract already entered into for the same purpose.—Village of Morrice v. Sutton, 139 Mich. 643.

¶ 511. Pub. Acts 1891, No. 186 (Comp. L. 1897, § 3437 et seq.), relating to contracts by cities for public lighting, applies to all cities, but requires conformity to charter provisions where they exist and in the absence of charter provision, the council may contract with whomever it chooses.—Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 512. A city council may contract with individuals for light to be furnished through a corporation to be subsequently organized. —Belding Land & Improvement Co. v. City of Belding, 128 Mich. 79.

¶ 512a. A contract by the city of St. Clair, a fourth class city, for the purchase of electric current, also stipulating that "the city shall furnish, install and maintain suitable transformers and purchase pumps," etc., and requiring it to be done "as soon as possible," is more than a contract for the purchase of electric current to be paid for out of current revenues as supplied; since the carrying out of the contract requires the city to furnish necessary apparatus through which the power can be utilized.—Vossen v. City of St. Clair, 148 Mich. 686.

¶ 512b. The power of a city of the fourth class, expressly given by Pub. Acts 1895, No. 215, chap. 26, § 11, to make a contract for water supply from year to year or for any term not exceeding ten years, construed with chapter 30, § 5, limiting to 1¼ per cent of the assessed valuation the aggregate amount which the council may raise by general tax for general expenses (exclusive of school taxes) does not require the making of an appropriation for water and the incorporation of it into the budget before the water contract can be let; but merely requires that when the annual charge for water is carried into the budget to meet the obligation of a contract it together with other general charges shall not exceed the limit of the leviable amount.—Monroe Water Co. v. Heath, 115 Mich. 277.

§ 121. Borrowing money.

Submission of question to electors, see ante § 115.

Power to issue and sell bonds to raise money, see Municipal Bonds, I.

¶ 513. The existence of the power to borrow money cannot be implied unless it is essential to the exercise of the function under which the municipality is acting.—Farr v. City of Grand Rapids, 112 Mich. 99.

¶ 514. Under How. St. § 2953, providing that a village may borrow, "in anticipation of the collection of special assessments actually made for any local improvement, such sum, not exceeding the assessment, as may be necessary for the prosecution or completion of the improvement," a village may borrow money to pay a contractor for street paving work in advance of collecting assessments, even after completion of the work.—City of Gladstone v. Throop, 71 Fed. 341.

§ 122. Incurring debts and limitations on amount of debts.

Agreements for annual future payments as debts within limitation, see post § 123.

Incurring debts after annual appropriations are made, see post ¶¶ 596-598.

Tax limitations, see post § 137.

Debt limit as limitation on power to contract, see also Public Contracts, I.

¶ 515. The limit of the gross debt of the city of Detroit for strictly municipal purposes is fixed by the charter at two per cent of the assessed valuation, and under the Const. 1909, and the Home Rule Act (Act No. 279, Sess. Laws 1909), it can only be changed by a general revision of the city charter made pursuant to the provisions of the Home Rule Act.—Attorney General ex rel. McRae v. Thompson, 168 Mich. 511.

¶ 516. Under Laws 1871, Act No. 277, and Laws 1873, Act No. 214, relating to a public park for the city of Detroit, it was held that all action of the park commissioners appointed to advise the city with regard to the purchase of lands for a park was provisional up to the time when the common council should order an issue of bonds for such purchase, and that no debt was contracted by the city or legal obligation assumed until affirmative action should be taken by that body upon the report of the commissioners. —People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 517. Municipal corporations cannot avoid restrictions upon the amount of indebtedness they may incur by purchasing property for public purposes subject to liens.—Ironwood Water Works Co. v. City of Ironwood, 99 Mich. 454.

¶ 518. A city charter empowering the common council to purchase the pipes, stock, etc., of certain water companies, and to pay

the purchase-price by bonding the city, subject to a provision in the charter that the total indebtedness of the city shall not exceed five per cent of the assessed valuation, does not authorize such purchase subject to a mortgage, which, if treated as a debt of the city, increases the indebtedness beyond the charter limit.—Ironwood Water Works Co. v. City of Ironwood, 99 Mich. 454.

¶ 519. Charter of Alpena, § 27 (Local Acts of 1871, No. 249), prohibiting issue by city of any evidence of indebtedness except as provided in sections 9, 14, 50 and 85, does not, when construed with section 14 (which gives council power to regulate times and manner of working upon city streets, and to provide for grading, etc., of sidewalks), exclude council from making contracts for current year so long as it keeps within amount of fund actually provided in annual budget.—City of Alpena v. Alpena Circuit Judge, 97 Mich. 550.

¶ 520. Detroit charter (compiler's section 188) provides that "the proceeds of each special assessment levied for the grading or paving of any street or alley shall become part of the street-paving fund, and be credited therein to the amount of the specific improvement for which the assessment was made: Provided, that the common council shall not, in any one year, enter into contracts for the grading and paving of streets, alleys, and public places, the cost of which will exceed in the aggregate $200,000, except upon the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved." Held, that said section relates to such paving as might be done upon the petition of abutting owners; that the charter contains no provision for repaving upon petition of abutting owners or others; that, in view of the language used, and of the limitations contained in other sections upon the power of the council to raise money by general taxation for other paving, the limitation in section 188 must be held to be for the benefit of persons liable to special assessment, and to refer to contracts for paving, the cost of which is to be made by such special assessment.—Goodwillie v. City of Detroit, 103 Mich. 283.

¶ 521. The common council of a city which had no general power to raise money for the purpose of entertainments and whose power was limited to raise by taxation a stated sum in each year for that purpose, had no power to enter into contracts to expend any greater sum.—Black v. Common Council of Detroit, 119 Mich. 571.

¶ 522. The school system of the City of Detroit was created by separate enactments under the article of the Constitution relating to education. The act relating to free schools in Detroit (Laws 1869, No. 233), as amended, provides that the said city should be considered one school district under the direction and regulation of the board of education. Votes cast by members of the board are deposited in separate ballot boxes from those used for other city officials. The school inspectors, mayor, controller, and recorder of the city, who are declared to be ex officio school inspectors with a right to a seat at the meetings of the board, but no power to vote, are a body corporate entitled "The Board of Education of the City of Detroit." Said board has full control over the school funds and authority to apply for and receive all moneys appropriated for primary schools and the Detroit Library. An elaborate provision is made for the control and management of the school system with respect to matters peculiarly affecting said system. Said board is to furnish the common council each year an estimate of financial needs, and so much of the estimate as the council and board of estimates approve is to be levied and collected, "in addition to all other taxes authorized by law to be assessed in said city." School taxes are to be put upon the roll of the city in a separate column distinct from other city taxes. Every resolution or proceeding of the board of education whereby any liability or debt may be created is, before it takes effect, to be approved by the mayor of Detroit. The Detroit Charter, c. 11, § 7, provides that the gross debt of the city after deducting the means in the sinking fund of the city and not including the water debt, shall never exceed two per cent of the assessed valuation. The title of the charter of the city of Detroit gives no notice that the educational system is involved. Held, the school bonds and library bonds of the city of Detroit are not included in the two per cent limit of indebtedness specified in said charter.—Attorney General ex rel. McRae v. Thompson, 168 Mich. 511.

§ 123. ——Agreements to pay future sums from future revenues.

As applied to contract for water rentals payable annually, see also ante ¶¶ 507, 509.

¶ 523. Where a city charter prohibits the creation of liabilities in any one year exceeding the amount to be raised by tax, and provides that payments on a city contract shall be made from sums raised by tax for the year for which such contract is made, the execution of a contract creating future responsibility for annual current expenses will be enjoined at the instance of tax payers.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 524. A city charter (Local L. 1877, p 565) provided that the common council should not have power "to contract debts, incur liabilities, or make expenditures in any one year which shall exceed the revenue for the same year, unless first authorized so to do by a majority vote of the tax payers." Without such authority a contract was made to supply the city with water for thirty years, at a certain annual rental which did

not exceed the average annual levy for previous years, but the aggregate of which did exceed one year's revenue. Held, that the whole contract obligation was a liability to the full extent of the thirty years' limit; that the contract was void, and that there could be no recovery for water furnished under it. —Niles Water Works v. City of Niles, 59 Mich. 311.

¶ 525. The common council of a village incorporated under the general statute cannot, under How. St. § 2957, which provides that "no loans shall be made by the council, or by its authority, in any year, exceeding the amounts prescribed" by the act, anticipate the revenues of succeeding years by contracting for the purchase of water works appliances upon terms of credit that make the price payable beyond the current fiscal year.—Trump Mfg. Co. v. Village of Buchanan, 116 Mich. 113.

¶ 526. If a water works contract offends How. St. § 2957, in that it anticipates the revenues of succeeding years by contracting on credit against them, it cannot be presumed, in order to sustain such a contract, that the council intended to raise the amount during the current year, and to set it aside to meet the payment when due.—Trump Mfg. Co. v. Village of Buchanan, 116 Mich. 113.

¶ 527. Where a village council is authorized by statute (How. St. § 2973) to raise and expend in any one year one-half of one per cent of the assessed valuation in making repairs or alterations upon water works previously constructed, provided such sum is included in the one and one-fourth per cent limitation upon the amount which the council can raise by general tax, it seems that it will be presumed, in the absence of evidence, that the general fund if sufficient in amount has not been otherwise appropriated, and that an indebtedness for water works appliances is payable out of the general fund, and is therefore valid.—Trump Mfg. Co. v. Village of Buchanan, 116 Mich. 113.

¶ 528. A city charter limiting the authority of the council in respect to incurring indebtedness has no application to a contract for future services to be paid for as rendered, as that is not an incurring of indebtedness. —Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480.

¶ 529. A charter limitation on tax levies to meet expenses does not inhibit a contract between a city and a water supply company which was not in excess of the powers of the council in relation to expenditures, and did not prohibit the incurring of such a liability as would from time to time accrue from the performance of the contract on the part of the water company, the aggregate of which would exceed the fixed limit on the tax levy existing at the time of making the contract. —Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480.

XII. TORTS AND CRIMES.

[Note. Since the liability of natural persons for torts to municipalities will depend on ordinary principles of tort, the cases, if any exist, will be found in the topics devoted to a treatment of the specific torts, e. g., the liability for injuring highways and bridges is treated in Highways, XI, and in Bridges, IV. The same is true of crimes injurious to municipalities, for which see Crimes, II.]

For the general law of torts, see specific topics treating of the particular torts, e. g., Conversion; Trespass; Nuisances; Negligence.

Presumptions respecting public authorization of act constituting nuisance, see Nuisances, I.

Power of municipality to define offenses and procedure to punish them, see ante IX, E.

§ 124. Tort liability in general.

Acts of governmental character, see post §§ 125, 126.

Responsibility for acts of officers and employees, see post §§ 189, 190.

Liabilities of separate and independent boards, see post § 133.

For acts of independent contractor on public work, see Independent Contractors ¶ 4.

Obstruction of streets incident to conduct of public market, see ante ¶ 452.

Necessity and sufficiency of presentment and notice of claim for damages for tort, see post § 148 et seq.

¶ 530. Cities may be liable for positive mischief produced by the active misconduct of the municipality itself, and this independently of the fact that the city had or had not, a private or proprietary, as distinguished from a mere public interest in the doing of the act or performing the work which occasioned the injury.—Alberts v. City of Muskegon, 146 Mich. 210.

¶ 531. Inasmuch as at common law a city was not liable for injuries resulting from the negligence of municipal agents employed on public works, a city is not liable in damages for injuries caused by fire from sparks emitted by a steam roller employed by the city in the repair of its streets.—Alberts v. City of Muskegon, 146 Mich. 210.

Liability of municipality for injury to children playing in public places other than on streets and sidewalks, see note, 8 N. C. C. A. 624-628.

Liability for injuries to children from attractive nuisances, see note, 4 N. C. C. A. 167-181.

Liability of municipality for illness caused by stagnant or impure water permitted to collect in street, alley or other public way, see note, 14 N. C. C. A. 522-526.

Liability for injury to or death of volunteer attempting to adjust lights used for street lighting, see note, 11 N. C. C. A. 1063-1071.

Liability of municipal corporation for injuries caused by electric wires of company operating under franchise, see note, 6 N. C. C. A. 611-623.
Liability of city for negligent operation of automobile used by public library, see note, 4 N. C. C. A. 40, 45.
Liability of municipal corporations for injuries or damage by mob violence, see note, 7 N. C. C. A. 285-296.
Liability of municipality for maritime tort, see note, 6 N. C. C. A. 795-800.

§ 125. Injuries done in exercise or by neglect of governmental functions.

Rules governing city in proprietary capacity, see ante § 74.
What are proprietary and what governmental acts and functions, see ante § 74.
Liability for defects in adopted plans, see post § 126.
Injuries in and about public buildings, see post § 127.
Injuries by street improvements and changes, see post § 130.
Change of grade damages, see post § 130.
Raising grade of bridge approach pursuant to contract, see also post ¶ 559.
Construction of sewer for production of income, see post ¶ 564.
Proper remedy to prevent improper governmental act, see post § 134.
Nonliability for negligence of health officers in permitting person to carry disease, see Health ¶ 29.
Nonliability for mistreatment of prisoners in Detroit House of Correction, see also Prisons ¶ 6.

¶ 532. Legislative power is governmental and discretionary, and no action as for a tort can be based upon any exercise of it unless such exercise would itself be tortious if the act of a natural person.—Burford v. City of Grand Rapids, 53 Mich. 98.

¶ 533. Municipal corporations, under their charters and ordinances, do not become insurers of the property within their limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances.—Hines v. City of Charlotte, 72 Mich. 278.

¶ 534. A city which has by ordinance established fire limits and prohibited the erection of wooden buildings therein does not, by failing to enforce the same, become liable to a property owner for loss to his building caused by fire originating in a contiguous building erected, with full notice to the city, within those limits in violation of the ordinance.—Hines v. City of Charlotte, 72 Mich. 278.

¶ 535. Damage from a city's failure in duties of a political nature, such as establishing or enforcing due regulations to protect and preserve right of passage in its streets, cannot be recovered.—Henkel v. City of Detroit, 49 Mich. 249.

¶ 536. A city, by designating a particular street for coasting, does not render itself liable for an injury inflicted by coasters upon a person passing in the street.—Burford v. City of Grand Rapids, 53 Mich. 98.

¶ 537. In the absence of a statute imposing liability a city is not liable for wrongful death of a workman caused by contagious disease contracted while working on a building on real estate set aside for an isolation hospital; such duties are clearly imposed on the city as a governmental function by Comp. L. 1897, §§ 4410 to 4467.—Nicholson v. City of Detroit, 129 Mich. 246.

¶ 538. The fact that a city is the absolute owner of a large tract of land used for an isolation hospital does not alter the rule of nonliability unless imposed by statute for injuries caused in the exercise of governmental function.—Nicholson v. City of Detroit, 129 Mich. 246.

¶ 539. The fact that a governmental function of caring for cases of contagious diseases is imposed upon the health officers of the city by statute rather than upon the city itself does not avoid the rule of nonliability for injuries caused through the exercise of a governmental function.—Nicholson v. City of Detroit, 129 Mich. 246.

¶ 540. Comp. L. 1897, §§ 2821 and 2822, delegating to the village council the powers and authority conferred upon boards of health by the general laws and authorizing the council to appoint a local board of health makes it the exercise of a governmental power ascribable to the state rather than a corporate function for the council to raise the level of an adjoining lake upon the recommendation of the local board of health and excuses the municipality from liability for misfeasance or nonfeasance.—Murray v. Village of Grass Lake, 125 Mich. 2.

¶ 541. A municipal corporation in furnishing electric light to its citizens for remuneration is not performing a governmental agency, but is liable for injuries caused by its negligence in failing to keep its electric wires reasonably safe.—Hodgins v. Bay City, 156 Mich. 687.

¶ 542. The providing of a water supply by a city to consumers, as authorized by Pub. Acts 1875, No. 62, ch. 11, § 1, as amended by Pub. Acts 1879, No. 245, is a function of government requiring the exercise of judgment and discretion, and carries with it no liability for negligence in its exercise.—United States v. City of Sault Ste. Marie, 137 Fed. 258.

Liability of city for injuries growing out of ball games and other amusements permitted in public places, see note, 11 N. C. C. A. 662-665.

§ 126. ——Defects in adopted plans.

Plans for drainage, see also post § 131, ¶ 565 et seq.

Trespass or injury directly due to plan, see post ¶¶ 552, 553.

¶ 543. A municipal corporation cannot be held liable in damages for an injury resulting from the defective plan of a public work, such plan being the exercise of legislative authority.—City of Pontiac v. Carter, 32 Mich. 164; City of Detroit v. Beckman, 34 Mich. 125; City of Lansing v. Toolan, 37 Mich. 152; Toolan v. City of Lansing, 38 Mich. 315.

¶ 544. The rule of nonliability for defective plans applies, no matter how dangerous such plan may be, in the absence of evidence that further action in respect to it was contemplated at the time of the injury. —Toolan v. City of Lansing, 38 Mich. 315.

¶ 545. Where a city under the permissive, not mandatory, provisions of its charter erects a market building, it is not exercising a governmental function and is bound to the same degree of care in plans and construction as a private corporation or individual would be, and is liable for negligence to the same extent.—Barron v. City of Detroit, 94 Mich. 601.

Liability at common law for injury to person on sidewalk or street resulting from plan of construction, see note, 11 N. C. C. A. 212-234.

§ 127. Injuries in or about public buildings.

Liability for injuries from condition of school buildings, see Schools, VII.

¶ 546. The government of the Detroit house of correction having been put under the control of a board of inspectors, and the common council having no voice in its internal management or in the election of any officers but the superintendent, whose powers and duties are all fixed by statute, the city cannot be regarded as custodian of the prison, or as jailer and guardian of the prisoners; the officers are not city agents, and the city has no means of directing or of checking their actions, and therefore is not responsible for their misconduct towards the prisoners.—Detroit v. Laughna, 34 Mich. 402.

Liability of municipal corporation for injury sustained in or near city building or court house, see note, 3 N. C. C. A. 37-51.

Liability of municipality for injuries growing out of negligent maintenance of fire station, see note, 10 N. C. C. A. 884-887.

§ 128. Negligence.

Neglect in governmental character or capacity, see ante § 125.

Responsibility for acts of officers and employees, see post § 190.

Necessity and sufficiency of presentment and notice of claims, see post § 148 et seq.

[Note. Negligence in operation of public utilities in a proprietary capacity, where the case involves nothing but the law governing the operation of similar properties by private persons, has been treated in specific topics, such as Electricity; Waters; Master and Servant, III.]

General law of negligence and contributory negligence and general rules of practice in negligence cases, see Negligence.

Law and fact questions in negligence cases in general, see Negligence, V.

Liability for injuries from defective highways, see Highways, XII.

Relative duty of municipality and township or county to construct or keep up roads and bridges within limits, see Highways §§ 107-110.

Charter provisions in respect to liability for injuries upon highways, see Highways § 198.

Liability for injuries in highways due to acts of third persons, see Highways §§ 253-255.

Liability for defects in highway caused by public contractor, see Highways § 254.

Abutting owner's liability over to city for injuries from highways, see Highways § 263.

Injuries sustained on defective bridge, see Bridges § 9; Highways, XII.

Immunity of Bay County Bridge Commission from liability for negligent operation of bridge, see Bridges § 4.

Tort liability of municipal corporation for failure to maintain wires with proper degree of care when furnishing electric light, see Electricity ¶¶ 10, 11.

¶ 546a. The liability of a municipal corporation for negligence has never been held to exist without proof of knowledge of the defect and notice of the defect which cause the injury complained of, or of facts from which notice may be reasonably inferred, has always been held essential to liability.—Campbell v. City of Kalamazoo, 80 Mich. 655.

¶ 547. A city which, under authority from the state, grants to an electric railway company a franchise, and the use of the streets for its trolley poles, is not liable for the flooding of premises abutting the street, occasioned by the company's negligence in obstructing a gutter while engaged in the construction of its road.—Tatman v. City of Benton Harbor, 115 Mich. 695.

¶ 548. Defendant city used one of the cross-arms of a telephone company's line of poles for stretching its electric wires used in supplying light. Plaintiff's deceased, a lineman in the employ of the telephone company, was killed by a city wire defectively insulated at the point of the tie wire. There was some evidence for and much against the defendant's contention that the tie wire had been retied by someone since the original

construction of the wire by the city. Held, an instruction sufficiently protected defendant on this point which stated that if the defect arose after the original construction, the defendant was not liable unless the defect had existed for such a time as to enable defendant to discover it by reasonable diligence in inspection.—Hodgins v. Bay City, 136 Mich. 687.

¶ 549. Where third persons have been given the right to construct a dam, a village which secures for itself and inhabitants the right to use the structure itself as a way, and pays the owners of the dam a consideration for building a highway supported by the dam as a part of the way, is not by such fact rendered liable for an injury caused by the giving way of the dam.—Grand Rapids & I. Ry. Co. v. Village of Morley, 166 Mich. 66.

¶ 550. Although a city should see that the construction of street-railway tracks does not necessarily interfere with or endanger other uses of its streets, it does not insure street-car passengers against defects in the street-car system itself not accessory to highway travel. So held, where a passenger standing upon one of the side boards of a street-car came in contact with one of the trolley poles placed in the gutter outside of the way intended for travel, and was injured; it appearing that the city did not fix or direct the precise location of the tracks or of the trolley poles or determine the width of the cars.—Kennedy v. City of Lansing, 99 Mich. 518.

Liability of city for injury by electric shock while using telephone, see note, 1 N. C. C. A. 684-685.

Liability of municipal corporation for negligent injury or damage caused by condition of waterworks system in street, see note, 2 N. C. C. A. 664-678.

Liability of municipal corporation for injuries on toll bridges, see note, 3 N. C. C. A. 128-136.

Application of doctrine of res ipsa loquitur in actions against city, see note, 5 N. C. C. A. 45, 46.

§ 129. Trespass or direct injury to property.

Responsibility of city for acts of officers, see post § 189.

Trespass based on ratification of officers' act, see post ¶ 837.

¶ 551. A municipal corporation is liable to an action for an invasion of private property unlawfully and forcibly taken for a way under directions of the corporate board of trustees and corporate officers.—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 552. When the plan adopted by a municipality in constructing a public improvement (gutter) must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof (surface water easement) to which the owner is entitled, the municipality is liable.—Morley v. Village of Buchanan, 124 Mich. 128.

¶ 553. Municipal corporations are not generally held liable, under the common law, for injuries to individuals arising from defective plans of construction of public works or failing to keep the same in repair, but where the injury is the result of the direct act or trespass of the municipality, it is liable, no matter whether acting in a public or private capacity.—Ferris v. Board of Education of Detroit, 122 Mich. 315.

§ 130. Injuries due to street improvements and changes.

Liability of city for alteration of street grades in separating grades at railroads, see Highways § 121.

¶ 554. A city is not liable for the injury to adjacent property caused by a change lawfully made by the proper authorities in the grade of a public street.—City of Pontiac v. Carter, 32 Mich. 164.

¶ 555. A municipal corporation is not liable as for misfeasance for the legislative action of the common council in widening a street so as to bring within its limits an existing nuisance.—McCutcheon v. Village of Homer, 43 Mich. 483.

¶ 556. A city is liable for damage done to an individual by its raising the grade of a street so as to set back the water in the gutter in front of his property and cause it to overflow his premises.—Rice v. City of Flint, 67 Mich. 401.

¶ 557. A village acting under the general incorporation act, Comp. L. 1897, chap. 87, is liable in damages for cutting down and removing shade trees from a street without previous notice to the abutting owner.—Stretch v. Village of Cassopolis, 125 Mich. 167.

¶ 558. A municipality owning and maintaining a waterworks system was not liable to a landowner for damages for the freezing of her service pipes connecting with the city mains, caused by the lowering of the grade of the street; since in changing the grades of its streets a municipality exercises a legislative power, and since such municipality can enter into no contract which would bargain away such power.—Miller v. City of Kalamazoo, 140 Mich. 494.

¶ 559. Where a city has caused a bridge to be erected at a grade above the street level so that approaches were necessary, and the city was not and in fact did not suppose it was proceeding in the exercise of any charter power in its erection; but the bridge was erected and the necessity therefor created because of an ordinance in form of a contract between the city and private parties,

the city is liable to an owner of adjoining property for any injuries resulting to his property arising from the construction.—Ransom v. City of Sault Ste. Marie, 143 Mich. 661.

§ 131. Injuries from sewers and drains.

Necessity of presentment or notice of claim, see post ¶ 639.
General law of nuisances, see Nuisances.
Tort liability for diversion or pollution of waters to injury of riparian owners, see Waters, V.

¶ 560. A city is not liable for damages arising from the insufficiency or defective construction of a public sewer, where such damages result directly to the party injured from his use of it for his private convenience.—Dermont v. City of Detroit, 4 Mich. 435.

¶ 561. A city which creates a nuisance, e. g., by digging ditches whereby the surplus water of the city is thrown back upon plaintiff's land, is prima facie liable for its continuance.—Pennoyer v. City of Saginaw, 8 Mich. 534.

¶ 562. A city is liable for an injury done to plaintiff's house by such a cutting of a sewer by the city authorities as to cause large quantities of water, which would otherwise not have flowed there, to collect and be thrown upon his premises.—Ashley v. City of Port Huron, 35 Mich. 296.

¶ 563. A city is liable for the damages resulting if it so negligently and improperly constructs a public sewer outlet above grade that the water therein is set back and discharged upon plaintiff's premises through a sewer connection which he properly made and maintained.—Defer v. City of Detroit, 67 Mich. 346.

¶ 564. A city, in the construction of a public sewer, from which, under its charter, it may derive an income, is engaged in the prosecution of a private municipal enterprise, and not in the exercise of a governmental function, and is liable for its negligence in the manner of doing the work.—Ostrander v. City of Lansing, 111 Mich. 693.

¶ 565. A city is bound to use due caution in establishing a system of drainage; and if, through its negligence in not providing reasonably efficient means to carry off the water that it should reasonably expect to accumulate by reason of its gutters, water is collected and cast upon premises which otherwise would not have been invaded, the city is liable for the resulting damages.—Seaman v. City of Marshall, 116 Mich. 327.

¶ 566. A declaration, in an action against a city, which alleges the ownership by the city of gutters and sewers, its duty to keep them open and clear, and not to permit them to become dammed, or the flow of the water through them to be impeded in any way, and charges that the city negligently permitted and allowed to remain in the gutters and sewers of a certain street divers impediments, by reason of which, and of the improper construction of said gutters and sewers, the water became dammed up until it overflowed the gutter, and ran down upon and injured plaintiff's property,—is sufficient to sustain a verdict for negligence in not removing obstructions, or in constructing a sewer inadequate for the exigencies of ordinary floods.—Seaman v. City of Marshall, 116 Mich. 327.

¶ 567. A city is not liable for injuries caused by the overflow of a natural water course due to a dam caused by the débris washed into the stream through drainage and storm sewers which empty into it.—A. L. Lakey Co. v. City of Kalamazoo, 138 Mich. 644.

¶ 568. A city is not liable for damages caused by the overflow of a creek into which its drainage and storm sewers empty, due to the obstruction of the bed of the creek by one who owned both banks and the bed of the stream and built a warehouse over the creek, where the building itself did not interfere with the flow of the stream and the city had no rights or duties in the stream except for drainage purposes.—A. L. Lakey Co. v. City of Kalamazoo, 138 Mich. 644.

Liability for injury or damage to property caused by defective sewer, see note, 6 N. C. C. A. 124-144.

§ 132. Conversion by municipality.

Use of paving materials left in street as conversion by city, see also Conversion ¶ 62.

¶ 569. A city is liable for appropriating material not incorporated in a pavement for which it has contracted.—City of Detroit v. Michigan Paving Co., 36 Mich. 336.

¶ 570. It is a conversion for the city to use paving materials torn up by a street railway in repairing the street according to its obligation to repair, which materials the railway company might have rightfully used in relaying the pavement.—City of Detroit v. Detroit Ry., 134 Mich. 11.

§ 133. Liability of boards or departments of municipality.

¶ 571. A paving contractor, who after paving a street under contract with a city, was required to make repairs on account of depressions, was not entitled to recover the cost of such repairs from the Board of Water Commissioners, on the ground that the depressions were caused by the neglect of such board to properly fill and settle a trench in which it had laid a water pipe prior to the time of the laying of such pavement by the contractor; such act of the board having been

done in performance of a duty owing to the public and not having been a wrong perpetrated upon any contractor who might subsequently make a contract to pave the street.—Grant v. Board of Water Com'rs of Detroit, 122 Mich. 694.

§ 134. Remedies for torts.

¶ 572. A city council, in passing and enforcing an ordinance which interferes with the rights of the proprietor in a private sewer constructed by authority of the council in the public streets, is in the exercise of its governmental functions, and hence the city is not liable to such person in an action at law for the damages sustained by reason of such action, the proper remedy being a proceeding to restrain an unlawful interference with vested rights.—Stevens v. City of Muskegon, 111 Mich. 72.

¶ 573. The erection of a building to be used for the installation and operation of an electric lighting plant by a village upon a public street is an improper use of the street, and will be enjoined at the instance of an adjoining landowner, and where since the bill had been filed the building had been completed the village may be required to remove it.—McIlhinny v. Village of Trenton, 148 Mich. 380.

§ 135. Crimes and penalties.

[Note. Crimes against municipalities, as well as other crimes, are treated in Crimes. The general law of penalties and penal actions is treated in Penalties. The power of the municipality to legislate on matters of police and public welfare is treated ante IX, and the construction of penal ordinances ante VI.]

Prosecutions for violating municipal ordinances, see post XVI, B.

XIII. TAXES AND REVENUES, MANAGEMENT OF SAME, AND APPROPRIATIONS.

§ 136. In general; power and duty to raise money or lay taxes.

Amount to be levied and limitations on levies, see post § 137.

Requisites and sufficiency of the levy, see post § 139.

Allotment and separation of levies, see post § 140.

Estimates, budgets, and appropriations, see post § 141.

Funds and objects of funds and keeping and custody, see post § 142.

Purposes and proper objects of expenditure, see post § 144.

Following and recovering funds and remedies for diversion, see post §§ 145, 146.

Power to borrow money, see ante § 121.

Debt making limitations, see ante §§ 122, 123.

Power of council in general to act without approval of electors, see ante § 81.

Ratification of invalid vote by later action, see ante § 67.

Effect of annexation to bring annexed property subject to taxation, see ante § 9.

Power to impose licenses for regulation or for revenue, see ante IX, C.

Reasonableness of licensing regulations as affected by purpose of regulation or revenue, see ante § 58.

Charter power to impose license as excluding power to tax, see also ante ¶ 373.

General taxing powers and limitations, levying taxes and assessments, collection thereof, and accountings for tax moneys, see Taxes; Local Improvements.

Collection of and accounting for taxes with county and state, see Taxes, X.

Sale of lands for taxes, see Taxes, XI, XII.

Mandamus to compel levy of taxes and making of assessments, see Mandamus § 87.

Selling bonds of city, see Municipal Bonds § 8 et seq.

¶ 574. The several municipal corporations have no inherent power of taxation, but take only so much as the state sees fit to allow, and under such restrictions as the legislature may impose.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452.

¶ 575. Under the charter of the City of Detroit, c. 7, § 59, and c. 10, § 2, it appears that the common council has no power to tax property unless by the laws of the state it is taxable for state purposes.—Union Trust Co. v. Common Council of Detroit, 170 Mich. 692.

¶ 576. A city council is limited by the grant of power given by the charter as to the purposes for which it may lawfully apportion taxes to be raised and expend the money of the municipality received from taxes or other sources.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

¶ 577. Contracting an indebtedness of $30,000 for the purchase of a city hall site is not an ordinary municipal expense.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

¶ 577a. Tax imposed on a municipality solely must not only be for a public purpose, but must be for a purpose of local interest.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452.

¶ 577b. A municipal body authorized to raise money by tax cannot raise it for the purposes or uses of others, but must apply it to public uses under its own control or care.—Attorney General v. Bay County Sup'rs, 34 Mich. 47.

§ 137. Amount to be levied; limitations.

Limitations on creation of debts in excess of amount levied, see ante §§ 122, 123.

Power of amendment and change of debt limit in freeholders' charters, see ante ¶ 62.

Limitations on purposes of expenditures, see post § 144.
Adding judgments against city to next tax levy, see post § 138.
Limitations on amount of bonds to be issued, see Municipal Bonds § 2.

¶ 578. In general, the discretion of the common council in determining what taxes ought to be levied for city purposes should not be interfered with except for the most imperative reasons.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

¶ 579. The levy of a municipal tax exceeding the aggregate amount limited by the charter for a single year is illegal, and cannot be sustained.—Wattles v. City of Lapeer, 40 Mich. 624.

¶ 580. Inasmuch as the charter of Detroit empowered the common council to make an annual assessment of one per cent on all taxable city property for certain purposes, a higher assessment was void as to the excess.—Connors v. Detroit, 41 Mich. 128.

¶ 581. The city council is only an agency to represent the people of the municipality, and the legislature has seen fit to give them what is deemed ample power to raise money year by year for the need of each year, and no more. When they desire to make larger outlays, or to burden the future revenues of the city, it is left to the parties who are more directly interested to determine how far this shall be done.—Niles Water Works v. City of Niles, 59 Mich. 311.

¶ 582. The word "raised," as used in a city charter which provides that the amount that may be voted or raised in any one year under provisions for the levy and collection of taxes and the borrowing of moneys shall not exceed a certain percentage of the assessed valuation, means "raised by taxation."—Schneewind v. City of Niles, 103 Mich. 301.

¶ 583. Charter of the city of Niles, § 30 (Local Acts of 1893, No. 414) limits the amount of taxes which the council is authorized to levy and collect in any one year to defray the expenses of the city to one and one-half per cent of the valuation of the real and personal property within the limits of the city, and, after authorizing the voting by the freeholders of the city of an additional sum by way of tax or loan, provides that the amount that may be voted or raised in any year under the provisions of the section shall not exceed two per cent of the assessed valuation of the property in the city, as shown by the last preceding tax roll made therein. Held, that the aggregate of the loan authorized by the freeholders and the amount ordered to be assessed by the council in any one year cannot exceed said two per cent.—Schneewind v. City of Niles, 108 Mich. 301.

¶ 584. Sections 2852-2857, Comp. L. 1897, provide for the taxation of villages for different purposes, prescribing a limit of taxation in each case. Section 2873 provides that should any greater sum be needed than can be raised by the foregoing provisions, it may be raised by tax or loan if authorized by a two-thirds vote, and prescribes a limit of two per cent of the assessed valuation for the amount to be raised in any one year. Held, that the limit in section 2873 applies only to the purposes expressed in that section.—Wightman v. Village of Tecumseh, 157 Mich. 326.

§ 138. Addition of judgments to levy.

¶ 585. Under How. St. § 8218, the assessment of a judgment rendered against a city need not be authorized by the city council or the board of supervisors; it is the duty of the city supervisors to apportion the amount among the wards within a reasonable time after receiving the transcript thereof, and to assess it as a part of the city tax upon the next tax-roll.—Shippy v. Mason, 90 Mich. 45.

¶ 586. How. St. § 8218, providing for the payment of judgments against municipalities by the assessment of such judgments upon the taxable property, is not repealed, so far as the city of North Muskegon is concerned, by the charter amendment of 1897 (Local Acts 1897, No. 354, chap. 11, § 9), which provides that the council may issue bonds to pay judgments that the city is unable to pay by reason of the limitation of its power of taxation.—Hammond v. Place, 116 Mich. 628.

¶ 587. Under How. St. § 8218, which provides for the assessment upon a municipality's taxable property of judgments against the municipality, and for the adding of the amount thereof to other municipal taxes, it is no defense that such assessment will increase taxation above the rate allowed by the charter.—Hammond v. Place, 116 Mich. 628.

§ 139. Requisites and sufficiency of the levy.

Allotting and separating levies for different funds and purposes, see post § 140.
Making levies in general, see Taxes, VII.

¶ 588. Where a city charter requires the council to determine "the amount necessary" to be raised by tax for a certain purpose, it does not mean that the council must determine that "it is necessary" to raise a certain amount for such purpose.—Fay v. Wood, 65 Mich. 390.

¶ 589. Where a city charter (Charter of Muskegon, 1871, § 66) prescribed that the common council should, on or before the first day of June in each year, determine the amount necessary to be raised for highway purposes, the council does not lose jurisdiction to act by not acting within the pre-

scribed time, where the law contemplates no hearing with reference to the amount to be raised.—Fay v. Wood, 65 Mich. 390.

§ 140. Allotment and separation of levies.
Separation of funds, see post § 142.

¶ 590. Where a city charter (Local Acts 1875, No. 298, § 57) requires the common council to determine by resolution the amount necessary to be raised by tax for city purposes during the year, and also that necessary to be raised for the payment of the public debt of the city, and the interest thereon, a failure to make such determination for each purpose, the resolution having fixed a gross sum for both, avoids the tax levy.—Fay v. Wood, 65 Mich. 390.

¶ 591. Where a resolution was adopted that a certain sum be raised for the purpose of defraying the contingent expenses of the city one year, and was silent as to interest on its public debt, the whole sum named was for the contingent fund, and the council's failure or neglect to raise any money for the interest fund would not invalidate the tax, though the charter required both to be determined.—Fay v. Wood, 65 Mich. 390.

¶ 592. The city charter of Muskegon (Local Acts of 1875, No. 298, § 57) requires that the common council apportion the amount to be raised by taxation among the several wards according to valuations on the equalized assessment rolls. Held, that as the data for the apportionment were absolutely fixed by the equalization of the rolls, so that the act of apportionment was simply a mathematical calculation, the requirement was directory merely, and that if the correct amount was assessed by each supervisor though not specified in the resolution no one would be injuriously affected, and the tax would not be invalidated.—Fay v. Wood, 65 Mich. 390.

¶ 593. A designation by the common council of the amount of tax to be raised in a village under How. St. §§ 2923-2925, by a fixed percentage, without specifying the exact amount to be raised for each fund, is sufficient.—Boyce v. Peterson, 84 Mich. 490.

§ 141. Estimates, budgets, and appropriations.
Inclusion of water charges, see also post ¶ 600.
Obligation of council to appropriate money for expense of charter commission, see ante § 19, ¶ 70.
Ordinance, resolution or motion as mode of making appropriation, see ante § 30, ¶ 119.
Vote required by councils in passage of appropriation revenue, or tax bills, see ante § 38.
Construction of resolution approving estimates but referring same to board of estimates, see also ante ¶ 203.
Effect of action of board of estimates on amounts of official salaries, see post § 197.
Making appropriation for salaries as ordinance fixing salary, see post § 197.
Limit on appropriation as preventing recovery by officer for overtime pay, see post ¶ 902.
Preliminary estimate of cost as basis for public contract, see Public Contracts, II.
Appropriations to meet cost of local improvements, see Local Improvements, II.

¶ 594. Under Laws 1873, Act No. 331, which requires the board of education to lay before the common council an annual estimate of expenditures for the year, which amount shall not be less than four dollars per child, and if the estimate exceeds five dollars the council may approve or disapprove of such excess, or any part thereof, the council could reject illegal items even though the estimate was within the five-dollar limit.—Board of Education of Detroit v. Common Council of Detroit, 80 Mich. 548.

¶ 595. The action of a city council in drawing a warrant on a fund to make payment of a certain indebtedness is not an appropriation of money for such indebtedness within the meaning of the requirements of the city charter.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

¶ 596. Provisions of a city charter stating that after the passage of the annual appropriation bill no further sums shall be appropriated nor further liability be incurred, do not apply to the purchase of voting machines where their purchase is specially authorized by statute (Act No. 76, Pub. Acts 1895, and Act No. 217 of the Pub. Acts of 1905), the contracts for the purchase of the same having been made in conformity with the provisions of such statutes.—Darling v. City of Manistee, 166 Mich. 35.

¶ 597. Where a city under the authority of Act No. 76, Pub. Acts 1895, and Act No. 217, Pub. Acts 1905, contracts for the purchase of voting machines, provisions for payment, including appropriations therefor, if there is no fund available, are to be made after, and not before the purchase.—Darling v. City of Manistee, 166 Mich. 35.

¶ 598. Where a city charter contains provisions forbidding the appropriation of money after the date for the annual appropriation, these provisions are repealed in cases where they conflict with Act No. 279, Pub. Acts 1909, § 19, which commands the common council to appropriate money to meet the expenses of a charter commission.—Attorney General v. Mayor & Common Council, City of Adrian, 164 Mich. 143.

§ 142. Funds and custody and objects thereof.
Necessity of prior appropriation, see ante § 141.

Use of city funds or property for providing county or state buildings, see ante § 103.
Disposal of fines for violations of ordinances, see post § 231.
Allotment of levies to corresponding funds, see ante § 140.
Market receipts as fund pledged for payment of market bonds, see also ante ¶¶ 453, 454.
Presumption as to existence of necessary fund to support employment of officers, see ante ¶ 313.
Presumption as to fund charged for water appropriation, see also ante ¶ 527.
Setting off claim against funds, see post § 143.
Liability of resolution transferring funds to be vetoed by mayor, see ante ¶ 183.
Effect of annexation or division on rights in funds and properties, see ante § 9.
Investigations of official receipts, see post § 195.
Deposit and protection of public money, see Banking §§ 24, 25.
Right to interest on public deposits consisting in part of money to be accounted for to city, see Counties § 40.
Transfer of funds to successor in office, see Officers, VI, A.
Provision of sinking funds to meet bonds, see Municipal Bonds § 21.
Creation of sinking fund against bonds for erection of public utility, see Municipal Bonds § 21.
Sufficiency of description on face of bond as "refunding bond" to identify proper fund, see Municipal Bonds ¶ 60.
Checks or other security held as collateral to public contract, see Public Contracts, VII.
Indorsee of deposit check from municipal treasurer as taker with notice of want of authority, see Negotiable Instruments, XIII, A.
Collection, accounting and paying over money realized from taxes, see Taxes, X.

¶ 599. Taxes and bonds for schools and educational purposes are not for city or municipal purposes.—Attorney General ex rel. McRae v. Thompson, 168 Mich. 511.

¶ 600. Where the common council of a city of the fourth class has exercised its right to contract for a supply of water for a period not exceeding 10 years, at a stipulated sum per month, payable monthly, the required amount must be raised annually for the purposes of that fund, and be included in the annual budget.—Monroe Water Co. v. Heath, 115 Mich. 277.

¶ 601. Under a contract purporting to bind a village as a corporation for a water supply for protection from fire, and in that form approved by the common council, payment should, under How. St. § 2923, be made out of the "general fund" constituted by the moneys raised by general tax.—East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201.

¶ 602. Under Comp. L. 1897, § 3310, and under a charter which requires that all moneys loaned or appropriated for the purposes of any particular fund shall be paid in and credited to such fund and shall be applied to the purposes for which such moneys were received, money raised by the sale of bonds authorized to install new boiler and pumps in the city's waterworks cannot be expended by the city's council, with the affirmative vote of the mayor, to enable the city to purchase electrical power to operate its waterworks system.—Vossen v. City of St. Clair, 148 Mich. 686.

¶ 603. A city charter conferred authority to assess and levy taxes for general street improvements, for ordinary municipal expenses, and for paying debts. It provided also that no money should be drawn from the treasury without a previous appropriation specifying the purpose. By ordinance the council created various funds and denominated one of them the "General Fund," and apportioned taxes thereto. This was made up of money received from taxes and from fines, penalties, and forfeitures. Held, no payment of money from this fund could be lawfully made to discharge a contract for the purchase of land for a city hall site.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

¶ 604. Where a city contracted to buy lands for a park with a view to inducing a third person to construct a hotel, and floated park bonds for the purpose of carrying out such contract, transfer to the general fund of the proceeds of the bonds, without complying with the provisions of the purchase, is a wrongful diversion of the funds, and in contemplation of law leaves them in the park fund subject to use for the fulfillment of the contract.—McArthur v. City of Cheboygan, 156 Mich. 152.

¶ 605. The action of a city council in drawing a warrant on a fund to make a certain payment does not raise the presumption that there is sufficient money in the fund lawfully subject to be used for such payment.—Niles Bryant School of Piano Tuning v. Bailey, 161 Mich. 193.

¶ 606. As section 222 of the Detroit Charter empowering the expenditure for entertainments of a sum not exceeding $2,000, to be raised by taxation, was the only grant of power to expend anything for that purpose, the discretionary power given by section 207, to credit moneys not received for the purpose of any particular fund to such fund as the common council might direct, had no application.—Black v. Common Council of Detroit, 119 Mich. 571.

¶ 607. It is to be presumed that the city charter, in providing that fine moneys shall be paid into the city treasury, designs that the subsequent disposition of them shall be in accordance with the constitutional pro-

vision, which requires payment into the county for a library fund.—People ex rel. Wayne County Treasurer v. Detroit City Controller, 18 Mich. 445.

§ 143. Set-off of claims on different funds.

¶ 608. Whatever obstacles there may be in the way of setting off a claim, payable out of a special fund, against one due the general fund, where there are no funds in the special fund to meet it, the claim may be set off where there is money to meet it, and where nothing is needed but a single transfer on the corporation's books.—City of Eaton Rapids v. Houpt, 63 Mich. 371.

§ 144. Limitations on and purposes of expenditures.

Restriction of funds to proper objects, see ante § 142.

Right to follow and recover funds paid to improper persons or objects, see post § 145.

Purposes for which contracts may be made which involve expense, see also ante § 112 et seq.

¶ 609. When the charter prescribes the limit of fiscal action it must be assumed to permit all reasonable and proper expenditures within those limits.—Torrent v. Muskegon Common Council, 47 Mich. 115.

¶ 610. A city contracted to pay over to a private corporation certain insurance money which the city had received for the loss of one of its buildings by fire. Said corporation agreed to give the city an interest in the new building to be erected proportionate to said sum of money, which interest was to be relinquished by the city if the corporation spent a specified sum of money each year for labor. Held, the agreement was void as being an attempt to use public moneys in furtherance of a private enterprise.—McManus v. City of Petoskey, 164 Mich. 390.

¶ 611. A resolution of the Common Council of the City of Detroit, appropriating and placing at the disposal of the mayor a certain sum to investigate the street-railway question of the city, and directing the city controller to pay any bills presented and audited by the mayor out of such appropriation, is unauthorized by the city charter and void.—Attorney General ex rel. Maguire v. Wayne Circuit Judge, 157 Mich. 615. (Brooke, Hooker and Moore, JJ., dissenting.)

¶ 612. The maintenance of the Detroit Museum of Art, a private corporation, at the expense of the City of Detroit, although the title to its property is vested in the city, is a violation of § 12, art. X of the Constitution, prohibiting the support of private enterprises at public expense.—Detroit Museum of Art v. Engel, 187 Mich. 432. (Brooke, C. J., and Moore, J., dissenting.)

¶ 613. Ordinance 230-A of the Detroit City Council, purporting to fix the compensation of the officers, clerks, and employees of the Detroit Museum of Art, is void, since such institution is a private corporation, and the payment of such salaries would constitute the use of public funds for a private purpose, in violation of the Constitution of 1908, art. X, § 12.—Burton v. City of Detroit, 190 Mich. 195.

§ 145. Right to follow and recover public funds.

Remedies for misuse or diversion, see post § 146.

Right to recover payment made by mistake, see Payment, VI.

¶ 613a. On repaying funds borrowed from the county treasurer the borrower is no longer liable to the county, since the treasurer is the proper custodian and no one is obliged to do more than put them in his hands.—Perley v. County of Muskegon, 32 Mich. 132.

¶ 613b. If one who received public money from the treasurer with a dishonest understanding could in any way be made liable to the county, it would be by bill in equity or action on the case and not in assumpsit for money had and received; and is it questionable how far the county would be damnified if the treasurer's sureties were responsible. —Perley v. County of Muskegon, 32 Mich. 132.

¶ 614. A village has no power to give a bonus for the construction of an electric light plant and a flour mill to be constructed by private parties, and money paid for such purpose may be recovered in an action for money had and received.—Village of Morrice v. Sutton, 139 Mich. 643.

¶ 615. Although the moneys deposited by the treasurer of a city board of fire and water commissioners in a bank, constituted a trust fund, only such amount as could be traced was subjected to the claim of the board, to the exclusion of the general creditors.—Board of Fire & Water Com'rs of Marquette v. Wilkinson, 119 Mich. 655.

¶ 615a. Where a city board sought to impress a trust upon moneys deposited by its treasurer in his bank, and it could be said justly that a certain amount of the cash received for the board found its way to the general cash fund of the bank within a certain period, and where the court found an amount exceeding that sum was in the bank when the assignees took it, the court presumed in the absence of proof to the contrary that it was the trust fund that remained.—Board of Fire & Water Com'rs of Marquette v. Wilkinson, 119 Mich. 655.

¶ 616. Equity has jurisdiction to determine the rights of parties in a proceeding by

a city against assignees for the benefit of creditors of a banker with whom the city had agreed to deposit funds in return for a percentage, and against certain other banks with whom such banker had entered into an agreement regarding such fund, the death of the party to the city's agreement having terminated it; and the court had also jurisdiction to direct the completion of the trust which arose as to such other banks, in favor of the city.—City of Marquette v. Wilkinson, 119 Mich. 413.

§ 146. Remedies for misuse or diversion of funds.

See also ante ¶ 616, post ¶ 914.

Right to follow and recover funds from taker, see ante § 145.

Actions by and against municipality, see post XVI, A.

Noninterference by courts with municipal discretion, see ante § 34.

Propriety of injunctions and proper person to sue, see Injunctions, II, III.

Injunctive or other relief against issuance of illegal or defective bonds, see Municipal Bonds § 19.

Liability to bona fide holder of bond where proceeds were diverted from legal or intended purpose, see Municipal Bonds § 15.

Implied contract in favor of city to repay illegally disbursed funds, see Public Contracts, V.

¶ 617. Where, under the provision of a city charter, a contractor is only payable out of a particular fund, the city will be liable to him if that sum is transferred to another fund or is misappropriated by the common council.—Chaffee v. Granger, 6 Mich. 51; City of Lansing v. Van Gorder, 24 Mich. 456.

¶ 618. The attorney general cannot maintain information in chancery to make city officers repay moneys unlawfully taken from city treasury.—Attorney General v. City of Detroit, 107 Mich. 92.

¶ 619. An information filed by the attorney general at the instance of a taxpayer of a city set out the acts of the common council and board of estimates in providing for a tax levy and for bond issues, and asked that they be determined to be valid, or if any illegality be found to direct the correction thereof. It further asked that the mayor and corporation counsel be enjoined from proclaiming the illegality of either the levy or the bond issues. The information did not point out that the mayor or corporation counsel had any official duty to perform in connection with said levy or bond issues, nor was any municipal officer or body charged with any breach of official duty. Held, the court had no jurisdiction to entertain such an information.—Attorney General ex rel. McRae v. Thompson, 167 Mich. 507.

¶ 620. A taxpayer has a right to ask chancery to restrain a threatened misuse of a city fund, in two classes of cases, viz. (1) where his interest in the fund or threatened damage to his property interest by its misuse amounts to one hundred dollars; and, (2) where he has land worth one hundred dollars which is threatened with sale, or liable to a lien, for a tax, in consequence of the proposed misuse.—McManus v. City of Petoskey, 164 Mich. 390.

¶ 621. A taxpayer has a right to ask chancery to restrain a threatened misuse of a city fund already in hand, where the inevitable result of such misuse will be that an equal amount must be raised by a tax which would otherwise have been avoided.—McManus v. City of Petoskey, 164 Mich. 390.

¶ 622. A taxpayer is not estopped from enjoining a proposed illegal expenditure of public moneys by the fact that he made no attempt to restrain a previous expenditure for the same purpose.—Savidge v. Village of Spring Lake, 112 Mich. 91.

¶ 623. Actual notice or knowledge of an intended expenditure by a city for entertainment purposes was necessary to take away the right of a citizen and taxpayer to object thereto on the score of laches, and action within 4 days after knowledge of the proceedings to expend the fund in question was not laches.—Black v. Common Council of Detroit, 119 Mich. 571.

¶ 624. Complainants, residents and taxpayers of defendant village, brought a bill to compel the defendant village to cancel certain contracts had by it with defendant corporation relative to pumping water and supplying light. Held, upon omission of complainants to prove, as required by section 435, Comp. L. 1897, that they were financially affected by the alleged grievance to the extent of more than one hundred dollars, the bill should be dismissed.—Kimmerle v. Village of Cassopolis, 160 Mich. 90.

XIV. CLAIMS AND DEMANDS, PRESENTMENT, AUDIT, AND WARRANTS.

§ 147. In general; proper claims and charges against municipality.

Expenses of prosecutions for violations of ordinances, see post ¶ 935.

Expenses of pursuing and arresting or keeping prisoners as county or city charge, see also Counties §§ 32, 35.

Liability for health department expenses as between city or village and other department of government, see Health § 11 et seq.

Disability of council to revive barred tort claim by calling claimant and witnesses, see Limitations ¶ 330.

Assignment of claim for military bounty, see Bounties § 3.

Presentment of claim and notice of claim, see post §§ 148-154.
Verification of claim, see post § 155.
Waiver of notice or defects in claim, see post § 156.
Evidence respecting presentment and notice, see post § 157.
Audit and hearing, see post § 158.
Compromises and settlements of claims, see post § 159.
Orders and warrants for payment, see post § 160.
Remedies to enforce claims, see post § 161.

¶ 625. A personal claim of a city attorney for services rendered in mandamus to compel the council to pay a certain claim for which the members of the council were personally liable, made at the request of such members of the council is not a valid claim against the city.—Smith v. Hubbell, 142 Mich. 637.

¶ 626. The provision of a city charter requiring presentation of claims for injuries caused by negligence, within 3 months, was one of limitation and not merely the requiring of a notice as a condition precedent to bringing suit, and the city officers had no authority by consenting to consider a claim absolutely barred, to revive it.—Van Auken v. City of Adrian, 135 Mich. 534.

§ 148. Necessity of presentment of claim or notice of injury.

[Note. In some statutes notice was requisite only in the case of claims for injuries from defective highways. The cases under such statutes are treated in Highways § 266 et seq. Such claims are now covered by the provisions of Comp. L. 1915, § 4591, expressly declaring a purpose to make the law "uniform throughout the state" and to repeal all local and special laws on the subject.]
Notice as prerequisite to action, see post § 149.
Time for presentment or notice, see post §§ 150, 151.
Delivery or service of notice, see post § 152.
Requisites and sufficiency of claim or notice, see post §§ 153-155.
Pleading failure to present claim, see post § 213.
Applicability to department of education of provision for presentment and notice of claim, see Schools, IV.
Statutory notices of claim for injuries suffered from defective highways, see Highways § 266 et seq.
Effect of limitation statute to repeal statute providing for making claim for injuries from defective streets, see also Limitations ¶ 79.
Amendment of pleading to set up proper claim and notice, see Pleading, VI.

¶ 627. A statute requiring notice to the city of a claim for personal injuries is in derogation of common right and should receive a reasonably strict construction.—Oesterreich v. City of Detroit, 137 Mich. 415.

¶ 628. A charter provision that all claims for damages against the city growing out of the negligence or default of the city, or of any officer or employee thereof, shall be presented to the common council within six months after the claim shall arise, applies to claims for personal injuries, notwithstanding a further provision that no claim shall be allowed unless it exhibits in detail all the items making up the amount claimed, and the true date of each.—Davidson v. City of Muskegon, 111 Mich. 454.

¶ 629. Infants, in the absence of any saving clause exempting them, are bound by a statutory provision limiting the time within which a claim for damages for personal injuries against a city must be presented to the common council.—Davidson v. Muskegon, 111 Mich. 454.

¶ 630. Under the charter of the City of Marshall, chap. 17, § 5, forbidding suits against the city on any account or claim until the same shall have been presented to the council, the presentation of the claim by the claimant was a sufficient compliance with such provision, and the assignee of the claim was not also required to present it.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 631. Pub. Acts 1895, No. 3, reincorporating villages and among other things providing for notices of claims for personal injuries, for failure to give such notice as a defense to any action for injuries, for the presentation of such claim to the council for allowance, but saving all rights and liabilities of the former corporation and all pending actions, and providing that any new remedies should be deemed cumulative, is to be construed as prospective in operation of causes of action for injuries.—Atherton v. Village of Bancroft, 114 Mich. 241.

¶ 632. As an action against a village for injuries received from a defective sidewalk prior to the taking effect of Pub. Acts 1895, No. 3, which reincorporated thereunder all previously incorporated villages, may, under the saving provisions of chapter 14, section 8, be presented under the former law, the injured person's failure to present his claim to the council for allowance, as required by chapter 5, section 7, and to give notice to the village clerk, within 60 days after the injury occurred, of his intention to hold the village liable for the damages sustained (chapter 7, section 7), will not, in such case, defeat a recovery, where no such provisions were contained in the law under which the defendant village was previously incorporated.—Atherton v. Village of Bancroft, 114 Mich. 241.

¶ 633. A village is not liable for a personal injury caused by a defective sidewalk where the claim required by Pub. Acts 1895,

No. 8, chap. 5, § 7, was not presented to the common council, althought notice of the time and place of the injury was served on the village clerk or his deputy as required by chapter 7, § 7.—Selden v. Village of St. Johns, 114 Mich. 698.

¶ 634. Local Acts 1895, No. 463 (Detroit City Charter, § 46) limiting the time for actions to be begun against the city for negligent injuries, providing that no action shall be brought "unless notice shall be given in writing within three months" from the time of injury, and further providing further that "this section shall not bar a suit * * * for which there is now a lawful cause of action" if suit for such be brought within six months after the act becomes effective, has no application to a claim then pending before the council but not yet a subsisting cause of action because under the former provision of the charter (Detroit Charter, chap. 5, § 17) a reasonable time after presentment and opportunity to pass on it had not elapsed.—Springer v. City of Detroit, 118 Mich. 69.

Provision of statute or municipal charter as to notice of injury as requiring notice from injured servant of municipal corporation, see note, 2 N. C. C. A. 44-45.

Incapacity of injured person as excuse for noncompliance with requirement of statute or charter as to notice of injury as condition to recovery from municipal corporation, see note, 3 N. C. C. A. 390-405.

Physical incapacity of injured person as excusing notice or claim to city for damages, see note, 10 N. C. C. A. 450-466.

Infancy of person injured as excusing failure to give notice of injury to municipal corporations, see note, 9 N. C. C. A. 279-285.

Notice of claim for injury caused by defect in or obstruction on sidewalk or crosswalk, see note, 5 N. C. C. A. 240, 241.

Notice to municipal corporation of accident or injury sustained from fall of billboard, see note, 5 N. C. C. A. 965-967.

§ 149. ——Notice and presentment as prerequisite to action.

Sufficiency of claim or notice to satisfy the statutes, see post §§ 153, 154.

Necessity of presentment anew by assignee of claim, see ante ¶ 630.

Waiver of notice or claim or of objections for defects therein, see post § 156.

Time to sue and limitations of actions by and against municipality, see post § 206.

¶ 635. Recovery cannot be had on a claim against the city of Detroit unless it has been first presented to the common council for audit and allowance as required by the city charter.—City of Detroit v. Michigan Paving Co., 38 Mich. 358.

¶ 636. The charter of Lansing provides that no claim can be prosecuted against the city that has not previously been presented to the common council with an affidavit in support of it. (Local L. 1875, p. 168.) Held, that this applies to a claim against the city to have a tax refunded that has been paid under protest.—Mead v. City of Lansing, 56 Mich. 601.

¶ 637. Presentation to the council of a city incorporated under How. St., ch. 80, of a verified claim of money paid under protest for taxes assessed against the claimant is under How. St. § 2528, a condition precedent to suit for recovery of money so paid.—Crittenden v. City of Mt. Clemens, 86 Mich. 220.

¶ 638. A claim need not be presented to the common council before suing the city of Adrian for negligent personal injury.—Lay v. City of Adrian, 75 Mich. 438.

¶ 639. A city charter provision making the failure to present in verified form, for allowance, accounts, claims or contracts against the city, a defense to any action against such city upon such account, claim or contract, had no application to an action ex delicto for the flooding of premises with filth from the clogging of a sewer.—Pollard v. City of Cadillac, 133 Mich. 503.

Validity of statute or section of municipal charter requiring notice of injury as condition to recovery from municipal corporation, see note, 3 N. C. C. A. 437-443.

Validity of requirement as to statement of residence in notice of injury as condition to municipal liability, see note, 2 N. C. C. A. 38-43.

Statutory liability of municipality for defective streets and the question of notice as a condition precedent to the right of recovery for personal injuries, see note, 5 N. C. C. A. 969-983.

§ 150. Time for presentment or notice.

Reasonableness of time for consideration of presented claim, see post § 151.

Affidavit filed after claim, see also post ¶ 666.

Evidence, jury questions, and instructions as to time of presentment or service, see post § 157.

¶ 640. Where a charter provision that "all claims for damages against the city * * * shall be presented to the common council within six months after such claim shall arise," does not exempt infants from its operation, one who was injured because of a defective sidewalk during infancy cannot claim that the six months did not begin to run until she came of age.—Davidson v. City of Muskegon, 111 Mich. 454.

¶ 641. Since by Pub. Acts 1895, No. 215, chap. 8, § 20, a claim against a city of the fourth class for a personal injury must be made within sixty days from the time of the injury, and must be "accompanied" by

certification or verification, an affidavit served after the sixty days as a verification of a claim previously filed is of no effect.—Griswold v. City of Ludington, 116 Mich. 401.

¶ 642. Under the charter of the village of Highland Park, chap. VIII, § 6, relating to the serving of a notice of personal injuries, within 60 days after an accident on the village and § 5, providing that it shall be a defense in an action for personal injuries that a verified claim has not been presented to the council for allowance, one suffering injuries may serve an unverified notice of injuries on the village at any time within 60 days after the injury and may present a separate verified claim after the expiration of the 60-day period.—Barkley v. Village of Highland Park, 199 Mich. 549.

§ 151. Reasonableness of time to pass on claim before suing.

See also post ¶ 904.

Waiver of reasonable or statutory time for consideration, see post § 156.

Construction of findings as to reasonableness of time to act on claims, see Verdicts and Findings, IV.

¶ 643. One who under protest has paid taxes assessed upon his lands cannot maintain an action for the payment of such taxes against a city whose charter provides that it shall be a sufficient defense to any action or proceeding against the city for the collection of any claim that such action or proceeding was begun before the common council had time to pass upon or investigate the claim, where he commenced his action before the next meeting of the council after one at which the claim was presented to it.—Mason v. City of Muskegon, 111 Mich. 687.

¶ 644. Under Detroit City Charter, chap. 5, § 17, requiring claims against the city to be verified and providing action should not be brought on a claim until it should be presented to the city council and a reasonable time for investigation and decision by the council, there is no lawful cause of action until the presentation of such verified claim and a reasonable time for such investigation and decision.—Springer v. City of Detroit, 118 Mich. 69.

¶ 645. "Reasonable time to investigate and pass upon" a claim for injuries presented to the common council of Detroit within Detroit Charter, chap. 5, § 17, providing that no suit should be brought until such time had elapsed, is not exceeded by holding the claim under investigation from November, 1894, to May, 1896, in good faith and for the convenience of the city; though in a smaller town upon a claim susceptible of quicker action a less time might be reasonable than in a large city where the facts were harder to ascertain.—Springer v. City of Detroit, 118 Mich. 69.

¶ 646. Where a suit against a city has not been commenced until about three months after a claim had been presented to and laid upon the table by the common council, a reasonable time has elapsed, and suit will lie.—Dundas v. City of Lansing, 75 Mich. 499.

§ 152. Delivery or service of notice or claim.

Evidence, jury questions, and instructions as to service, see post § 157.

Sufficiency of evidence of delivery of notice and receipt of same by corporation counsel, see also Notices.

Sufficiency of commencement of suit by defective notice, see also post § 206.

¶ 647. A requirement that notice of a claim against a city for personal injuries must be served upon the city attorney, is waived where the common council refers the claim to a committee for investigation on the merits and the committee proceeds to so investigate.—Lindley v. City of Detroit, 131 Mich. 8.

¶ 648. The service of notice of personal injury upon the head of the law department of Detroit as required by Local Acts 1895, No. 463, § 46, is not waived by the presence of the assistant corporation counsel at the hearing before the committee on claims without making objection to the proceedings.—Wilton v. City of Detroit, 138 Mich. 67.

§ 153. Requisites and sufficiency of notice or claim.

Necessity for notice or presentment, time for same, and service of notice, see ante §§ 148-152.

Sufficiency of description of injury and damages, see post § 154.

Waiver of defects, see post § 156.

Provisions in statutes or charters as to notice of claim for highway injuries, see Highways §§ 266, 267.

¶ 649. Statutes requiring notice of claims are given a liberal construction, and when by any reasonable construction the notice can be said to be in substantial compliance with the statute, or when the defect was waived by the Council, relief will not be denied.—Pearll v. City of Bay City, 174 Mich. 643.

¶ 650. A charter provision (Local Acts 1885, No. 296, chap. 15, § 2), that no suit shall be maintained against a city on any account or claim until the same shall have been presented to the common council does not apply to actions ex delicto for negligence in care of a bridge.—Snyder v. City of Albion, 113 Mich. 275.

¶ 651. Comp. L. 1897, § 2754, as amended, providing that every account against a village shall exhibit in detail all the items making up the amount claimed and the true date of each, applies only to an account made up of items, and had no application to a claim

for damages resulting from personal injuries. —Hunter v. Village of Ithaca, 135 Mich. 281.

¶ 652. Where a city charter (Local Acts 1903, No. 514, § 204) provided for notice of claims of personal injuries, and was subsequently amended by Local Acts 1907, No. 636, § 204, containing a similar provision with somewhat different requirements, a person sustaining an injury prior to such amendment properly filed a notice complying with the act as it then stood, although the amendatory act was passed ten days subsequent to the injury.—Boughner v. Bay City, 156 Mich. 193.

¶ 653. The statute requiring notice of a claim against the city for personal injury to be filed with the city within a period limited, is to be construed liberally in favor of the claimant, a substantial compliance with the statute as to the contents of the notice being sufficient.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 654. Under Comp. Laws 1897, § 3081, providing for notice to a municipality before suit is brought for personal injuries, the words "loose plank upon the sidewalk," used in a notice to a city in regard to a sidewalk injury, may be construed as meaning a plank forming a part of a sidewalk which had become loosened.—Brown v. City of Owosso, 126 Mich. 91.

¶ 655. Under Local Acts 1903, No. 514, § 204, relating to notice of claims against a city for personal injuries, it is not necessary for the notice to state the nature of the claim, and in detail the amount of each item making the amount claimed, nor is it necessary to state the particular manner in which the injury occurred, nor its nature and extent, nor the names and addresses of witnesses.—Boughner v. Bay City, 156 Mich. 193.

¶ 656. The intent of the statute requiring the names of claimant's witnesses to be stated in the affidavit is not to exclude all witnesses not so named, but only that claimant shall state frankly all material things known when the affidavit is made; accordingly witnesses subsequently discovered may be called in discretion of the court, where there was no bad faith and where proper precautions against surprise are taken.—Pearll v. City of Bay City, 174 Mich. 643.

¶ 657. A notice to a municipality of personal injuries, resulting from a fall on a defective sidewalk, held to sufficiently state the name of the street where the accident occurred and the extent of the injuries suffered, "so far as then known."—Pearll v. City of Bay City, 174 Mich. 643.

Mistake of date of injury as affecting sufficiency of statutory notice to city of claim for damages, see note, 9 N. C. C. A. 599-603.

§ 154. ——Description of injury and damages.

See also ante ¶ 628.

Waiver of defects, see post § 156.

¶ 658. A notice of claim for personal injuries, under Comp. L. 1897, § 3081, sufficiently specific as to containing a reasonably definite statement of the time, place, manner, and extent of the accident and the damages, is sufficient to set the council in motion and relieve the plaintiff from the charge of noncompliance with the law in regard to notice. —Brown v. City of Owosso, 126 Mich. 91.

¶ 659. A statutory notice of claim against a city for personal injury is insufficient which states the injury as a broken and dislocated right shoulder blade, whereas the proof showed a broken and dislocated left collar bone.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 660. Under Comp. L. 1897, § 3173, requiring notice to be filed of the extent of the personal injury for which damages are claimed of a city, the statute is not satisfied by a notice stating the amount of damage, without setting forth the nature of the injury.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 661. Where the statutory notice to a city of injuries caused by a fall on a defective sidewalk provides that attachments formed after a certain surgical operation were torn loose, that severe and permanent internal injuries were sustained, the extent of which were unknown at the time and that further developments might show other and different injuries, such notice is sufficient to permit the admission of evidence which tends to prove that the internal injuries caused certain adhesions in the locality of the former operation.—Hayes v. City of St. Clair, 173 Mich. 631.

Sufficiency of statutory notice to municipal corporation of time, place, cause and extent of injury on sidewalk or highway, see note, 2 N. C. C. A. 1-37.

Sufficiency of notice to municipality of nature and extent of personal injury, see note, 8 N. C. C. A. 409-414.

§ 155. Necessity and sufficiency of verification of claim.

Necessity of affidavit supporting presentment, see also ante ¶¶ 636, 639.

Time for service of affidavit, see ante § 150.

Waiver of verification, see post § 156.

Validity of verification of claim before notary who is also concerned as attorney, see Notaries Public.

¶ 662. A charter provision to the effect that no action shall be sustainable upon any claim against the city unless an itemized statement thereof, duly verified, shall have first been presented to the council for allowance, has no application to a claim for per-

sonal injuries resulting from a defective highway.—Mackie v. City of West Bay City, 106 Mich. 242.

¶ 663. West Bay City's revised charter (Local Acts 1897, No. 442, ch. 8, § 20), provides that no account, claim, or contract against the city shall be received for audit or allowance unless accompanied by affidavit that the services charged therein have been actually performed, and it is made a sufficient defense to an action against the city for any demand or claim for personal injuries, "that it had never been presented to the council for allowance, or, if such claim is founded on contract, that the same was presented without the affidavit aforesaid." Held, that an affidavit to a claim for personal injuries is not required.—Angell v. City of West Bay City, 117 Mich. 685.

¶ 664. Pub. Acts 1895, No. 215, ch. 8, § 20 (charter of a city of the fourth class), so far as it provides that "no account or claim or contract shall be received for audit or allowance unless" certified to or verified, does not cover an unliquidated claim for personal injuries in an action ex delicto; but the remaining part of the section makes it "a sufficient defense * * * to any action * * * for the collection of any demand or claim against the city (for personal injury or otherwise)" that it has not been certified to or verified.—Griswold v. City of Ludington, 116 Mich. 401.

¶ 665. Under the charter of the city of Detroit (chap. 5, § 17), which provides that "the common council shall audit and allow all accounts chargeable against the city, but no unliquidated account or claim or contract shall be received for audit or allowance unless it be verified by the affidavit of the person rendering it," and that "it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against the city that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit and rejected for that reason," the presentation for audit and allowance of a claim for damages for injuries received by falling upon a defective sidewalk is a condition precedent to bringing suit to recover the same.—Springer v. City of Detroit, 102 Mich. 300.

¶ 666. Section 2754, Comp. L. 1897, provides that no claim against a village for personal injuries shall be valid unless a sworn statement thereof is presented to the council. Section 2775 requires notice of the time, place, manner, and extent of the injuries to be served on the village clerk within sixty days. Plaintiff filed with the village clerk, within the proper time, an unsworn notice which complied with the other provisions of section 2775, and later, within the sixty days, filed a verified statement of the items of damages sustained by her. Held, that there was a substantial compliance with the statutes.—Hawley v. Village of Saranac, 157 Mich. 70.

§ 156. Waiver of notice or claim or of defects therein.

Waiver of service on law officer of city, see also ante § 152.
Disability of law officer to waive service on law department, see post ¶ 809.
Waiver of bar of limitations, see post § 206.
Disability to revive barred claim, see ante ¶ 626.
Evidence, jury questions, and instructions as to waiver, see post § 157.
Waiver of notices or claims for highway injuries, see also Highways § 268.

¶ 667. The requirement of Pub. Acts 1895, No. 3, chap. 5, § 7, that claims against a village for damages for injuries shall be verified, held, to be for the benefit of the village which the village may waive. Public policy does not forbid such a waiver.—Wright v. Village of Portland, 118 Mich. 23.

¶ 668. Defects in the statutory notice of personal injuries required to be given to a municipality may be waived by the common council.—Foster v. Village of Bellaire, 127 Mich. 13.

¶ 669. The benefit of Comp. L. 1897, § 3173, requiring notice of a claim against the city for personal injury to be filed with the city, may be waived.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 670. In order to waive the notice of claim against it required by Comp. L. 1897, § 3173, for personal injury, the city must intentionally give up its right to the notice, either by word or act.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 671. A substantial defect in a notice to a city, required by Comp. L. 1897, § 3173, of a claim for personal injury, is not waived where the city does not know of the defect, and has simply appointed a committee to investigate the claim.—Ridgeway v. City of Escanaba, 154 Mich. 68.

¶ 672. Prompt exception to a statutory notice of claim containing merely technical defects should be taken by a city which proposes to rely thereon as a reason for failure to pass on the claim.—Brown v. City of Owosso, 126 Mich. 91.

¶ 672a. An objection that plaintiff in an action against a city for injuries due to a defective sidewalk failed to comply with a provision of the charter requiring all claims to be presented to the common council for allowance is not available as a defense when raised for the first time by motion for a new trial.—Canfield v. City of Jackson, 112 Mich. 120.

¶ 673. Section 2 of the Detroit Charter, Local Acts 1895, prohibiting the bringing of actions for personal injuries against the city unless written notice be given within three months from the time of the injury to the head of the law department or his chief assistant, as to time, place, etc., of the injury, was not waived by the fact that the common council directed plaintiff to appear and produce his witnesses; as there was no evidence that at the time plaintiff was so notified to appear, the common council knew that plaintiff had failed to give such notice.—Holtham v. City of Detroit, 136 Mich. 17.

¶ 674. The receipt by the common council, of a notice relating to a claim for damages against the city for personal injuries, based upon a repealed statute, and reference of such notice to a committee, was not a waiver of the invalidity of the notice.—Chamberlain v. City of Saginaw, 135 Mich. 61.

¶ 675. The provision of a city charter requiring the presentation of claims for injuries caused by negligence, within 3 months, was not waived by the promise of members of the council, as a matter of grace, to investigate a claim and make a recommendation if they thought claimant ought to have something.—Van Auken v. City of Adrian, 135 Mich. 534.

¶ 676. The provision of a city charter requiring the presentation of claims for injuries caused by negligence, within 3 months, were not waived by the action of the council in referring a claim filed after the expiration of the limited period, to the committee on claims and finance; and by the action of that committee in receiving affidavits and making investigation and reporting adversely after a delay of over two months.—Van Auken v. City of Adrian, 135 Mich. 534.

¶ 677. A city charter provided that it should be a sufficient defense to any action or proceeding for the collection of any demand or claim against the city of any description whatever that it had never been presented to the common council for allowance, or that it had been presented without the required affidavit, and rejected for that reason. A personal injury claim was presented to the council, verified before one of the attorneys who afterwards brought suit for the collection of the claim, but was not rejected because thus verified. Held, that it is unnecessary to decide whether the affidavit was within the prohibition of How. St. § 637, which prohibits attorneys from administering oaths in causes in which they may be professionally engaged, as, by not rejecting the claim for that reason, the alleged defect was waived.—Germaine v. City of Muskegon, 105 Mich. 213.

¶ 678. By accepting the report of a committee appointed to investigate plaintiff's claim against the village for personal injuries, and offering to compromise at the figure named by such committee, without requiring a verification of plaintiff's claim, as provided for in section 2754, Comp. L. 1897, the common council of the village waives such verification.—Morlan v. Village of Marcellus, 150 Mich. 400.

¶ 679. The requirements of a city charter providing that a notice of claim for negligence must be served in writing upon the head of the law department or upon his chief assistant, are not waived by the fact that the person claiming to have been injured by the negligence of the city is given a hearing before a committee of the common council.—Boyle v. City of Detroit, 152 Mich. 248.

¶ 680. A statement that an injured party believes herself entitled to $5,000, in a notice of personal injury to a municipality as required in Comp. L. 1897, § 3081, is sufficient to infer a claim for $5,000 damages where the council received and considered the notice without objection to its form.—Brown v. City of Owosso, 126 Mich. 91.

¶ 681. A notice of a claim against a city for breach of contract to lay out and construct a street is not too indefinite where the relations of the parties are set out at length concluding with a statement of the nature of the damage but failing to state the amount of the damage, where the claim was received and acted upon without objection by the city.—Spier v. City of Kalamazoo, 138 Mich. 652.

¶ 682. A claim which was treated as sufficient in form by a common council although not verified or accompanied by a certificate of a village officer, as required by Comp. L. 1897, § 2754, and which was unanimously allowed, could not be refused recognition by the president on the ground of such informality.—Kriseler v. Le Valley, 122 Mich. 576.

¶ 683. Where claims are presented to a city without being verified as required by Comp. L. 1897, § 2754, and the city charter, and the city hears evidence on the claim without objection and declines payment, the failure to verify the claim is waived.—Moore v. City of Detroit, 164 Mich. 543.

¶ 684. A claimant for personal injuries who disregards an agreement to arbitrate with a village and brings suit cannot claim that such village waived a provision of its charter (Pub. Acts 1895, No. 3, chap. 5, § 7), requiring the filing of a verified statement, because of the arbitration agreement.—Clark v. Village of Davison, 118 Mich. 420.

§ 157. Evidence, jury questions, and instructions respecting notice and claim.

Evidence to show notice of claim for injuries from highways, see Highways §§ 297, 302.

¶ 685. A provision in a municipal charter that no action shall be brought against the city for any negligent injury unless written notice shall be given within three months from the date of the injury, to the city attorney or his assistant, places the burden of proving such notice upon plaintiff, and proof of delivery to one employed as a messenger in the city attorney's office is insufficient.—McAuliff v. City of Detroit, 150 Mich. 346.

¶ 686. Evidence that a notice of a claim for personal injuries was delivered to a person employed as a messenger in the office of the corporation counsel, and was delivered by him to a captain of the police department, who was assigned to the office of the corporation counsel as a member of its investigating department, is sufficient to require the submission to the jury of the question of whether notice seasonably reached the corporation counsel or his chief assistant, as required by statute.—McAuliff v. City of Detroit, 150 Mich. 346.

¶ 687. Where plaintiff testified that he delivered a notice of injury sustained by reason of the negligence of a city, to the chief clerk in the corporation counsel's office, such evidence is sufficient to render the question of whether the notice reached the corporation counsel one for the jury, although the chief clerk testified that he did not deliver the notice to the corporation counsel, where there was other evidence tending to discredit and contradict him.—Abbott v. City of Detroit, 150 Mich. 245.

¶ 688. Under Pub. Acts 1895, No. 215, chap. 8, § 20, requiring claims to be verified, where an unverified claim for personal injuries has been presented against a city, the common council, by appointing a committee, holding the claim under advisement until after the time for filing a new and verified claim, and by notifying plaintiff that no damages will be paid, evidences an intent to waive the nonverification that is sufficient to go to the jury.—Griswold v. City of Ludington, 116 Mich. 401.

¶ 689. Whether a village had waived verification of a claim against it for damages for injuries sustained by plaintiff, in an action to recover such damages, is a question for the jury on offered evidence, it being within the power of a village to waive it.—Wright v. Village of Portland, 118 Mich. 23.

¶ 690. The question as to whether verification of claims against a city was waived by the council by accepting the claims without objection, and acting upon them on their merits, is one of fact.—Ludington Water Supply Co. v. City of Ludington, 119 Mich. 490.

¶ 691. As a matter of law a city waives further notice of an injury to plaintiff on an alleged defective sidewalk, where within the statutory 60 days allowed for the presentation of a claim plaintiff's claim is filed with the proper officer, presented to the council, spread on the records and referred to a committee which investigates as ordered by the mayor and reports to the council, and such claim is referred to the city attorney by the mayor with the council's permission and where it does not appear that any suggestion is made to plaintiff that the notice is deficient or that any further statement of claim is required.—Warner v. City of Wyandotte, 175 Mich. 695.

¶ 692. In an action on a contract against a city, the question of whether or not a claim was presented to the city within the time specified by the charter is not raised by a request pointing out defects in the notice and a subsequent request to charge that the claim is barred by the statute of limitations as the latter request refers to the action, in which the defendant had pleaded the statute of limitations as a defense.—Spier v. City of Kalamazoo, 138 Mich. 652.

§ 158. Audit, hearing, and decision on claims.

Time for presentment and allowance of reasonable time to consider claim before suing, see ante §§ 150, 151.

Necessity and sufficiency of verified statement, see ante § 155.

Duties and functions of controller, see post § 184.

Hearing or investigation of claim as waiver of defects or want of notice, see ante § 156.

Presentation of claim for salary or compensation as waiver of extra time, see post § 203.

Estoppel by issuance of warrant, see post § 160.

Manner of auditing health claims, see also Health § 16.

Right to hearing on claim of city against county for expenses of health administration, see Counties § 46.

Conclusiveness of audit and allowance of claim for services or expenses to health department, see Health § 17.

Power of common council to revise audit of health board claim settled by health board, see also Health ¶ 66.

Mandamus to compel auditing of claims, see Mandamus § 92.

Decision of council on claim as starting time for limitation of action for sidewalk injury, see Limitations ¶ 261.

Disqualification of witnesses on trial who were not called before city authorities on hearing claim for damages, see Witnesses, II.

Auditing of county, township, school district, and state claims, see Counties, VI; Townships, VI; Schools, IV; State of Michigan, IV.

¶ 693. One who applies for and receives a warrant upon the treasurer of a municipality for the amount allowed him for services, and thereunder accepts payment, is estopped from making further claim for the same services or disputing the settlement so made.—Perry v. Village of Cheboygan, 55 Mich. 250.

¶ 694. A claimant against a city who is present when council audits his claim and by resolution directs an order to be drawn in payment thereof at a specified sum and the recorder directed to draw an order for the amount in full of the account, and who accepts and cashes such order, must be held to have acquiesced in the action of the council in the settlement of his account, is estopped from suing the city on such claim.—Davey v. City of Big Rapids, 85 Mich. 56.

§ 159. Compromises and settlements.

General law of compromises and settlements and releases, see Accord and Satisfaction; Releases.
Compromises of tax claims, see Taxes, VIII.
Settlements of accounts with officers, see post § 195, and see Officers, VI, A.
Estoppel to collect interest on assessments after settlement remitting interest, see Taxes, VIII.

¶ 695. A municipal corporation has power to adjust claims against a taxpayer for special assessments for paving and by the remitting of interest.—Corby v. City of Detroit, 191 Mich. 308.

¶ 696. A court of equity should not, on the application of a taxpayer, interfere with the settlement of a claim against the city by the common council, where the council appear to have acted in good faith, and there could be no serious doubt of the legality of the larger portion of the demand, and the question as to the remainder was at most one of doubtful construction of the contract under which the claim accrued.—Chaffee v. Granger, 6 Mich. 51.

§ 160. Orders and warrants for payment.

Warrant as an "appropriation" of money, see ante ¶ 595.
Set-off of claim against fund, see ante § 143.
Presumption as to sufficiency of fund, see ante ¶ 605.
Non-negotiable character of warrants or orders, see Non-negotiable Paper.
Rights of transferors and transferees of municipal warrants, see Non-negotiable Paper.
Allowance of interest on municipal orders, see Interest ¶ 33.
Payment of claim of paving contractor as preventing recovery upon contractor's agreement to indemnify city, see Indemnity § 9.

¶ 697. Borrowing money in anticipation of special assessments (Comp. L. 1897, § 2872) does not include issuance of a time warrant to a contractor before his money is due as a means of advancing it to him.—Field v. Village of Highland Park, 141 Mich. 69.

¶ 698. The power of a village to borrow money in anticipation of a special assessment under Comp. L. 1897, § 2872, does not sanction issuance of a warrant exceeding the unused balance of the assessment to be collected.—Field v. Village of Highland Park, 141 Mich. 69.

¶ 699. No estoppel arises against a village by reason of having issued a warrant to a transferee in renewal of a balance remaining due on the original warrant given to a paving contractor, where the contract was not properly performed, but the village had taken a bond for future proper performance and had agreed to postponement of it, and where the first warrant was an attempt to advance money to the contractor without legal warrant, and no new consideration passed from the transferee for the renewal.—Field v. Village of Highland Park, 141 Mich. 69.

¶ 700. Where a city issues a paving warrant as an advance payment and relies upon the contractor's promise to complete the pavement in compliance with his contract, the city is not estopped to defend mandamus proceedings to compel payment of the warrant on the ground that the contractor failed to complete his contract as agreed.—Barber Asphalt Paving Co. v. Village of Highland Park, 156 Mich. 178.

¶ 701. Where a city receives and uses voting machines for two years without objecting thereto and issues a certificate of indebtedness for the purchase price, in an action on the certificate, the city cannot avoid payment thereof on the ground that the machines are defective and are not as warranted.—Cogswell v. City of Escanaba, 176 Mich. 156.

§ 161. Remedies to enforce claims.

Remedy of claimant where proper fund is diverted from his use, see ante ¶ 617.
Remedy in federal courts, see also post ¶ 912.
Assumpsit or mandamus as remedy to enforce right to refund of surplus assessment for local improvement, see post ¶ 911.
Mandamus to enforce claims against municipality, see Mandamus §§ 91-98.
Actions by and against municipality, see post XVI, A.

¶ 702. Assumpsit will not lie against a city upon city orders if the charter provides that no money shall be drawn from the city treasury unless it shall have been previously appropriated to the purpose for which it shall be drawn, and if it also requires all orders to specify the purposes of the payment.—Peterson v. City of Manistee, 36 Mich. 8.

XV. OFFICERS, EMPLOYEES, AND DEPARTMENTS.

§ 162. In general; existence and creation of office.

Commission to frame freeholders' charter, see ante § 19.

Submission of proposed amendments to freeholders' relative to city officers, see ante § 20.

General law of officers and elections, see Officers; Elections.

Statutory and constitutional creation and existence of offices in general, see Officers, I.

State or local character of office, see Officers, I.

Power of legislature to create or abolish offices, see Constitutional Law §§ 261, 262.

School officers and employees and their relation to the municipality, see Schools, III.

Proper officers to officiate in tax matters, see Taxes.

Municipal court judges and officers, see Municipal Courts, I.

¶ 703. It is not necessary that an ordinance be passed for the creation of a board of assessors to lay special assessments according to How. St. 2427, where section 2643 has expressly provided for such a board.—Boehme v. City of Monroe, 106 Mich. 401.

¶ 704. The action of a village common council in appointing a person as night watchman and deputy marshal, whose duties were to begin at 6:30 p. m. and continue to 5:30 the following morning, was not construed as an attempt to create the office of a night watchman, but rather as intended to designate such person as a deputy marshal under a village ordinance creating the office of deputy marshal.—Kriseler v. LeValley, 122 Mich. 576.

§ 163. Aldermen, councilmen, and supervisors.

Effect on power to conserve public health of failure to create board of health, see ante ¶ 334.

Power of council over offices and officers, see post § 164.

Councils as judges of qualifications and elections, see post § 167.

Power to fill vacancies, see post § 175.

Vacancy by loss of residence, see post § 176.

Disqualification to hold other office, see post § 165.

Right of member to take employment as attorney for city, see post ¶ 893.

Council as board of health, see ante ¶ 334.

Power of presiding officer to adjourn councils, see ante § 35.

Contractual powers of councils, see ante § 112 et seq.

Functions of council in levying taxes, see also ante ¶ 581.

City and village representation on board of supervisors, see Counties § 50.

¶ 705. Aldermen are elected by the electors of the wards, and therefore represent the people of the ward in the legislative body of the city.—Chateau v. Jacob, 88 Mich. 170.

¶ 706. A city charter provided for the annual election of one alderman from each ward for a term of two years. For the purpose of reducing the number of aldermen, and at the same time preserving the term of office and the practice of electing but one-half of the aldermen each year, it was provided by amendment that at the next election one alderman should be elected from each even-numbered ward for a term of two years; that in each odd-numbered ward the alderman whose term was unexpired should hold until the end of his term; and that, at the expiration of the term of office of each alderman, his successor should be elected for a term of two years. Held, that the amendment was not invalid as unjustly discriminating against the even-numbered wards, in that aldermen elected therefrom for a term of two years were removed from office after one year's service.—Attorney General v. Cogshall, 107 Mich. 181.

¶ 707. The proviso to Pub. Acts 1895, No. 215, chap. 31, § 1 (general act for the incorporation of cities of the fourth class), that any incorporated city which shall become reincorporated under the act, having an assessor, "may" retain its present method of assessing property and levying taxes, and that the assessor in office when the act takes effect "shall" remain in office until the expiration of his term, is permissive merely, and cities not availing themselves of the permission are entitled, under chapter 5, section 2, to elect supervisors in the several wards of the city, who, under the provisions of chapter 7, section 26, are to represent their respective wards upon the board of supervisors.—Ostrander v. Gratiot County Sup'rs, 111 Mich. 64.

¶ 708. The council acts as the legislative body of the city, not less when levying special assessment than when imposing the ordinary taxes, and cannot be regarded as an agent of the benefited property owners on the one side and the contractor on the other.—City of Lansing v. Van Gorder, 24 Mich. 456.

§ 164. Power of municipality or councils over offices and officers.

Power and procedure to remove officers, see post § 170 et seq.

Power over salaries, see post § 196 et seq.

Relative powers of boards to appoint or employ subordinates, see post § 180.

Adding to duties of controller, see post ¶ 814.

Investigations by council, see post § 195.

Power to veto ordinance which creates office and also appoints incumbent, see ante ¶ 182.

Ordinance or resolution employing officers or fixing salary as one "appropriating" money, see also ante § 38.

Power of legislature to establish police or fire system, see Constitutional Law § 78.

¶ 709. The term of office of city marshal under the amended charter of Detroit (Sess. L. 1861, pp. 181, 182) was two years; and the common council had no authority to limit it to one year in making the appointment.—Stadler v. City of Detroit, 13 Mich. 346.

¶ 710. Where a city charter, besides specifying certain conditions to be contained in the bond of the city treasurer, declared that such bond might be further conditioned as the common council should prescribe, it was held that, under the pretext of further conditions, the council could not add any provision which would destroy or conflict with any of the charter conditions, and could not substitute a conditional liability where the charter required it to be absolute; that the bond must secure everything mentioned in the charter, and more, if the council required, but no less.—City of Detroit v. Weber, 26 Mich. 284.

§ 165. Eligibility and qualifications.

Determination of qualifications, see post § 166.
Eligibles for civil service appointments, see post § 168.
Eligibility to office and incompatibility of offices disqualifying incumbent to be appointed to other office, see Officers, I, II.
Sufficiency of official bonds, see Officers, VII.
Approval of the bond, see also Officers, VII.

¶ 711. Section 53 of the charter of the City of Lansing, providing that no "member of a city council shall, during the period for which he was elected, be elected or appointed to, or be competent to hold any office or position or receive any employment directly or indirectly connected with the city government," was enacted for the purpose of preventing the holding of two offices by one man at the same time, and the holding by one man of a second office during the period of the term of his first office, and consequently aldermen may succeed themselves or be elected to other city offices.—People ex rel. Brown v. Parsons, 200 Mich. 39.

¶ 712. Where a city incorporated under the Pub. Acts 1909, No. 279, and amendments thereto, How., 2nd Ed., § 5442 et seq., exercises the right conferred thereby to determine the qualification of elective officers, and its charter provides that no person shall be eligible as candidate for any elective office unless he is a citizen, such limitation does not apply to the eligibility of an appointive officer.—Coxe v. Carson, 194 Mich. 304.

§ 166. Election or appointment and determination of qualifications.

Times for electing aldermen, councilmen, or supervisors, see also ante § 163.
Vote required for appointment by councils, see ante § 37.
Civil service system, see post § 168.
Recalling or revoking appointments, see post § 169.
Removals, see post § 170 et seq.
Nomination by vice mayor in absence of mayor, see Nomination, post § 178.
Declaring vacancy for failure to qualify and assume office, see post § 175.
Ratification of acts as ratification of irregular appointment, see post ¶ 836.
Constitutional power of appointment, see Constitutional Law § 46.
Failure to elect officers, effect as dissolution, see ante ¶ 30.
General law of appointments and elections, see Elections; Officers, II; Constitutional Law, II, XII.
Right to office and how determined, see generally Officers, III; Quo Warranto.
Applicability of township election law, see Elections § 2.
Statutes applicable to cities respecting ballot boxes and equipment of polls, see Elections § 8.
City election officers and inspectors, see Elections § 10.
Provisions relating to primary elections in cities, see also Elections § 19.
Presumptive notice of regular charter times for election, see Elections § 6.
Time allowable for voting in booth, see Elections § 39.
Power of councils to judge of qualifications and election of own members, see Elections § 60.
City council as canvassing board, see Elections ¶ 149.
Conclusiveness of majority report of recount committee on election contest, see Elections ¶ 200.
Legislative invasion of power of selection, see Constitutional Law § 74.
Impropriety of mandamus to try relative rights and franchises of adverse official claimants, see Mandamus § 20.
De facto officers and the de facto doctrine, see Officers.

¶ 713. Permanent appointments for purely municipal purposes can only be made by municipal authority. Whether the appointment by the legislature of a municipal board (Laws 1871, Act No. 494; 3 Sess. L. 1871, p. 273) can be sustained as provisional or initiatory only for the purpose of a primary organization of the board and to put it in full operation, quære; court equally divided.—People ex rel. Le Roy v. Hurlbut, 24 Mich. 44.

¶ 714. Municipalities have a constitutional right of self-government, and it is an invasion of that right for the state to make appointment of officers to perform functions of a local governmental character.—Davidson v. Hine, 151 Mich. 294.

¶ 715. A board of estimates is not, under article 15, section 14, of the State Constitu-

tion, relating to mode of electing or appointing officers, an unconstitutional board because its members are appointed by the common council instead of being elected by the voters of the city.—Bay City Traction & Electric Co. v. Bay City, 155 Mich. 393.

¶ 716. The Home Rule Act, Pub. Acts 1909, No. 279, § 3, providing that each city charter shall provide for the election of a mayor, was not intended to restrict the election of the mayor to a popular election and authorizes the election of the mayor by the commission of a city which has adopted a commission form of government.—Kopczynski v. Schriver, 194 Mich. 553.

¶ 717. The word "majority" use in § 10 of art. V of the charter of the City of Cadillac, to the effect that in certain events the candidate receiving at an election a majority of the first and second choice votes cast shall be deemed elected does not mean "plurality," since a contrary intention clearly appears from the further declaration that the word "majority" as used in such section shall mean more than one-half of all votes cast for the office in question.—Garneau v. Commission of City of Cadillac, 182 Mich. 91.

¶ 718. A charter provision authorizing the common council to appoint a certain officer, and to remove him at pleasure, remains in force after the taking effect of an amendment providing for the creation of a municipal board at a specified time in the future, which should have the appointment of such officer, until the provision last mentioned becomes operative.—Grant v. City of Alpena, 107 Mich. 335.

¶ 719. Local Acts 1893, No. 419, entitled an act "supplemental" to Detroit Charter and "to provide for a law department in said city," and providing that the city counselor "shall be appointed by the mayor," etc., necessarily repeals former charter provisions whereby the mayor had only a nominating power to the councils which made the appointment.—Speed v. Detroit Common Council, 97 Mich. 198.

¶ 720. Where a mayor appointed a city attorney on the third Monday of April as required by the old charter of a city, but after the adoption of a commission form of government under a charter which expressly continued in office all old officers until the expiration of their terms or the appointment by the commissioners of their successors, such appointment is a nullity.—North v. City of Battle Creek, 185 Mich. 592.

¶ 721. The provision of the Charter of Detroit, § 114, that all appointments to office by the "board of aldermen" shall be made by a majority vote of the members-elect, does not, in view of the history of that provision, which originally did not contain the quoted words, apply to appointments which, under the charter, are to be made by the mayor "with the consent" of the council, and a confirmation of such an appointment by a majority of a quorum of the council is sufficient.—Randall v. Schweikart, 115 Mich. 386.

¶ 722. Where a city's charter requires all appointments to office to be made upon mayor's nomination concurred in by majority of common council's members elect, mandamus to compel recognition as an officer of one whose nomination was not concurred in by a majority of the council exclusive of his own vote, must be denied.—Tinker v. Board of Public Works of City of Jackson, 97 Mich. 616.

¶ 723. Mandamus was granted to compel the common council of Detroit to consider and act upon nominations made by the mayor, under Laws 1873, Act No. 392 (3 Sess. L. 1873, p. 175), establishing a board of public works for Detroit.—People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108.

¶ 724. Under Comp. L. 1897, § 2769, subd. 26, providing that a village council shall have authority to provide for the care and custody of the public property, a village council, upon the discharge of the marshal by the president and their refusal to confirm his appointee, may hire the discharged marshal to look after the fire apparatus of the village and the president will be compelled to sign orders for sums voted to the marshal as compensation for his services in the latter capacity.—Clapp v. Titus, 138 Mich. 41.

¶ 725. The legislature has power to confer upon cities the right to determine qualifications of elected officers.—Coxe v. Carson, 194 Mich. 364.

§ 167. Council as judge of elections and qualifications.

Power of charter commission to judge of member's qualifications, see ante § 19.
Procedure to remove officers, see post § 171.

¶ 726. The charter of Alpena makes the mayor a member of the common council, and constitutes that body the judge of the election and qualification of its own members. Held, that the council's action in determining the mayor's election is final.—People ex rel. Dafoe v. Harshaw, 60 Mich. 200.

¶ 727. Laws 1887, Act No. 293, to preserve evidence of error or fraud in the counting of ballots, etc., in contested elections, does not apply to an election to the office of mayor of a city—Grand Rapids in this case—whose charter provides that the common council shall consist of the mayor and aldermen, and shall be the judges of the election of its own members and determine all contested elections.—Weston v. Kent Probate Judge, 69 Mich. 600.

¶ 728. Grand Rapids charter, title 2, § 20 (Local Acts of 1877, No. 282), which pro-

vides that, on the Thursday following a municipal election, the council of the preceding year shall convene, and determine and certify the persons elected to the several offices, must be construed with title 10, section 4, declaring the common council to be the judge of the election and qualification of its own members; and title 2, section 20, does not therefore relate to the office of alderman which is left to the new board.—Hilton v. Common Council of Grand Rapids, 112 Mich. 500.

¶ 729. The charter of Muskegon, § 33, makes the common council judges of the election or qualification of its members. Held, that this power expires with the council that admits a member, and a rehearing of the questions cannot be granted by any subsequent council.—Doran v. De Long, 48 Mich. 552.

¶ 730. Where the common council of a city is by charter made the judge of the qualifications of its members, statutory provisions for a recount of votes do not apply to an election for aldermen; and the incoming council is the judge rather than the one in office at the time of the election.—Hilton v. Common Council of Grand Rapids, 112 Mich. 500.

¶ 731. A common council has no authority to declare vacant a seat held by one whose title is regular and who disputes the facts which are claimed to make him incompetent; the question whether he has disqualified himself can be tried only by a judicial tribunal. —Doran v. De Long, 48 Mich. 552.

¶ 732. Where the common council is made the final judge as to the election of its members, the supreme court cannot review its decision on the facts.—Alter v. Simpson, 46 Mich. 138.

¶ 733. By §§ 11 and 12 of the nonpartisan charter of the City of Grand Rapids, the common council is made the sole judge of the qualifications of its members.—Sinclair v. Common Council of Grand Rapids, 181 Mich. 186.

¶ 734. A contest for the office of mayor is to be determined by the common council; and under §§ 11 and 12 of the nonpartisan charter of the City of Grand Rapids, its decision is final.—Sinclair v. Common Council City of Grand Rapids, 181 Mich. 186.

¶ 735. The provision of § 12 of the so-called nonpartisan clause of the charter of the City of Grand Rapids, that contested elections to municipal offices shall be decided by the council as nearly as may be according to the laws governing contested elections for state officers, is directory merely.—Sinclair v. Common Council of Grand Rapids, 181 Mich. 186.

¶ 736. Section 12 of the nonpartisan provision of the charter of the City of Grand Rapids, providing that in contested elections the council shall be governed as nearly as may be by the regulations of the state law pertaining to contested elections for state officers, is to be construed if possible in connection with § 4 of title 10 of the charter declaring the council to be the judge of the qualifications and elections of its members.—Sinclair v. Common Council of Grand Rapids, 181 Mich. 186.

¶ 737. A contest of a mayoralty election is to be determined by the incoming council of the City of Grand Rapids under § 4, title 10 of the charter, declaring the common council to be the judge of the qualification and election of its members, and not under §§ 11 and 12 of the nonpartisan provisions of the charter requiring the common council to meet as a board of canvassers, and to declare the result of municipal elections; and that election contests shall be conducted as near as may be according to the state laws governing contested elections for state officers.—Sinclair v. Common Council of Grand Rapids, 181 Mich. 186.

¶ 738. Since § 12 of the nonpartisan provision of the charter of the City of Grand Rapids, providing that the city council shall decide all election contests as nearly as may be according to the state law regulating contested elections for state officers, does not expressly repeal, nor is it inconsistent with § 4 of title 10 of the charter, declaring that the council shall be the judge of the qualification and election of its members and to determine contested elections thereof, a contest for the office of mayor is to be heard under the latter section.—Sinclair v. Common Council of Grand Rapids, 181 Mich. 186.

§ 168. Civil service system of appointments.

Application of system to employees of boards and departments, see post § 180.
Applicability of civil service rules to Recorder's Court officers in Detroit, see also Municipal Courts ¶ 12.
Reinstatement by civil service board, see post § 173.

¶ 739. The Civil Service Amendment of 1913 to Detroit City Charter repeals or supersedes all special acts relating to appointments and removals in individual departments, although containing no express repealing clause.—Pryzbylowski v. Detroit Board of Poor Commissioners, 188 Mich. 270.

¶ 740. The so-called civil service act adopted by the election of the City of Detroit April 7, 1913, placing all employees of the city under the control of a civil service commission, became operative from the adoption of the act, and was not suspended until the appointment and qualification of the commissioners.—Grobbel v. Detroit Board of Water Com'rs, 181 Mich. 364. (McAlvay, C. J., Ostrander and Stone, JJ., dissenting.)

¶ 741. Under the civil service amendment to the Detroit city charter where the

commissioner of public works has made a mistake by appointing a disqualified person to fill a vacancy, and such appointment is not confirmed by the civil service commission, and is subsequently withdrawn, the person heading the list of eligibles is entitled to the office, as, while some action of the appointing power is necessary before a place can be filled, it must be deemed that it was intended to fill the position, and that the appointing power was simply exercised in favor of the wrong person.—Savage v. City of Detroit, 190 Mich. 144. (Bird, Brooke, and Kuhn, JJ., dissenting.)

§ 169. Recalling or revoking appointments.

¶ 742. Where, as in Local Acts of 1893, No. 419, the exclusive power to appoint a city counsellor is vested in the mayor, such an appointment once duly made and filed is absolute, and the mayor cannot recall it.—Speed v. Common Council of Detroit, 97 Mich. 198, 98 Mich. 360; Attorney General v. Corliss, 98 Mich. 372.

§ 170. Removals.

Under civil service system, see also ante § 168.
Procedure for removal and removal on charges, see post §§ 171, 172.
Reinstatement of officer, see post § 173.
Power of charter commission respecting removal of member, see ante ¶ 67.
Removals from offices or public employments in general, see Officers, V.
Neglect or misfeasance as ground for removal, see Officers, V.
Certiorari to review removal of mayor by governor, see Certiorari § 20.
Mandamus to compel restoration of policeman to service after improper dismissal, see Mandamus ¶ 565.
Amenability of official body to writ of prohibition to prevent illegal proceeding to remove officer, see Prohibition, Writ of.

¶ 743. Municipal officers are legislative officers, and the power of removal is inherent in municipalities.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 744. Pub. Acts 1915, No. 149, § 6, does not repeal § 11, tit. 2, of the charter of the City of Grand Rapids authorizing the common council to remove city officers for official misconduct, but simply gives concurrent power to the governor to remove city officers.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 745. The common council of Port Huron can remove none but city officers.—Tibbals v. Port Huron Board of Education, 39 Mich. 635.

¶ 746. That a city charter expressly forbids the removal of executive officers except for cause does not raise a presumption that the legislature intended that appointed officers might be removed without cause.—Hallgren v. Campbell, 82 Mich. 255.

¶ 747. A provision in Detroit's charter, ch. 4, § 19, that "any officer holding office by appointment, unless otherwise provided by law or ordinance, may be removed at any time by the common council, without charges and a trial thereof," does not apply to the city counsellor appointed by the mayor under Local Acts of 1893, No. 419; since such power of removal would be inconsistent with the power of appointment by the mayor for a fixed term.—Speed v. Common Council of Detroit, 97 Mich. 198; Attorney General v. Corliss, 98 Mich. 372.

¶ 748. The power to remove the city counsellor of Detroit for cause is not inherent in the common council, nor is it vested in that body by the charter, nor can it be implied from Local Acts of 1893, No. 419, § 8 (supplemental to the charter), which provides that upon the expiration of the term of office of the city counsellor and the city attorney, or their resignation or removal, such officer shall forthwith, on demand, deliver to his successor in office all deeds, leases, contracts, and other papers and books in his hands belonging to the corporation, or delivered to him by the corporation or any of its officers, and all papers in actions prosecuted or defended by him, or which are pending and undetermined.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 749. Under Comp. L. 1897, § 2729, providing that a village president may remove any officer appointed by him when he shall deem it to the public interest, the power of removal by the president has reference to officers appointed by him with the consent of the council; as seemingly no power to remove appointed officers was vested elsewhere.—Kriseler v. Le Valley, 122 Mich. 576.

¶ 750. Pub. Acts 1897, No. 109, § 2, providing for the appointment of police matrons and their removal for cause by written order stating the cause does not require such written order of removal where the matron has been appointed "on probation and during the pleasure of" the board of police commissioners.—McNab v. Common Council of Bay City, 125 Mich. 51.

¶ 751. Under Loc. Acts 1901, No. 416, which provides that the police commissioner shall have power to remove and suspend from office for cause and further provides that he may make such removal upon charges preferred touching character or competency, a police officer may be removed for other cause than violation of the rules and regulations of the police department.—Oesterreich v. Fowle, 132 Mich. 9.

¶ 752. A special clerk appointed by the receiver of taxes of the city of Detroit, and confirmed by the common council, pursuant to an ordinance providing that, when assistants shall be required, the receiver shall apply to the council therefor, and such assist-

ants, when appointed, shall receive such compensation as the council shall by resolution prescribe, holds office at the pleasure of the receiver, there being no charter provision vesting in the council the power of removal as to employees so appointed.—Osborn v. Common Council of Detroit, 111 Mich. 362.

¶ 753. Under the Home Rule Act, Pub. Acts 1909, No. 279, § 5, subd. (d), How. 2nd Ed., § 5446, providing that no city shall have power to shorten or extend the term of any public official beyond the period for which he was elected or appointed unless he resign or be removed for cause, the amendment of November 14, 1914, to the Detroit city charter which made appointive officers hold office at the will of the mayor could not become effective against any appointive officer unless he resigned.—Burton v. City of Detroit, 190 Mich. 195.

§ 171. ——Procedure before council.

Necessity of charges and opportunity to answer them on hearing, see post § 172.

¶ 754. In proceedings for the removal of a park commissioner upon several charges, it is not necessary that the council vote separately upon each charge and specification thereunder, and upon the question of removal; but where, in the return of the council, the officer is found guilty "of the said several charges and specifications as aforesaid," it will be presumed that each alderman who voted for the affirmative upon the resolution passed upon every one of the charges and specifications enumerated in the resolution, and upon the question of removal.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 755. Where, after hearing evidence for a number of days upon charges against a park commissioner, of negligence in permitting the execution of defective work by contractors, the council viewed the work as to which neglect was charged, and in rendering their decision returned that "from such personal examination of the work, and from such evidence as said council and the individual members thereof then and there saw, by being present and examining and viewing such work in detail, and which was apparent to said commissioner had he done his duty, the said council was satisfied of the incompetency and unfitness of the officer," it cannot, from such language alone, be held that the common council based its determination upon its own view and not upon the evidence, and that its determination for that reason is void.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 756. The provisions of the charter of the city of Grand Rapids, tit. 3, § 11, relative to providing for and regulating the election and appointment of all officers and for their removal from office, and the filling of vacancies, are permissive and directory, and not imperative, and it is unnecessary that the council prescribe rules or regulate by some preadopted method the manner it shall exercise its power for removing an officer from office.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 757. In a proceeding by the council under the charter of the city of Grand Rapids, Tit. 2, § 11, to remove a city officer for misconduct, while the council is not a court nor the members judicial officers, so as to be bound in a strict sense by the ordinary rules of regularly constituted courts, yet such hearing is judicial in its nature, the body necessarily acts in a quasi judicial capacity, and the procedure must be of a quasi judicial character.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 758. The mandatory provisions of the Grand Rapids charter, tit. 2, § 11, relative to the removal of a city officer for misconduct are that steps taken in that behalf be recorded in its proceedings, a copy of the charges be served with 10 days' notice of time and place of hearing, opportunity of the accused to make a defense to such charges, and a two-thirds affirmative vote of all aldermen elect.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 759. Where, in a proceeding by the council under the charter of the city of Grand Rapids, tit. 2, § 11, to remove a city officer from office, written charges have been preferred and notice given to the accused officer, the council, in session as such, at the legally noticed time and place of hearing, with the necessary quorum in attendance, complies with all requirements of the charter in that particular, and may enter upon the hearing, the proceedings of which are to be entered in its records, without any reorganization or special formalities to resolve itself into a court.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 760. In a proceeding before the common council of the city of Grand Rapids, pursuant to the charter, tit. 2, § 11, to remove a city officer for misconduct there must be an affirmative vote amounting to two-thirds of the members elect, cast by members who participated in all the proceedings and heard all the evidence given by the witnesses who appeared and testified.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

¶ 761. A city officer of the city of Grand Rapids who is under trial before the common council pursuant to the charter, tit. 2, § 11, is not accorded a fair and impartial trial where three of the members of the council indicate prejudice toward him in statements made to the council, before any evidence is taken, in opposing a motion for a delay of the hearing, and the officer's request for more time to prepare his defense is refused and the hearing continued all night without intermission, there being no special circumstances calling for urgent ac-

tion.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

§ 172. ——Charges and hearing and order thereon.

In proceedings before councils, see also ante § 171.

¶ 762. Under Comp. L. 1897 (Act 109, Pub. Acts 1897), § 3492, providing that a police matron shall hold office until removal for cause, an attempted dismissal without giving previous notice and an opportunity for a hearing is without effect.—Rowell v. City of Battle Creek, 169 Mich. 19.

¶ 763. Where, by the amended charter of the city of Port Huron (Local Acts 1893, No. 392), the police force, which had been under the control of the common council, and the members of which were not subject to removal until charges had been preferred against them, and they afforded an opportunity of being heard in their defense, was placed under the control and management of a commission created by the act, with exclusive power to appoint members of the force, and to suspend or remove policemen under and for such causes as should be fixed by the ordinances and charter of the city and the rules adopted by the commission, it being further provided that the existing police force should continue to hold their offices until their successors should be appointed and qualified, held, that the members of the police force had no fixed tenure of office at the time of the enactment of said statute; that its evident purpose was to confer upon the commission authority to reorganize the force; and that a policeman who received his appointment under the earlier law cannot complain of his removal by the commission for his alleged physical incompetency, on the ground that charges were not preferred against him, and the question of his physical incapacity tried and determined by said commissioners.—Enright v. Duff, 102 Mich. 446.

¶ 764. The requirements of Loc. Acts 1901, No. 416, § 10, that a complaint against a member of the police force must be under oath, is waived where the point is not raised at the hearing and trial is had on the merits.—Oesterreich v. Fowle, 132 Mich. 9.

¶ 765. A charge that a police officer reported himself as sick when in fact he was engaged in such manual labor at home as to show that he was not sick, is more than a charge of absence from duty merely.—Oesterreich v. Fowle, 132 Mich. 9.

¶ 766. A proceeding under the Charter of Detroit (Local Acts 1901, No. 416) for removal of a policeman on charges is in no sense criminal or to be conducted like a criminal proceeding.—Oesterreich v. Fowle, 132 Mich. 9.

¶ 767. Under Detroit Charter of 1893, § 232, providing that the council should have power to remove certain officers for cause, a copy of the charges made, with notice of the time and place of hearing, being first served, the council, at the time assigned for hearing charges preferred against an official, notwithstanding his protest, adjourned such hearing, upon the recommendation of the mayor, until after a certain report, regarding a matter not necessarily involved in such charges, should have been received. Held, that such officer was entitled either to a hearing at that time, or to have a time assigned therefor; and that the indefinite action of the council must be regarded as equivalent to a dismissal of the charges.—Goodfellow v. Common Council of Detroit, 102 Mich. 343.

¶ 768. In determining the cause of dismissal of a police officer pursuant to charges made, the specifications in the complaint and in the order of dismissal must be looked to rather than the general language therein.—Oesterreich v. Fowle, 132 Mich. 9.

¶ 769. A board of police commissioners, authorized by charter to remove policemen in certain cases, will not be compelled to reinstate an officer improperly removed, if such officer is regularly dismissed before proceedings are taken for his reinstatement.—Michelson v. Board of Police Com'rs of Saginaw, 111 Mich. 587.

§ 173. Reinstatement.

Right to pay for time excluded, see post § 201.

Power of council to re-employ marshal after discharge by mayor, see ante ¶ 724.

¶ 770. A board of police commissioners, authorized by charter to remove policemen summarily "or" on conviction of misconduct, cannot, upon acquitting an officer of specific charges preferred against him, adjudge him guilty of another offense not specified, and order his dismissal; and in such case mandamus will lie to compel the officer's reinstatement.—Wilkinson v. Board of Police Com'rs of City of Saginaw, 107 Mich. 394.

¶ 771. The Detroit Civil Service Commission may not reinstate a city employee because no reasons were given for his discharge; it may reinstate only where the employee was removed for reasons other than the good of the service.—Philbrick v. Dust, 178 Mich. 605.

¶ 772. Where a discharged city employee has erroneously appealed to the civil service commission for reinstatement because no reasons were assigned for his discharge, instead of resorting to action, and then has brought mandamus to compel obedience to the decision of the commission whereupon mandamus was allowed, the application will be treated as having been made to the courts in the first instance.—Philbrick v. Dust, 178 Mich. 605.

§ 174. Term and duration of office and holding over.

Power of council to change term, see also ante § 164.
Validity of act changing terms of aldermen and times of election, see ante ¶ 706.
Term and duration of offices in general, see Officers, IV.
Resignations from office, see Officers, V.

¶ 773. Where a charter of a city (Menominee) authorizes the appointment of a street commissioner for a fixed term, it is presumed, in the absence of express authority for removal, that it is intended such officer shall hold until his term expires, unless removed for cause after notice and trial.—Hallgren v. Campbell, 82 Mich. 255.

¶ 774. The city physicians of Grand Rapids are appointed and not elective officers, and are not authorized by the charter to hold over where their successors are not chosen within a fixed time after their terms expire and a vacancy occurs in the office.—Saunders v. City of Grand Rapids, 46 Mich. 467.

¶ 775. By the charter of Grand Rapids, title 2, § 6, as amended in 1897 (Local Acts 1897, No. 374), the term of office of the building inspector is fixed at one year from the first Monday in May, thus shortening his term; and accordingly it forms an exception within title 12, section 33, of the revised charter, providing that officers elected for a period longer than until the ensuing first Monday in May shall serve out their terms "except as herein otherwise provided."—People v. Van Auden, 116 Mich. 654.

¶ 776. The term of an officer appointed to fill a vacancy in an elective city office under a charter provision that the person so appointed "shall hold only until the first Monday of May next succeeding" ends at that time, whether a successor is chosen or not, and there can be no holding de facto.—Edison v. Almy, 66 Mich. 329.

¶ 777. Under a new charter for the city of Jackson, providing that the city attorney shall hold office for the term of one year from the first Monday in May and providing that the first appointment of city attorney thereunder shall be made on the first Monday in May, 1904, and that the appointment of city attorney before that date shall be made in accordance with the old charter, an appointment made in 1903 for two years as provided by the old charter does not entitle the attorney to the office beyond May, 1904, the date set for an appointment under the new charter.—Attorney General ex rel. Reece v. Shekell, 138 Mich. 287.

¶ 778. Where one act attempts to amend another it may be valid as to some parts although invalid as to others; and Local Acts 1905, No. 392, amendatory of Local Acts 1899, No. 430, an act amending the charter of the city of Battle Creek, attempting to change the judicial system of the city, while invalid as to that part, is valid as to that part which changes the term of office of the mayor, eliminating his compensation, and restricting the continuous holding of office by the same person.—City of Battle Creek v. Barnes, 143 Mich. 400.

¶ 779. Comp. L. 1897, § 2704, governing the Village of Fairview, provides that all appointive officers shall hold office until their successors are qualified and enter upon the duties of their offices. Held, plaintiff officer, his successor having never been named or qualified, was entitled to his office and the salary attached thereto irrespective of the validity of his reappointment.—Otto v. City of Detroit, 164 Mich. 532.

§ 175. Vacancies and vacancy appointments.

Power of council to declare a vacancy in membership, see also ante § 107, ¶ 731.
Effect of loss of residence in city or ward, see post § 176.
Filling vacancies and duration of vacancy appointment on charter commission, see ante § 19.

¶ 780. Under Comp. L. 1897, § 2710, providing that if any person appointed to office shall fail to take the oath or to give the required bond, the council may declare the office vacant unless previously thereto the oath shall be taken and the bond given; the office of a village deputy marshal was not vacated by a failure to give the required bond until some action was taken by the council.—Kriseler v. Le Valley, 122 Mich. 576.

¶ 781. Local Acts 1901, No. 284, containing a void provision for an appointment by the governor of a provisional local superintendent of public works for the city of Detroit and the abolition of the local board of public works, is not wholly unconstitutional and invalid because the governor's power of appointment is void; the office is created and the governor's appointee being without authority, a vacancy exists which the mayor has immediate right to fill, the old board holding until then.—Moreland v. Millen, 126 Mich. 381.

¶ 782. The city council of Grand Rapids is not precluded by the charter from filling an office held by its appointment where there is no one holding for a regular term.—Saunders v. City of Grand Rapids, 46 Mich. 467.

¶ 783. Whether the mayor of Bay City is entitled to fill by appointment a vacancy in the office of alderman is not determined.—Ross v. Barber, 86 Mich. 380.

¶ 784. A special election was held to choose a village trustee to fill a vacancy caused by resignation. Respondent was chosen. The council met and carried motions declaring him elected, and allowing

him to qualify and take his seat. Afterwards it was discovered that the special election was void. Section 2711, Comp. L. 1897, gives the council power to fill vacancies in the office of trustee. Held, on quo warranto, that the action of the council amounted to an appointment of respondent under said statute, and he was entitled to hold his seat.—People ex rel. Sutherland v. Ford, 163 Mich. 359.

§ 176. ——Effect of loss of residence or change of boundaries.

¶ 785. The provision of the charter of Bay City that the office of alderman shall become vacant on the incumbent's removal from his ward applies to a removal effected by a legislative change of boundaries as well as to a voluntary removal by the alderman.—Ross v. Barber, 86 Mich. 380.

¶ 786. Cutting off and taking away a portion of the territory of their wards in creating new ones cannot oust the aldermen of their offices if they still reside in the remaining territory.—Stow v. Common Council of City of Grand Rapids, 79 Mich. 595.

¶ 787. Where an act (Local Acts 1891, No. 324) annexing the larger part of a village (Highland Park) to a city provides that taxes for 1891 shall be collected in the annexed territory as if the act had not been passed, the village treasurer who resides in the annexed part is not retained in office for the purpose of collecting the taxes.—Ketcham v. Wagner, 90 Mich. 271.

¶ 788. Village trustees who in consequence of an act detaching territory from the village have ceased to be residents thereof cannot legally participate in a meeting of the village council for the purpose of ordering a special election to fill the vacancies in their offices.—People v. Village of Highland Park, 88 Mich. 653.

¶ 789. Where most of the electors acted on the validity of the notice of an election specially ordered, and elected new officers to fill the vacancies, such election was held valid notwithstanding the participation of such trustees in the council meeting as had lost office by loss of residence on change of boundaries.—People v. Village of Highland Park, 88 Mich. 653.

§ 177. Disqualification of officer.

Disqualification of councilman or alderman by interest, see ante § 41.

Interpretation of charter provisions disabling officers to be interested in contracts with city, see Public Contracts, I, IV.

Invalidity of contract in which city officer is interested, see Public Contracts, IV.

¶ 790. Members of a city council who had omitted to take a bond from a contractor constructing a public building being personally liable for damages to the materialmen, had a direct pecuniary interest in the allowance of a claim and are legally disqualified from voting on such claim presented to them.—Smith v. Hubbell, 142 Mich. 637.

¶ 791. Under the charter of the city of Jackson, a member of the common council cannot by mandamus compel his recognition as a member of the board of public works, when his petition fails to show his election by a majority of the common council, exclusive of his own vote.—Tinker v. Board of Public Works of City of Jackson, 97 Mich. 616.

§ 178. Substitutes and vice officers during absence or disability.

Validity of city charter provision allowing the calling in of special justice of the peace, see Justices of the Peace ¶ 17.

¶ 792. The charter of Detroit provides that in case of vacancy in the office of mayor or in his being unable to perform his duties by reason of sickness, absence from the city, or other cause, the president of the common council shall be acting mayor vested with the mayor's powers, the temporary absence of the mayor for a day and a half would not authorize the president of the council to approve of a resolution where the mayor had returned and within the time required had returned the resolution with his objections and the next regular meeting of the council did not occur until five days after his return.—City of Detroit v. Moran, 46 Mich. 213.

¶ 793. Under Grand Rapids charter providing for the mayor's making nominations to city offices, subject to confirmation by the common council, and also conferring (title 3, section 2 of revised charter) upon the president of the council the right to "discharge the municipal duties of the mayor during the absence" of the latter, a nomination by the president of the council, made and confirmed during the mayor's absence from the state, is valid.—People v. Van Auden, 116 Mich. 654.

§ 179. Boards and departments and their status and relation to municipality.

Effect of transfer of powers to board as abrogating existing ordinance by council, see ante § 66.

Fire and police departments, see post § 181.

Law department and its officers, see post § 182.

Mode of action by board, see post § 193.

Power to appoint or employ subordinates, see post § 180.

Tort liability of board, see ante § 133.

Proper officer to negotiate for water board, see post ¶ 825.

Right of water superintendent to sue water taker on contract repudiated by board, see ante ¶ 504.

Construction of ordinance and charter respecting power to permit sewer connections, see ante ¶ 204.

Powers of park commissioners over parks and boulevards, see also ante § 31.
Responsibility of water board for negligence of subordinate, see post § 190, ¶ 850.
Salaries and compensations of boards and their subordinates, see post § 196 et seq.
Functions of board of estimates respecting salaries, see post § 197.
Disability of board of public works to change plans and specifications after letting of contract by council, see also Public Contracts, II.
Health boards and officers and clerks, subordinates and employees, see Health §§ 4, 5.
Necessity of approval of bond issue by board of estimates, see Municipal Bonds § 5.
Function of Detroit Board of Public Works to approve plats and street plans, see Dedication §§ 21, 22.
Power of board of public works to vacate plat, see Dedication § 86.
Board of education as separate corporation or agency, see Schools.
Administration of water department, see Waters, VI.
Right and duty of departments to have and furnish free water service, see Waters, VI.
Status of board of poor commissioners in Detroit, see Poor Persons § 13.

¶ 794. The board of estimates of Detroit, being limited in its jurisdiction to the several funds mentioned in the city charter (Local L. 1887, Act No. 488, chap. 8, § 4), and the educational fund not being specified in the charter as among them (Local L. 1889, Act No. 424), has no supervisory power over the board of education funds except over the fund for purchasing lots and erecting buildings, under Laws 1873, Act No. 331.—Board of Education of Detroit v. Common Council of Detroit, 80 Mich. 548.

¶ 795. The board of public works of the city of Ann Arbor is not the governing body of the city, but is a board of limited powers.—Schneider v. City of Ann Arbor, 195 Mich. 599.

§ 180. ——Power to employ or appoint subordinates.

Power and procedure to remove or reinstate, see ante §§ 170-173.
Power to fix salaries, see post § 196 et seq.
Power to make contract to pay for overtime, see post ¶ 900.
Appointments under civil service system, see ante § 168.
Operation and time of taking effect of provision transferring power of appointment to board, see also ante ¶ 718.

¶ 796. By Local Acts 1901, No. 415, giving the commissioner of public works of Detroit power to "supervise the construction, repairing and alteration of all public buildings," and providing that all moneys for such repairs, etc., shall be expended under his supervision and under contracts and specifications prepared by him, and Charter of Detroit 1893, p. 168, § 10, providing that when peculiar skill is required the common council may authorize the commissioner to employ competent supervisors, the duty of making plans and specifications and of supervising the work of making alterations in, and additions to the city hall is imposed upon the commissioner of public works; and the city controller, though authorized by the council, has no authority to contract with architects to do such work.—Moreland v. Common Council of Detroit, 130 Mich. 343.

¶ 797. Under the charter of Ionia, §§ 83, 92, 93, as amended Loc. Acts 1891, No. 246, the board of public works has authority to appoint an engineer and assistant engineer of the city water works without the approval of the common council of the city.—Willsie v. Common Council of Ionia, 137 Mich. 445.

¶ 798. Under Local Acts 1901, No. 415 (charter of the city of Detroit) § 6, providing that the commissioner of public works may appoint such employees of the department as the common council shall create he need not submit the contract of hiring to the common council for its consent or approval, section 8 requiring it not being applicable.—Gadd v. City of Detroit, 142 Mich. 683.

¶ 799. The fact that the Board of Water Commissioners of the City of Detroit was created by a separate act of the legislature, does not preclude its being with an amendment to the city charter adopted by the electors, placing the employees of all city departments and commissions on a civil service basis.—Grobbel v. Detroit Board of Water Com'rs, 181 Mich. 364. (McAlvay, C. J., Ostrander and Stone, JJ., dissenting.)

¶ 800. Employees of the Board of Water Commissioners of the City of Detroit came within the Civil Service Act upon it becoming effective, and not upon the subsequent appointment and qualification of the members of the commission.—Grobbel v. Detroit Board of Water Com'rs, 181 Mich. 364. (McAlvay, C. J., Ostrander and Stone, JJ., dissenting.)

¶ 801. The employees of the Board of Health of the City of Detroit are not subject to the civil service law of the city.—Detroit Civil Service Commission v. Engle, 184 Mich. 269.

¶ 802. Under Local Acts of 1907, No. 720, relative to the appointment of a board of park commissioners and providing that such board shall have power to employ "such superintendents, engineers, clerks, agents, subordinates and laborers as it may deem necessary and fix their compensation" and that the "city engineer of Bay City shall perform the duties of engineer of said board without additional compensation" the board has authority to employ engineers and pay

them compensation for their services.—Bloomshield v. City of Bay City, 192 Mich. 488.

§ 181. Fire and police departments and members thereof.

Vote authorizing police department to offer rewards, see ante ¶ 153.
Removals of officers, see ante § 170 et seq.
Fixing amounts of salaries, see post § 197 et seq.
Vacation allowance and pay, see post § 200.
Powers of policemen in making arrests and liability for illegal arrest, see Arrest; Assault, I; False Imprisonment, I.
Territorial limits of powers of policemen, see also Officers, VI, A.
Class legislation affecting fire or police departments, see Constitutional Law § 216.
Detroit Fire Department as membership corporation, see Associations.
Powers of policemen respecting fugitives from justice and extradition, see Extradition ¶ 1.
Liability of city to fireman for injuries from defective streets, see Highways ¶ 902.
Liability of city for injuries caused by firemen operating in streets, see Highways § 228.
Powers of police officers to execute and serve process from Recorder's Court, see Comp. L. 1915, § 14653.

¶ 803. A city's fire department is distinctly a matter which concerns the inhabitants of the city as an organized community apart from the people of the state at large, and is peculiarly within the field of municipal activity and local self-government.—Simpson v. Paddock, 195 Mich. 581.

¶ 804. The relation of master and servant does not exist between the city of Detroit and the members of its fire department.—Coots v. City of Detroit, 75 Mich. 628.

¶ 805. A municipality is not responsible for negligent injuries to persons or property committed by members of a fire department while engaged in work pertaining exclusively to the extinguishment of fires.—Brink v. City of Grand Rapids, 144 Mich. 472.

Liability for injury to member of fire department by explosion, see note, 13 N. C. C. A. 302-306.

§ 182. Law department and officers.

Holding over term, see ante § 174.
Officers authorized to control litigation and to employ counsel, see post § 187.
Proper prosecutor and assistants in prosecutions for violating ordinances, see post § 225.
Power to appear or intervene for city, see also post ¶ 917.
Rendition of legal services by mayor or other officer, right to compensation, see ¶¶ 892, 893.
Compensation and salary, see post § 196 et seq.
Right to pay during unlawful appointment, see post ¶ 886.
Distinctive duties of city counselor and police justice with respect to collection of city demands, see also Municipal Courts ¶ 28.
Mode of appointment or selection, see ante § 166.
Recall of appointment, see ante ¶ 742.
Power of removal, see ante § 170.
Service of notice of claims on law department or officer, see ante § 152.
Claim of city attorney for defending mandamus against officers as claim against them, see also ante ¶ 625.

¶ 806. Even though a village ordinance may provide that the village attorney shall prosecute and defend all actions which may be brought by or against the corporation or any officer thereof, and who may have incurred any penalty or forfeiture under the charter and ordinances, or by reason of any breach of the conditions of any official bond when directed by the council to do so, such village attorney would not be precluded thereby from appearing against the village authorities to compel them by mandamus to issue and sign an order to pay a claim presented against the village.—Smith v. Hubbell, 142 Mich. 637.

¶ 807. Local Acts 1895, No. 389, entitled "an act to provide for a law department of the city of Detroit, etc.," must be construed as requiring the corporation counsel of the city to render legal services to the board of education "in or out of court" without other compensation than that provided for in the act itself; and the act is broad enough to include a case where by resolution the board employed the corporation counsel to appear in court in a case against the auditor general wherein the validity of a statute was attacked by a railroad company, and wherein the board was not itself a party and could not be made a party against its own will.—Tarsney v. Board of Education, 147 Mich. 418.

¶ 808. Where a village passes a resolution electing a firm to be attorneys of the village, it must pay for all services performed on litigation in court and out, and also for work done in pursuance of the appointment with the consent and knowledge of the village, but it is not bound to pay in addition to such full compensation a sum for a retainer contracted for without authority by the president of the village.—Moore v. City of Detroit, 164 Mich. 543.

¶ 809. Section 2 of the Detroit Charter, Local Acts 1895, prohibiting the bringing of actions for personal injuries against the city unless written notice be given within three months from the time of the injury to the head of the law department or his chief assistant, as to time, place, etc., of the injury, could not be waived by an assistant to the

corporation counsel, even if it could be waived by the officers named in the act, which latter question was not decided.—Holtham v. City of Detroit, 136 Mich. 17.

§ 183. Authority and functions in general and notice of limitations.

As to particular officers, see post § 184.
Ex officio powers and functions, see post § 185.
Power to contract for or to charge municipality, see post § 186.
Power to control or direct litigation or to employ counsel, see post § 187.
Distribution of powers among councils, officers and citizens, see ante § 31.
Delegability of powers, see ante § 32.
Construction of contracts reposing authority in officer as harmonious with statutory limits of his powers, see also ante ¶ 494.
Ratification of unauthorized acts and contracts, see post § 188.
Noninterference by courts with official discretion, see ante § 34.
General duties and obligations of officers, see Officers, VI.
Liability upon bond of officer, see Officers, VII.
Power and duty of municipal council and other officers or boards to make local improvements, see Local Improvements §§ 5, 6.
Power of municipal officers to levy assessment for local improvement, see Local Improvements §§ 46, 47.

¶ 810. Persons dealing with a municipal corporation through its officers must at their peril take notice of the authority of the particular officer to bind the corporation.—Rens v. City of Grand Rapids, 73 Mich. 237.

¶ 811. No one has a right to rely upon the acts of officers of a municipality beyond the limits of their authority, as binding upon the corporation, or to be misled thereby; since all are bound to take notice of the public law which defines the powers of such officers.—Plumb v. City of Grand Rapids, 81 Mich. 381.

¶ 812. Persons dealing with municipalities and their agents act with constructive, if not actual, knowledge of the limitation upon their delegated powers and their instrumentalities.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

§ 184. ——Particular officers.

Right to pay for extra time or for extra services, see post § 202.

¶ 813. Where the charter of a city (Ionia) provides that the city clerk shall have all the powers and duties of township clerks—see How. St. § 743—such city clerk has power to appoint a deputy to perform his duties in his absence.—Tower v. Welker, 93 Mich. 332.

¶ 814. The duties of the controller of Detroit are prescribed by the charter. In addition to those particularly specified, the common council may require him to perform others, subject to the provisions of the charter. But this will not authorize the council to prescribe duties which do not come within the scope and are in no way subject to the provisions of the charter, and are of an entirely different nature from those required by the charter.—City of Detroit v. Redfield, 19 Mich. 376.

¶ 815. Under a city charter requiring the controller to perform "such duties in relation to the finances as shall be prescribed by ordinance," he may be empowered to negotiate and dispose of city bonds, and the sureties upon his official bond are liable for any misappropriation by him of the proceeds, or for any unauthorized disposal of the bonds themselves.—Stevenson v. Bay City, 26 Mich. 44.

¶ 816. Where a city charter gives the common council the power to audit and allow accounts, and only permits the comptroller to receive, examine and report upon them, the latter cannot modify a contract on the part of the city, and the city is not bound by notice to him that has not been communicated to the council.—Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116.

¶ 817. An appointment made under Local Acts 1901, No. 284, providing invalidly for an appointment by the governor of a provisional local Superintendent of Public Works for the city of Detroit and the abolition of the local Board of Public Works, is not shown to have been accepted by the city by the fact that the governor's appointee's bond has been accepted by the city controller; as he had no power to ratify the legislative act wherein it was void.—Moreland v. Millen, 126 Mich. 381.

¶ 817a. The harbor-master of Detroit is, like the other police officers, a purely ministerial officer, and he is confined to the exercise of such duties as may be imposed by valid ordinances for the purpose of "preserving and regulating the navigation of said river."—Horn v. People, 26 Mich. 221.

§ 185. Ex officio powers and functions.

Effect of conferring on officer ex officio powers in other corporation, see also ante ¶ 24.
Municipal officers ex officio members of board of supervisors, see Counties § 50.

¶ 818. It is within the province of the legislature to make the mayor of a city an ex officio member of the board of education, and to give him the veto power.—Pingree v. Board of Education of Detroit, 99 Mich. 404.

§ 186. Authority to contract or charge municipality.

Disability to revive barred claim by hearing it out of time, see ante ¶ 626.

Ratification of unauthorized contracts, see post § 188.

Statutory provision for issuance of school bonds as excluding implication of power in city to issue bonds for school purposes, see Municipal Bonds ¶ 14.

Authority to sign bonds as excluding authority to deliver them, see Municipal Bonds ¶ 47.

Power of health officers or board to incur expense and charge municipality, see Health § 12.

¶ 819. The director of the poor, under the charter of Saginaw City, whose powers, duties and liabilities are by express reference limited to those of like officers in townships, has no authority to bind the city by the employment of a physician to perform a surgical operation upon a pauper of the city at any agreed price.—Barber v. City of Saginaw City, 34 Mich. 52.

¶ 820. The city surveyor of Grand Rapids has no power to make contracts binding upon the city for the improvement of its public streets.—Rens v. City of Grand Rapids, 73 Mich. 237.

¶ 821. The city surveyor and board of public works of the city of Grand Rapids have no power to make contracts for the improvement of streets except under the direction of the common council, and the city can in no way be made liable for such improvements, unless the same are made under contract approved by the council.—Rens v. City of Grand Rapids, 73 Mich. 237.

¶ 822. The board of police commissioners of the city of Grand Rapids has no power to contract for the board of a witness for the people in a criminal case while waiting to testify, or of a respondent who, upon his conviction in the superior court of said city, has been remanded to the police station under suspended sentence, to be detained until the trial of said case, and then used as a witness for the people therein. The proper way is to commit the witness in default of recognizance.—Tucker v. Common Council of Grand Rapids, 104 Mich. 621.

¶ 823. Authority to sign municipal bonds does not include power to deliver them.—Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670.

¶ 824. Promise of compensation by a city surveyor, additional to that provided for in a contract with a city for the construction of a sewer, was not binding upon the city.—Fox v. City of Bay City, 122 Mich. 499.

¶ 825. So far as third persons are concerned, the superintendent and engineer is the proper medium of negotiation with the board of water commissioners. And if he exceed his authority, and make a contract which the board repudiate, third persons are not to be injuriously affected thereby, or deprived of rights acquired in good faith by dealing with an agent upon whose authority they had a right to rely.—Hale v. Houghton, 8 Mich. 458.

¶ 826. An appropriation by the city council for a new pumping station carries with it authority to purchase a site.—Union Trust Co. v. Detroit Common Council, 158 Mich. 198.

§ 187. Authority to control litigation and employ counsel.

Ratification of unauthorized acts, see post § 188.

¶ 827. Where the mayor of a city is involved with some aldermen in litigation growing out of the exercise of his veto power in which litigation the city attorney is engaged on the other side, the question of whether or not an emergency existed so as to make the city liable for fees of another lawyer employed by the mayor without the formal consent of the council is a question of fact for the jury.—Smedley v. City of Grand Haven, 125 Mich. 424.

¶ 828. Where a city council by resolution directed the mayor and clerk to enter into a contract with a named attorney to have him take charge of pending city litigation in conjunction with its own committee there was a sufficient delegation of power to the mayor and the attorney to authorize them to take an appeal in the suit which had been decided adversely in the probate court.—City of Flint v. Stockdale's Estate, 149 Mich. 214.

¶ 829. Under the charter of the city of Grand Haven, where through his veto of an unlawful resolution of the council, the mayor is involved in litigation in which part of the aldermen and the city attorney are on the other side, the jury should be instructed that if they found an emergency existed for the employment of other counsel by the mayor they should find the city liable for the legal services of such counsel.—Smedley v. City of Grand Haven, 125 Mich. 424.

¶ 830. Under Comp. L. 1897, § 2752, giving to the president of a village no specific authority to hire an attorney for the village on a retainer, he cannot bind the village by such a contract.—Moore v. City of Detroit, 164 Mich. 543.

¶ 831. Under section 2727, Comp. L. 1897, making it the duty of the president of a village to enforce the ordinances and regulations of the council, the village is liable for services performed by an attorney at the direction of the president and without any action by the council.—Hosner v. Village of Leonard, 163 Mich. 92.

§ 188. Ratification of unauthorized acts and contracts.

Ratification of act of officers in sale of bond issue by vote of council approving their acts, see Municipal Bonds ¶ 44.

¶ 832. Ratification by a municipal corporation of the unauthorized contracts of its agents or officers must be of such contracts as it could legally have made originally.—Township of Taymouth v. Koehler, 35 Mich. 22; Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429; Davis v. City of Jackson, 61 Mich. 530; Wrought Iron Bridge Co. v. Township of Jasper, 68 Mich. 441.

¶ 833. The rule that a corporation cannot ratify an act that it would have been positively unlawful for it to do does not prevent proceedings to recover back money or property obtained by an act done ultra vires.—Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429.

¶ 834. A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, when the corporation might legally have authorized such acts and contracts, in the first instance, subject to exception when the mode of contracting operates as a limitation upon the power to contract.—Davis v. City of Jackson, 61 Mich. 530.

¶ 835. In some cases the acceptance and appropriation of work done for the use and benefit of the corporation may amount to ratification if done with full knowledge of all the facts.—Taymouth Township v. Koehler, 35 Mich. 22.

¶ 836. Where a board of park commissioners, whose functions were local and municipal, had been appointed by an act of the legislature, and the common council had ratified their action, afterwards confirming such ratification in opposition to the mayor's veto, it was held that the action of the council necessarily involved an approval of everything necessary to give validity to the action of the board, including, as a primary element of regularity, the right of the public agents to assume the agency.—People ex rel. Attorney General v. Lothrop, 24 Mich. 235.

¶ 837. The acts of certain village officers in removing earth from in front of a landowner's premises for the improvement of the street were ratified by the council of such village, and on that ground, a verdict for them might properly have been directed, in trespass quare clausum fregit brought against such officers by the landowner, where it appeared that although there was no record of any action of such council ordering such work to be done, certain bills which included the expense of such improvement had been approved by the council with full knowledge of their contents.—Wheat v. Van Tine, 149 Mich. 314.

¶ 838. Where a village finance committee enters into a contract beyond the powers of the village to furnish a bonus to a manufacturing company, said village cannot ratify the contract so as to be bound by it.—Village of Reed City v. Reed City Veneer & Panel Works, 165 Mich. 599.

¶ 839. The act of the common council of a city in ratifying the acts of its mayor in taking an appeal and signing an appeal bond on behalf of the city, if not necessary, was within the power of the council and forever disposes of any objection that might be raised as to his authority.—City of Flint v. Stockdale's Estate, 149 Mich. 214.

§ 189. Responsibility for acts of officers or subordinates.

Officers as exclusive organs of municipality, see also ante ¶ 116.
Duty to take notice of limitations on officers' powers, see also ante § 183.
For acts of negligence, see post § 190.
Notice to officer as notice to city, see post § 191.
Estoppel of municipality by act of officer, see post § 192.
General doctrine of respondeat superior, see Agency, II; Master and Servant, IV.
Responsibility of county for embezzlement by county officers, see Counties § 36.
Liability of city to bona fide holder of bonds issued by wrongdoing officers, see also Municipal Bonds § 13 et seq.

¶ 840. A municipality is not as such responsible for acts of officers of a public prison, since all criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by law.—Detroit v. Laughna, 34 Mich. 402.

¶ 841. A city cannot be held liable for the sickness and death of a workman on land used for the isolation of contagious disease cases under the rule of respondeat superior where the city would not be liable for such injury caused by itself directly.—Nicholson v. City of Detroit, 129 Mich. 246.

¶ 842. A declaration in case against a city for entering and using plaintiff's dwelling house as a pest house without leave or license (first count), and for entering and expelling plaintiff by force (second count), and for trespass with direct and consequential damage (third count) sounds in tort and will not support a judgment against the city for more than the rental value of the premises, where possession was obtained by a trick of the health officer pretending to rent a house without disclosing the purpose of its use; since though the city is liable for the value of the use it is not liable for the torts of its officers unratified by it.—Bodewig v. City of Port Huron, 141 Mich. 564.

¶ 843. Where the charter of a corporation engaged in municipal water supply was repealed, and the repealing act is sought to be enforced for the benefit of the inhabitants of the municipality at large, their right to have a law enforced cannot be affected by the fact that some agent of the municipal corporation acted improperly in securing the passage of the law.—People ex rel. Ellis v. Calder, 153 Mich. 724, aff'd 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122.

¶ 844. A city cannot be held liable for a nuisance though one of its employees, contrary to express orders, had contributed in a small measure to the nuisance.—McKee v. City of Grand Rapids, 137 Mich. 200.

¶ 845. A city is not liable for the wilful refusal of its common council to approve a sufficient liquor-bond.—Amperse v. City of Kalamazoo, 75 Mich. 228.

§ 190. ——Negligence by employees or contractors.

See also ante ¶ 531.

Negligence or other injurious acts of fire department, see also ante § 181.

¶ 846. Municipal officers are in no such sense municipal agents that their negligence is the negligence of the municipality; the latter cannot be made liable in such a connection.—Amperse v. City of Kalamazoo, 75 Mich. 228; Hines v. City of Charlotte, 72 Mich. 278.

¶ 847. Municipal officers are in no such sense municipal agents that their negligence is the neglect of the municipality; nor will their misconduct be chargeable against it, unless the act complained of be either authorized or ratified.—City of Detroit v. Blackeby, 21 Mich. 84.

¶ 848. A municipality is liable as a natural person would be for a tortious act, but is not, apart from contract or statute, responsible for official neglect involving no active misfeasance.—Hines v. City of Charlotte, 72 Mich. 278.

¶ 848a. Cities and other municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute.—O'Leary v. Board of Fire & Water Commissioners of City of Marquette, 79 Mich. 281.

¶ 849. A municipality, in the absence of a statute to the contrary, is not responsible for injuries caused by the negligence of its employees engaged in so called governmental functions.—Brink v. City of Grand Rapids, 144 Mich. 472.

¶ 850. A board of water commissioners chartered to furnish a city with water and which has no taxing powers but can only levy an equitable water rate is not liable for injuries caused by its servants' negligence.—O'Leary v. Board of Fire & Water Commissioners of City of Marquette, 79 Mich. 281.

¶ 851. By arrangement with the mayor of a city a contractor, engaged in laying water pipe for the city, laid such pipe from the street into adjoining college grounds and the trench was left open and unguarded on said grounds. A traveler falling into it was injured and sued the city, which was held not liable, as the relation of master and servant did not, at the time the work was done, exist between the city and such contractor.—Harvey v. City of Hillsdale, 86 Mich. 330.

Liability of city for negligent operation of automobile used by public library, see note, 4 N. C. C. A. 40-45.

Liability of city or county for negligent acts of health officers, see note, 11 N. C. C. A. 406-413.

Liability of municipal corporations for negligence of independent contractor, see notes, 3 N. C. C. A. 922-938; 5 N. C. C. A. 71-96.

§ 191. Notice through officers or agents.

General doctrine of notice through agency, see Agency, II, E; Corporations, XVII, E.

Presumption that city and officers know the law, see Evidence § 47, ¶¶ 256, 257.

¶ 852. The individual knowledge of officers or agents of a municipal corporation, who in such capacity have powers or duties conferred upon them with reference to a given matter, is the knowledge of the corporation, and notice to them is notice to the corporation, which is bound by such knowledge or notice.—Dundas v. City of Lansing, 75 Mich. 499; Fuller v. Jackson, 82 Mich. 480.

Notice to city officer, agent or private citizen, as notice to the city, see note, 3 N. C. C. A. 723-739.

§ 192. Estoppel by acts of officers.

¶ 853. A city is not estopped by the neglect of its officers to enforce an ordinance.—Detroit v. Fort St. & E. R. Co., 41 Mich. 413.

¶ 854. In an action of trespass quare clausum against a village in which both parties claim possession, the fact that the village had assessed and collected taxes against the plaintiff for some years does not estop the village from denying the plaintiff's possession or title as the assessor and collector have no power to convey title.—Moore v. Pear, 129 Mich. 513.

¶ 855. A city treasurer's voluntary rendition of a tax statement which omitted some taxes does not bind the city, it not having been any part of his official duty to make such a statement.—Gray v. City of Detroit, 113 Mich. 657.

§ 193. Mode of official action and record or minute thereof.

Manner of signifying approval or veto of ordinances, see ante § 46.

Name in which instruments should be executed to bind city, see post § 194.

Name in which suits or defenses should be made, see post § 212.

¶ 856. Since Laws 1873, Act No. 392, § 13, provides that the board of public works of

Detroit may authorize one of its members to inspect the grading and paving of streets, the action of a single member in such regard is presumably within his authority.—Kulwicki v. Munro, 95 Mich. 28.

¶ 857. A municipal board of public works is a quasi-corporation, and its acts in platting streets, approving plats, and establishing a system of grades and sewers, cannot rest in parol, and should be recorded by them in permanent form.—Larned v. Briscoe, 62 Mich. 393.

¶ 857a. Where a power is conferred, a resort to the usual means in its execution must be understood as intended, unless others are indicated.—Grover v. Huckins, 26 Mich. 476.

§ 194. ——Execution of instruments for municipality.

Making contracts in form of personal obligation, see also ante ¶ 480.
Vicarious execution of instruments in general, see Execution of Instruments, II.
Presumption of intent to execute sealed bonds where such were authorized, see also Municipal Bonds ¶¶ 36, 37.

¶ 858. The mayor of a city is the proper party to sign a claim of appeal on probate from the probate court on behalf of the city.—City of Flint v. Stockdale's Estate, 149 Mich. 214.

¶ 859. It is the duty of the mayor of a city of the fourth class, either as chief executive under the provision of Pub. Acts 1895, No. 215, chap. 7, § 1, or as president of the common council under chapter 8, § 1, to obey the directions of the council in performing the ministerial act of executing a contract for a supply of water to the city, and mandamus will lie to compel the performance of that duty.—Monroe Water Co. v. Heath, 115 Mich. 277.

§ 195. Supervision, investigations, and accountings and liabilities.

Rights and remedies in case of misuse or diversion of public funds, see ante §§ 145, 146.
Right to follow and recover funds received from officer, see ante § 145.
General liabilities of officers, see Officers, VI.
Liabilities on the official bond, see Officers, VII.
Effect of failure to supervise or examine books as working release of bondsmen, see Officers, VII.
Liability of officers for neglect to take bond for security of laborers and materialmen on public contract work, see Public Contracts, VII.
Title or special interest of mayor to be relator in mandamus to delinquent officers, see Mandamus ¶ 779.

¶ 860. The common council of a city has a right to investigate the accounts of the police court judge and clerk in a matter of fees belonging to the city, and to have access for such purpose to the files and papers of the court.—Schwartz v. Barry, 90 Mich. 267.

¶ 861. Under Local Acts 1882, Act. No. 48, c. 7, § 3, authorizing the mayor of a city to examine and inspect the books, records, and papers of any employee or officer thereof; section 8, giving the city clerk charge of all books and documents relating to the accounts of the corporation; and chap. 8, § 14, authorizing the common council to cause all the corporate records to be deposited and kept in the office of the city clerk, so as to be convenient of access or inspection by any person interested, a city council may be authorized to inspect and audit the books for the board of water commissioners of such city, appointed pursuant to Local Acts 1903, Act No. 422, at a different time than that provided for in sec. 15 of the last named act, which requires such board to make and file with the city clerk a record on or before a certain day, as such provision does not restrict the exercise of the general powers inherent in the council to investigate the performance of their duties by its officers and agents.—Field v. Board Water Com'rs City of Manistee, 156 Mich. 186.

§ 196. Salaries and compensation in general.

Determining and fixing amount, see post § 197.
Increases, reductions and changes, see post § 198.
Deductions and set-offs and pay during leave, see post §§ 199, 200.
Pay during exclusion or improper suspension, see post § 201.
Extra pay and pay for extra services, see post § 202.
Compensable duties and compensations of municipal attorneys, see ante § 182.
General law respecting compensation and emoluments, see Officers, VIII.
Contractual or statutory nature of right to compensation, see Officers, VIII.
Right to collection fees in addition to stated salary, see also Officers, VIII.
Payment of salaries of employees of Detroit Museum of Art as devotion of public moneys to private object, see ante ¶ 613.
Compensation for injuries under Compensation Act, see Workmen's Compensation Law.
Nonliability to employees for injuries resulting from governmental acts or omissions, see also ante ¶ 537.
Duty of Wayne county auditors to allow claim for salary of officers of police court fixed by city, see Counties § 45.

¶ 862. The Village Incorporation Act, under which Cheboygan is incorporated, provides that officers, with certain exceptions, "shall receive such compensation as the council shall prescribe" (How. St. § 2825), and it specially authorizes the council to fix the

compensation of sewer commissioners and of the fire department. It also authorizes the appointment of a board of water commissioners, but says nothing about paying them, nor does the ordinance creating the board. Held, that the water commissioners are not entitled to a salary, nor to payment for any services done in the line of their official duty. —Perry v. Village of Cheboygan, 55 Mich. 250.

Municipal corporations as employers within Workmen's Compensation Acts, see note, 5 N. C. C. A. 904-912.

Municipal employees within the Workmen's Compensation Acts, see note, 8 N. C. C. A. 960-968.

§ 197. ——Determining and fixing amount.

Increases, reductions, and changes, see post § 198.

¶ 863. When the legislature has delegated to a city council the power to fix the salaries of city officers the passage of ordinances fixing the salaries of such officers constitutes the fixing of salaries by law.—Burton v. City of Detroit, 190 Mich. 195.

¶ 864. Merely appropriating, for the payment of a municipal salary, a less amount than had been paid before, is not to be construed as fixing the salary at the smaller sum, if the body making the appropriation continues to allow salary bills at the former rate.—Fountain v. City of Jackson, 50 Mich. 260.

¶ 865. Under the charter of Cadillac (Laws 1873, Act No. 178) the city council has the power to fix the salary of the health officer, and the board of health cannot bind the council by assuming to fix it instead.—Coleman v. Common Council, City of Cadillac, 49 Mich. 322.

¶ 866. In April, 1891, the council of a city adopted a resolution fixing an officer's salary for the year. In April, 1892 by a vote of six to five, one being absent, a resolution to fix the same salary was declared lost by the mayor; and in May, 1892, it attempted by a like vote, the mayor voting also, to pass a resolution fixing his salary at a lower rate, but such resolution was void because not adopted by a majority vote of all the aldermen-elect. The charter provided that the council should "annually" determine the salary to be paid to officers. Held, that the officer was not entitled to the rate fixed by the resolution of April, 1891, for work done after April, 1892, although the resolution of May, 1892, was void, but that mandamus would lie in his behalf to compel the council to determine his compensation for the year 1892.—Fournier v. Mayor, etc., of West Bay City, 94 Mich. 463.

¶ 867. Where a village council has not created the office of village attorney, Comp. L. 1897, § 2700, How., 2nd Ed., § 5919, providing for the appointment of officers by presidents of villages by and with the consent of the council, gives a village president no authority to appoint a village attorney, and where an attorney removed by a president is reappointed by the council, the village is bound to pay him such compensation as the council shall direct.—Gansser v. Vanderveen, 176 Mich. 517.

¶ 868. Local Acts of 1895, No. 366, § 4, empowering the board of estimates of Detroit to disallow any items or parts of items of the various estimates referred to it, and making it unlawful for the common council to expend any moneys as to items thus specifically disallowed, the city has no authority to pay an official the salary fixed by the common council after the board of estimates has reduced the amount.—Attorney General v. City of Detroit, 113 Mich. 494.

¶ 869. A city council was authorized by the charter to appoint such subordinate officers as might be necessary, and to fix their compensation. The charter further provided that, before any taxes should be levied for the purposes of any of the several funds of the city, the controller should present to the council his estimate of the amount necessary to be raised for the ensuing year for each of said funds; that the council might revise or alter said estimates, and, when finally adopted, should transmit the same to the board of estimates; and that such board should have the right to call upon the council or any municipal officer for information as to any matter pending before it. By subsequent enactment it was provided that the board should have the power, after consideration of the various estimates referred to it, to disallow any item in the different funds, and that it should be unlawful for the council to create any expenditure or expend any moneys as to items specifically disallowed by the board. Held, that, where the board had assumed to deduct the salaries of certain officers from the estimate for the general fund, appointments to said offices thereafter made by the council were illegal, and the payment of salaries thereunder would be enjoined though the estimates certified to the board were not itemized.—Robinson v. City of Detroit, 107 Mich. 168.

¶ 870. The Detroit city charter, § 604, confers upon the board of estimates of the city the power to approve or disapprove the amounts of the salaries of the officers, clerks, and employees of the board of education.—Burton v. City of Detroit, 190 Mich. 195.

¶ 871. Under Local Acts 1901, No. 474, as amended by Local Acts 1905, No. 617, § 1, amending the Detroit city charter, the board of estimates of the City of Detroit has no authority to interfere with the raising of moneys to pay salaries which have been fixed by law.—Burton v. City of Detroit, 198 Mich. 195.

¶ 872. The Detroit city charter, § 472, expressly confers upon the board of estimates the power to approve or disapprove the amounts of the salaries of the officers, clerks, and employees of the board of health.—Burton v. City of Detroit, 190 Mich. 195.

¶ 873. Where the commissioner of police of Detroit transmitted to the city controller his estimates for the police department, and therein was an item for "356 patrolmen, at $1,000, $356,000," which item was allowed by the common council, but reduced by the board of estimate to "356 patrolmen at $960, $341,760," and as so reduced the common council caused this latter sum to be assessed, levied, and collected by general taxation, the salary of the patrolmen was thereby fixed at $960 a year.—Carney v. Whelan, 147 Mich. 15.

§ 198. ——Increases, reductions, and changes.

Deductions and set-offs, see post § 199.
Effect of new charter to repeal salary ordinance, see ante ¶ 290.
Constitutional provisions as to alteration of salaries, see Constitutional Law § 268; Officers, VIII.
Effect of Home Rule Act in connection with constitutional provisions, see Officers, VIII.

¶ 874. The salary of a municipal officer, when once fixed in the manner prescribed by law, can be changed only by a like compliance with the statutory conditions; and by accepting a smaller amount than that to which he is entitled the officer does not waive his right to recover the full salary.—Ruell v. City of Alpena, 108 Mich. 290.

¶ 875. Under a charter authorizing the common council to fix the compensation of municipal officers, subject only to the provision that the salary of no officer shall be diminished "during the term for which he is elected or appointed," the council may, after the appointment of an officer, but before the commencement of his term, reduce the salary to a nominal sum in good faith.—Wesch v. Common Council of Detroit, 107 Mich. 149.

¶ 876. The charter of Jackson provides that the compensation of the superintendent of public works shall be fixed by the board of public works and approved by the common council. Held, that the council alone could not reduce it.—Fountain v. City of Jackson, 50 Mich. 15.

¶ 877. The charter of Detroit, by a provision made in 1871, forbids the reduction of the salary of any city officer during his term. Laws 1873, Act No. 392, creating a board of public works, provided that "each member of the board shall receive such salary per annum as the common council may from time to time establish." Held, that the provision in the charter had never applied to any public board, and could not restrict later legislation containing independent provisions concerning salaries; and that under the Act of 1873 the council could reduce the salary of a member of the board of public works during his term of office.—People ex rel. Chapoton v. Detroit Common Council, 38 Mich. 636.

¶ 878. Local Acts of 1893, No. 419, which provides for a law department for the city of Detroit, and for the appointment by the mayor of a city counsellor, is supplemental to the charter of said city, and does not disturb existing officers, but, on the contrary, constructs said department with material then on hand; and the provision respecting salary relates as well to the city counsellor acting before the act took effect as to the city counsellor subsequently appointed.—Speed v. Common Council of Detroit, 100 Mich. 92.

¶ 879. In the absence of a contrary allegation a city council will be presumed to have acted in good faith and upon sufficient reasons in reducing the salary of an officer from $1,200 to $5 a year.—Wesch v. Common Council of Detroit, 107 Mich. 149.

¶ 880. Under Local Acts 1905, No. 470, patrolmen in Detroit appointed under such act must be considered as officers and not employees and the term of their office is at least one year. The commissioner cannot reduce or increase the patrolman's salary as patrolman, and although he may reduce his grade and pay, until such reduction takes place, the patrolman is entitled to the compensation originally fixed by the commissioner.—Carney v. Whelan, 147 Mich. 15.

§ 199. ——Deductions and set-offs.

Pay for time excluded or suspended, see post § 201.

¶ 881. Where an alderman has received unlawful extra compensation, the mayor has no power to deduct it from the alderman's salary, and refuse to sign a warrant for the full amount.—Alberts v. Torrent, 98 Mich. 512.

§ 200. ——Pay during leave of absence.

¶ 882. In amending Local Acts 1905, No. 416, by adding section 34a providing that "the leave of absence of every policeman * * * shall be a furlough of twenty days," the legislature recognized an existing custom of the Detroit police department to grant a leave of absence of 10 days with pay. Inasmuch as this customary leave of absence carried with it full pay it must be concluded that the legislature intended the longer leave to be accompanied with pay.—Carney v. Whelan, 147 Mich. 15.

§ 201. ——Effect of unlawful exclusion or suspension from office.

¶ 883. A municipal corporation which has excluded a salaried officer from the perform-

ance of his duties is bound to pay him the salary.—Stadler v. City of Detroit, 13 Mich. 346.

¶ 884. A police officer is not entitled to compensation for services during the time he was suspended and during which time he had rendered no "actual service" under the charter and ordinances of Bay City.—Hawkins v. Bay City, 149 Mich. 268.

¶ 885. While an officer is entitled to the salary belonging to the office if prevented from filling it; yet since he can have only such salary as the law fixes for it, under the charter of the city of Saginaw (Local Acts 1889, p. 936), providing that police officers shall be paid such salary, for the time engaged in "active service," as shall be recommended by the board of police commissioners and approved by the common council, an officer who ceases to perform the duties of his office pending proceedings for reinstatement, after an invalid removal is not entitled on re-instatement, to salary for the time lost.—Wilkinson v. Common Council of Saginaw, 111 Mich. 585.

¶ 886. Where a mayor appointed a city attorney on the third Monday of April as required by the old charter of a city, but after the adoption of a commission form of government under a charter expressly declaring that all old officers should continue in office until the expiration of their terms or the appointment by the commissioners of their successors, such appointment is a nullity, and the previous incumbent is entitled to the salary of the office for the time it was paid the last appointee.—North v. City of Battle Creek, 185 Mich. 592.

¶ 887. The village of Fairview was annexed to defendant City of Detroit by an unconstitutional statute, and the city authorities took charge of the property and territory of the village and exercised governmental functions therein. Held, that plaintiff, an officer of the village at the time of the attempted annexation, was entitled to recover his salary for the period during which defendant exercised such functions under the unconstitutional statute.—Otto v. City of Detroit, 164 Mich. 532.

¶ 888. Detroit City Charter, 1904, § 662, provides that the police commissioner shall have power, for cause assigned and on public hearing and due notice, to remove and suspend from office, or for a definite time to deprive of pay, any member of the city force. Relator was suspended without hearing or notice on the basis of a criminal charge which had been made against him. Held, that upon acquittal of such charge, relator was entitled to his salary during the period of suspension.—Newberry v. Smith, 157 Mich. 181.

¶ 889. In a suit against a city by a police matron to recover salary after her attempted dismissal, she may properly testify as to whether she talked with members of the council and informed them of her rights after said dismissal, said evidence being competent on the questions of abandonment and acquiescence.—Rowell v. City of Battle Creek, 169 Mich. 19.

¶ 890. In a suit against a city by a police matron to recover salary after her attempted dismissal, evidence as to payment of salary to another matron is immaterial where by the statute more than one matron may be appointed.—Rowell v. City of Battle Creek, 169 Mich. 19.

¶ 891. The police commission attempted to discharge a police matron of the city of Detroit. She testified that her nonperformance of services thereafter was because the police department made it impossible for her to serve, and that she at all times held herself in readiness to perform her duties, and so notified the proper officers. Held, the question of her acquiescence in said attempted discharge was, in a suit for salary, one for the jury.—Rowell v. City of Battle Creek, 169 Mich. 19.

§ 202. Services or employment and compensation extraneous to office.

Waiver of claim for extra pay, see post § 203.

Right to pay for overtime, see Officers, VIII.

Right of policeman paid by city to claim from county fees for arrests for crime, see also Counties ¶ 126.

¶ 892. The mayor or a councilman of a municipality is not bound by his official position to give the municipality his professional services as an attorney without charge.—City of Niles v. Muzzy, 33 Mich. 61.

¶ 893. A mayor or councilman of a municipality may be employed by it as an attorney to defend a suit against it, and may recover the value of services rendered under such employment.—City of Niles v. Muzzy, 33 Mich. 61.

¶ 894. If the controller is made agent of the city to perform duties not properly pertaining to his office he is entitled to the like compensation for performing them that any other agent would have been.—City of Detroit v. Redfield, 19 Mich. 376.

¶ 895. A city officer is entitled to be paid for acts done, under appointment of the common council, outside of his official duty.—McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 896. A common council passed a resolution appointing a committee of its members to act with the city attorney, police justice and chief of police to revise the ordinances. The police justice was not, as such, a servant of the council, nor subject to their direc-

tions in rendering unofficial services. Held, that as he was appointed by a resolution of the council the committee had nothing to do with his employment beyond directing the labor, which, however, would bear on the amount of his services; nor were his duties imposed by the city attorney; he therefore had a right of action against the city for compensation.—McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 897. The appointment of a person, who holds office as a police justice, by the common council of a municipality to act with other named persons in revising the municipal ordinances, imposes upon him functions other than those for the performance of which he receives his salary, and hence entitles him to additional compensation; and in an action therefor it is error to charge that he was entitled thereto if the council accepted and adopted the revision, as if that was a condition of his being paid for his labor. So also with extra-official services in aiding the city to collect money from the county, unless his services were meant to be gratuitous. McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 898. A village officer cannot recover from the village for voluntary services outside the line of his duties, if rendered on his own responsibility, in a case in which he alone would not have been competent to hire their performance.—Perry v. Village of Cheboygan, 55 Mich. 250.

¶ 899. The provision of the charter of the city of Muskegon (Local Acts 1889, No. 304, tit. 5, § 40) which limits the compensation of aldermen for services, either as councilmen, aldermen, or otherwise, to a yearly salary of $100, prevents their receiving extra compensation while acting ex officio as members of the boards of registration or as inspectors of election.—Alberts v. Torrent, 98 Mich. 512.

¶ 900. Where there was a city ordinance providing for an eight hour day and a minimum wage, and the city charter provided that the commissioner of public works might employ such help in his department as the council had decided should be employed, a city is bound by a contract of hire whereby the commissioner agreed to pay overtime.—Gadd v. City of Detroit, 142 Mich. 683.

§ 203. Waiver or estoppel of claim for extra services.

Waiver of reduction or deduction, see ante ¶ 874.

Waiver of claim for overtime, see also Officers, VIII.

¶ 901. The presentation by a clerk in a city office of a bill for extra services, and its allowance, constitute a settlement of all claims by him for extra services prior to such time, where he accepts the sum allowed, and gives his receipt, without in any way indicating that he has a further claim.—Goodson v. Board of Health of Detroit, 114 Mich. 345.

¶ 902. Although Revised Ordinances of Detroit, chap. 47, § 1, provides that eight hours shall constitute a day's work for laborers, etc., employed by the city or by any of its boards or officers, yet an assistant engineer employed by common council in the city hall and kept at work for eleven hours daily cannot recover for the time over eight hours, where he signed the pay-roll calling for a fixed sum per day which corresponded to the amount of the annual estimate made by the board of estimate for his compensation; since by virtue of Detroit Charter of 1904, § 250, the common council is deprived of power to exceed the funds specifically appropriated for the particular objects.—Kobel v. City of Detroit, 142 Mich. 38.

XVI. ACTIONS AND SUITS BY AND AGAINST MUNICIPALITY.

A. IN GENERAL.

[Note. The law of actions and procedure, being general, does not admit of treating here all cases in which a municipality was one of the parties. Most of such cases present no law that is specific to municipal corporations and should be sought in the various procedural topics. See the cross-references under the sections following. As to actions involving the law of municipalities, but not having them as parties the same exclusion is necessitated for similar reasons. See the other divisions of this topic and also other topics referred to in the appropriate places. Nothing is proper to this division except such matters as pertain distinctively to actions in which a municipality is one of the parties.]

§ 204. Jurisdiction, power and capacity of municipality.

Officers authorized to control litigation and employ counsel, see ante § 187.

Jurisdiction of prosecutions for violations of ordinances, see post § 218.

General law of jurisdiction, see Courts, V.

Matters within jurisdiction of superior or other local courts as involving city or its officers, see Municipal Courts § 6.

Justices' jurisdiction of actions by and against municipalities, see Justices of the Peace § 25.

Set-off in justices' court against municipality, see Justices of the Peace, § 98.

Liability to or immunity from garnishment, see Garnishment § 13.

¶ 903. The provision in a city charter (in this case St. Clair) that the corporation may sue and be sued in all courts of law and equity, etc., will not confer jurisdiction upon all courts. Such a provision must be understood to mean in all courts of law and equity

having jurisdiction of the case.—Gurney v. City of St. Clair, 11 Mich. 202.

§ 205. Rights of action and prerequisites.

[Note. The question whether a given right of action exists and is mature is mainly one of substantive law or of general law not peculiar to municipalities. See such topics as Highways, XII; Injunctions, II; Public Contracts; and see substantive and remedial topics treating of the right in question.]

Presentation and notice of claim as prerequisite to action on it, see ante § 148 et seq.

Time for suit, see post § 206.

Rule of judicial noninterference with or control of municipal administrative functions, see ante § 34.

Suits for sums due for water service, see Waters, VI.

§ 206. Time for suit and limitations.

Time for notice or presentment of claim, see ante § 150.

Reasonableness of time for consideration of claim after presentment and before suing thereon, see ante § 151.

General law of limitations of actions, see Limitations.

General law of laches, see Equity, IV.

Applicability of limitations to actions by or on behalf of city, see Limitations § 26.

Adverse possession of land by or against municipality, see Adverse Possession, I, II.

Prescription of easements or against them, see Easements; Highways, II, A.

¶ 904. Where, after the presentation to a city council of a claim for taxes paid under protest, four meetings of the council are held without any action being taken regarding the claim, a suit brought at the expiration of thirty-six days from such presentation, and two days after the last council meeting, is not premature, under a charter provision barring such action if commenced before the council has had a reasonable time to investigate and pass upon the claim.—Whitney v. City of Port Huron, 88 Mich. 268.

¶ 905. Local Acts 1895, No. 444, requiring notice of sidewalk injuries to a city and fixing the statute of limitations at one year does not apply to injuries sustained prior to its taking effect.—Broffee v. City of Grand Rapids, 127 Mich. 89.

¶ 906. Since under Comp. L. 1897, § 9985, there must be personal service of a copy of the declaration in a suit commenced by filing and serving declaration, a suit against a city is barred at the end of the statutory year, where service on the controller was set aside and proper service not obtained until after the year.—Wilton v. City of Detroit, 138 Mich. 67.

¶ 907. There is not a commencement of suit within a year from the time of the injury, where it occurred on November 16, 1903, and the suit was commenced by summons issued on November 15, 1904 and served on the controller on that day but not served by an officer in the regular way until the following December.—Dedenbach v. City of Detroit, 146 Mich. 710.

¶ 908. Where the city and a claimant for damages received upon a defective sidewalk, treated an investigation as though made within a reasonable time and the delay caused by the investigation resulted in a suit being barred by a limitation of the city's charter, the city was precluded from setting up the statute as a defense to the action.—Springer v. City of Detroit, 118 Mich. 69.

¶ 909. The defense of the City of Kalamazoo that the personal injury action in question was barred by the charter provision limiting the commencement of such actions to four months from the occurrence, was not waived by the reference of the claim, which was received after the expiration of the limited period, to a committee which fixed a time and a place for a hearing.—Woodworth v. City of Kalamazoo, 135 Mich. 233.

¶ 910. The provisions of the City of Kalamazoo charter, requiring personal injury cases to be brought within four months, were not waived by advertising for claims against the city, under an ordinance requiring the city clerk to advertise that claims for the current year must be filed before a stated day.—Woodworth v. City of Kalamazoo, 135 Mich. 233.

§ 207. Remedies and forms of action.

Proper remedy to prevent improper governmental act, see also ante ¶ 572.

Following and recovering public funds, see ante § 145.

Remedies of taxpayers and attorney general for misuse of funds, see ante § 146.

Remedies for enforcement of claims, see ante § 161.

Prosecutions and penal actions for violations of ordinances, see post XVI, B.

Injunctions to restrain acts of municipalities and public officers, see also Injunctions II, D.

Injunction against enforcement of invalid ordinance, see Injunctions, II, H.

Mandamus to compel performance of official duties, see Mandamus, III.

Mandamus by one municipality against another, see Mandamus ¶ 622.

Remedies and procedure to enforce or collect bonds, see Municipal Bonds § 22.

Actions against delinquent water patrons, see Waters, VI.

Sufficiency of execution of agreement for arbitration to bind city, see Arbitration ¶ 17.

¶ 911. Where a city contests all liability as well as the amount claimed to be due plaintiff as his share of the surplus above

the expense of a public improvement, which surplus has been turned into the city's general fund instead of being apportioned and paid over as the charter requires, mandamus to compel the common council to apportion and pay over is not the only remedy, but assumpsit lies.—Thayer v. City of Grand Rapids, 82 Mich. 298.

¶ 912. A Michigan municipal corporation may be sued in the federal courts on a liquidated demand, as in such courts a judgment is an essential prerequisite to a mandamus, while in the state courts it is not.—Township of Chickaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 600.

¶ 912a. The fact that a municipal contract is awarded to one other than the lowest bidder thereon does not give to the latter a right of action at law to recover profits which he might have made had his bid been accepted, although the charter of the municipality requires that such contracts be let to the lowest responsible bidder.—Talbot Paving Co. v. City of Detroit, 109 Mich. 657.

§ 208. Suits by attorney general.

Power of attorney to appear against municipality, see ante § 182.

Power of attorney general to proceed to prevent action under invalid ordinance or resolution, see ante § 73; and see also Injunctions § 102.

¶ 913. The failure of a municipal council to follow strictly the provisions of their charter in making a public contract does not warrant the state in interfering by its attorney general to set aside the contract, if it does not appear that the council acted in bad faith and sought to usurp authority, or that any loss to the public or injustice to individuals would result from the arrangement made.—Attorney General v. Detroit, 55 Mich. 181.

¶ 914. The remedy by action at law by the city being adequate, an information by the attorney general to compel city officers to pay back to the city treasury money unlawfully taken therefrom, will not lie.—Attorney General v. City of Detroit, 107 Mich. 92.

§ 209. Taxpayers' suits on behalf of municipality.

Interest entitling taxpayer to restrain action by city, see also Injunction § 21.

Application of clean hands maxim to taxpayer suing for injunction, see also Equity ¶ 23.

Effect of taxpayer's injunction suit to bind city, see Former Adjudication, § 59.

¶ 915. The owners of taxable property may maintain a bill to enjoin the municipality in which it lies from executing a contract if its effect would be to increase their burdens by way of taxation to an amount sufficient to bring the case within the jurisdiction of equity.—Putnam v. City of Grand Rapids, 58 Mich. 416.

¶ 916. Injunction to prevent the construction of a bridge by a city will not be granted at the instance of a taxpayer on the ground that its construction has not been authorized by the board of supervisors of the county.—Kundinger v. City of Saginaw, 132 Mich. 395.

§ 210. Process, service, and commencement of actions.

General law of process and rules for service on municipalities, see Process.

Mode of commencing suit against municipality, by writ or by filing and serving declaration, see Process, I.

Commencement of actions for purpose of limitations, see Limitations, V.

§ 211. Appearance or intervention.

General law of appearance, see Appearance.

Interventions in general, see Parties.

¶ 917. A city attorney cannot bring the corporation into court by filing a brief in a case in which the city is not impleaded.—People ex rel. Attorney General v. Hatch, 60 Mich. 229.

§ 212. Name or title in which to sue or defend.

Name in which complaint for violation of ordinance is to be made, see post § 219.

Name in which penal process should run, see post § 219.

Suits in name of municipality for penalties under statutes, see also Penalties.

Right of ward supervisor to sue under statute empowering "supervisor," see Animals ¶ 11.

Amendment to cure misnomer, see Pleading, VI.

¶ 918. A suit on behalf of a village should ordinarily be brought in its corporate name, but exceptions may be made by statute. And under a statute making the president and trustees ex officio commissioners of highways, with the like powers and duties as township commissioners, a suit on behalf of the village against mill owners, for the expenses of constructing a bridge on a street across their mill-race, should be brought by them in their name of office as commissioners, and not in their name as a common council; but where suit has been brought in the latter name the misnomer may be cured by amendment.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 919. It is competent for the legislature to direct in what name suits by a municipal corporation shall be brought.—Smith v. Village of Adrian, 1 Mich. 495; Village of Romeo v. Chapman, 2 Mich. 179.

¶ 920. Under the act incorporating the village of Romeo (Laws 1837-38, p. 87), a suit

to recover a penalty under R. S. 1846, ch. 41, should have been brought in the name of the "Village of Romeo," instead of the "President and Trustees of the Village of Romeo," which was the corporate name of the village authorities.—Village of Romeo v. Chapman, 2 Mich. 179.

¶ 921. Where a bequest had been made to the "corporation of the village of New Baltimore," and a probate order granted leave to sue upon the residuary legatee's bond "for the use and benefit of the common council of New Baltimore," suit was properly brought for the use and benefit of the village of New Baltimore.—Hatheway v. Sackett, 32 Mich. 97.

§ 213. Pleading and trial practice.

Name in which to sue or defend, see ante § 212.

Evidence, jury questions, and instructions respecting claim and notice thereof, see ante § 157.

For matters of pleading, evidence, or trial practice in which the public corporate character of the party is not a controlling or distinctive factor, see Pleading; Evidence; Trial; Instructions; and other like topics.

Amendment to plead ultra vires, see Pleading, VI.

Necessity for specially pleading ultra vires, see Pleading, III, IX.

Evidence and questions of fact as to bona fide transfer of municipal bonds, see Municipal Bonds § 16.

Pleading, trial and judgment in actions on bonds, see Municipal Bonds § 23.

Taxpayers as jurors in actions involving city, see Jury § 27.

Sufficiency of pleadings in suit by village on representative's bond, see Estates of Decedents ¶ 1239.

Disclaimer as proper pleading by city in suit to quiet title to alley in which it has no claim, see Equity § 111, ¶ 395.

Pleading existence of private corporations, see Corporations §§ 189, 193.

Discretion to allow calling of witnesses not named in claim as filed, see Trial, V.

General rules of practice in negligence cases, see Negligence, V; Highways, XII, H.

¶ 922. In an action against a village a declaration which describes defendant as "the village of North Muskegon, a municipal corporation of the state of Michigan," sufficiently alleges its corporate existence and character.—Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 923. A defense that a verified claim for personal injuries was not presented as required by statute (Pub. Acts 1895, No. 3, chap. 5, § 7), may be shown under the plea of the general issue.—Clark v. Village of Davison, 118 Mich. 420.

§ 214. Judgments and costs and enforcement of same.

Addition of judgments to tax levy for ensuing year, see ante § 138.

General law of judgments, see Judgments.

Proper judgment and relief on particular causes of action, see specific topics treating of the cause of action, e. g., Nuisances, III; Injunctions, V; Mandamus § 171 et seq.

Nonliability of city for costs in action by officer without authority, see Costs § 12.

Costs in suits by or against municipality or officers in chancery, see Costs § 37.

Right to costs on recovery of less than ordinary statutory limit, see Costs § 19.

Mode of enforcing costs charged against city or village, see Costs § 152.

Mandamus to enforce payment of judgments, see Mandamus ¶¶ 633, 634.

Addition of judgment to next tax levy, see ante § 138.

¶ 924. Judgment against a city for damages for injury from a defective sidewalk must now be enforced under Laws 1887, Act No. 312 (How. St. § 8218), providing generally for the collection of judgments against municipal corporations.—Shippy v. Mason, 90 Mich. 45.

B. ENFORCEMENT OF ORDINANCES AND PROSECUTIONS FOR VIOLATIONS.

§ 215. In general; violations and defenses.

Power of municipality to define offenses and prescribe procedure and punishments, see ante IX, E.

Construction of ordinances to determine unlawfulness of acts charged or proven, see ante § 54.

Liabilities for violations of ordinances, see ante § 69.

Nonliability of city for neglect to enforce ordinances, see ante § 125.

Nonliability to private persons for violating snow-cleaning ordinance, see ante ¶¶ 303, 304.

Crimes under general laws of the state as distinguished from violations or ordinances, see Crimes.

Noncriminal nature of prosecution, see post § 217.

Pleading defenses to complaint, see post § 223.

Prosecutions for nuisances under ordinances, see also Nuisances, IV.

Restraining enforcement of ordinances, see Injunctions, II, H.

Restraining breach of ordinances, see Injunctions § 93.

Advice of counsel as justification for prosecution under ordinance, see Malicious Prosecution § 10, ¶¶ 45, 46.

¶ 925. Under an ordinance regulating auctioneers, a pawnbroker cannot be charged as a principal in a violation thereof, he being outside the designation fixed in the ordinance.—People v. Meisner, 178 Mich. 115.

¶ 926. Where a city ordinance prohibited the depositing of objectionable matter named in the streets and alleys, and also provided that in case any of the matter shall be so deposited it shall be the duty of the owner or occupant of the premises within 24 hours after notification to remove it, in a prosecution for a violation of such ordinance, a conviction may be sustained without showing that the defendant had been notified to remove the matter, the second provision being intended to accomplish the abatement of the nuisance, and a compliance with the order to remove would not relieve from a penalty incurred by a violation of the first part of the ordinance.—People v. Bennett, 83 Mich. 457.

¶ 927. Inasmuch as the validity of an ordinance does not depend on a completely successful enforcement of its provisions it is no defense to show that there are other violators who have not been convicted, or that those whose duty it is to perform the duties required by it have fallen short, through inattention or intentional omission or neglect. —People v. Gardner, 143 Mich. 104.

¶ 928. It is no defense to a violator of an ordinance that others also are violating it.—City of Monroe v. Postal Tel. Co., 195 Mich. 467.

¶ 929. The question of the validity of a contract made under an ordinance by the board of health, giving the exclusive right to remove garbage for a period of years with the right of renewal, cannot be raised by a defendant in a prosecution for removing garbage in an open vehicle without a license in violation of such ordinance regulating the removal of garbage and providing that a contract for the removal of garbage might be entered into by the board of health. —City of Grand Rapids v. De Vries, 123 Mich. 570.

¶ 930. Under an ordinance providing that "no owner, or occupant, or other person having control" of premises "shall allow any nuisance to exist" thereon, an owner of the premises in possession of a tenant cannot be held criminally liable on its violation.—People v. Kent, 151 Mich. 134.

§ 216. Penal action of debt for violation.

General law of penal actions, see Penalties.
Penal actions under liquor laws, see also Intoxicating Liquors § 74.

¶ 931. Under section 3090, Comp. L. 1897, How. St., 2nd Ed., § 5612, an action of debt will lie against a corporation for the violation of a municipal ordinance providing for a fine and imprisonment.—City of Owosso v. Michigan Cent. R. Co., 183 Mich. 688. (Ostrander, J., dissenting.)

§ 217. Civil or criminal nature of prosecution.

See also post ¶ 942.
With respect to form of verdict allowable, see post ¶ 965.

¶ 932. Prosecutions for offenses under city ordinances are not "criminal cases" as that term is used in the law.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422; People ex rel. Fennell v. Bay City Common Council, 36 Mich. 186.

¶ 933. Prosecutions for violations of city ordinances are not criminal cases within the meaning of the term as used in the general laws of the state.—People v. Smith, 146 Mich. 193.

¶ 934. Where a city charter authorizes a city to prosecute civil suits in its own name for the violation of city ordinances, a criminal prosecution before a justice for the violation of an ordinance cannot, on appeal, be transformed into a civil suit, nor can the original criminal sentence be affirmed on the civil side of the appellate court.—Webster v. City of Lansing, 47 Mich. 192.

¶ 935. Offenses against city ordinances are not "criminal cases," and the expenses of detaining persons arrested for such offenses are not county charges, but city expenses.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422.

§ 218. Jurisdiction of prosecution.

Place for trial of cases under ordinances, sittings at station houses, see Municipal Courts ¶ 43.
Civil or criminal nature of the jurisdiction, see also ante § 217.
Proper court in which to have review of judgment, see post §§ 232, 233.
Criminal jurisdiction in general, see Indictment, III.
Distinction of cases under city ordinances from general subjects of police court jurisdiction, see also Municipal Courts ¶ 41.

¶ 936. It was not the intent of the legislature by the passage of Local Acts 1893, No. 408, which amended certain sections of the charter of the city of Detroit, to take from the police court of said city jurisdiction to hear, try, and determine cases arising under the city ordinances, which is conferred by Laws 1885, Act No. 161, § 10; where the expressed purpose of the later act was an amendment of a Local Act of 1883 establishing a charter for the city, and where there is no inconsistency with the law of 1885.—In re Busbey, 105 Mich. 64.

¶ 937. The Recorder's Court of Detroit has jurisdiction of prosecutions for violations of ordinances enacted by virtue of contract relations existing between the city and the owners of public franchises, as well as of those for violations of ordinances adopted under the police power of the common council, since both classes of ordinances are within the city's powers, and the court has by Detroit Charter of 1893, § 249, jurisdiction of trials for violation of ordinances. —People v. Detroit Citizens' St. R. Co., 116 Mich. 132.

§ 219. Complaint, process, arrest, and bail.

Charging part of complaint, see post § 221.
Separation and joinder of charges and counts, see post § 220.
Issues and variance under complaint, see post § 222.
Pleas and objections to complaint, see post § 223.
Trial and trial practice on complaint, see post § 224 et seq.
Name in which complaint is to be entitled, see also ante ¶ 934.
Complaints for crime, see Arrest, III; Indictment, I, XVIII.
Arrest for crime and bail thereon, see Arrest.
Warrants for arrest for crime, see Arrest, IV.
Arrest without warrant for violation of ordinance as due process, see Constitutional Law, V.
Justification of arrest for violation, see also False Imprisonment.
Illegal arrest for violation of ordinance as false imprisonment, see False Imprisonment § 6.
Admission to bail by municipal court clerk, see Comp. L. 1915, § 15701.

¶ 938. Suits commenced by complaint and warrant for the violation of village ordinances, under How. St. § 2839, are in the nature of criminal proceedings, and may be commenced and prosecuted in the name of the people of the state of Michigan.—People v. Vinton, 82 Mich. 39.

¶ 939. Prosecution of an action for violation of a city ordinance to judgment in the name of the village, and, after its appeal, in the name of the people, is not ground for reversal, especially where no objection is made until after adverse verdict in appellate court.—People v. Vinton, 82 Mich. 39.

¶ 940. Under a village charter contemplating process for the arrest of one charged with rescuing impounded animals, substantially like the warrant of arrest for offenses triable by justices of the peace, a warrant commanding the officer to arrest the person named and bring him before the justice to answer a complaint filed against him, etc., "in a plea of debt for the penalty to their damage of $50," etc., is not regular.—Sheldon v. Hill, 33 Mich. 171.

¶ 941. Where the charter of a village fails to provide for the style of process issued to enforce its ordinances, but provides that the village shall in all things not otherwise provided for in the charter be governed and its powers and duties be defined by the general law for the incorporation of villages, a warrant for the arrest of an alleged violator of a village ordinance may properly run in the name of the people of the state of Michigan, as provided by How. St. § 2839.—Village of Vicksburg v. Briggs, 85 Mich. 502.

¶ 942. The charter of Charlotte requires suits for penalties under liquor ordinances to be brought in the corporate name. Held, that such suits are not criminal prosecutions, but penal actions on the part of the city, and cannot be maintained in the name of the people of the state of Michigan.—Cooper v. People, 41 Mich. 403.

¶ 943. The remark in Quinn v. Heisel, 40 Mich. 577, that the court "is not at present prepared to say that an ordinance of the city of Grand Rapids could not authorize arrests without process in cases not justified by common-law principles," was mere dictum.—Burroughs v. Eastman, 101 Mich. 419.

¶ 943a. A complaint for violating wharfing regulations is not valid which merely shows that a party has refused to obey the orders of a harbor-master; it must show such conduct as is a violation of the rights of navigation and aver such facts as would justify the orders and render disobedience wrongful.—Horn v. People, 26 Mich. 221.

§ 220. Separation and joinder of charges and counts.

Rules for separation and joinder in general civil and criminal cases, see Pleading, II; Indictment, I, C.

¶ 944. Separate and distinct offenses, committed on different days, cannot be alleged in the same complaint and warrant.—Tiedke v. City of Saginaw, 43 Mich. 64.

¶ 945. Separate and distinct offenses, committed on separate days, may be charged in different counts of an information, but the prosecutor must elect on which count he will proceed.—Tiedke v. City of Saginaw, 43 Mich. 64.

§ 221. Substantial or charging part of complaint.

Substantial portions of indictments and informations, see Indictment, I, B.
Averments necessary to bring accused within statutory offense, see also Indictment ¶ 133.

¶ 946. A complaint under a city ordinance, charging a person as an "omnibus agent" with conduct forbidden to an omnibus agent when acting as a porter or runner for a hotel, but not averring that defendant was then acting in each capacity, is fatally defective.—Napman v. People, 19 Mich. 352.

¶ 947. A complaint and warrant, charging that on a specified day, and at "the McElvein House, in said village," the defendants used loud, boisterous and profane language, and that one of them delivered to the other a knife to enable him to make an assault upon a third person, and that he thereupon made such assault, whereby the defendants did commit and promote a disturbance, and did break the peace and quiet of said village, contrary to the provisions of a specified ordinance, entitled "an ordinance relative to dis-

turbances and breaches of the peace," giving the date of its adoption, sufficiently set out an offense under How. St. § 2841.—Village of Vicksburg v. Briggs, 85 Mich. 502.

¶ 948. Where a complaint under a city ordinance punishing "any person who shall make any disturbance by which the peace and good order of the neighborhood are disturbed," etc., charges that the person complained of "was and is a disorderly person," for that she was on a specified day, at said city, "making and assisting in making a noise, disturbance, and improper diversion, by which the peace and good order of the neighborhood were disturbed," it is sufficient, and the words "disorderly person" may be treated as surplusage.—In re Bushey, 105 Mich. 64.

¶ 949. A complaint charging generally that the respondent was "guilty of indecent, insulting and immoral conduct, and behavior by peeking into the windows of" an occupied house, which was not his residence, sufficiently charges a violation of an ordinance against "indecent, insulting, or immoral conduct in any public street or elsewhere," though no unlawful or improper purpose is stated.—City of Grand Rapids v. Williams, 112 Mich. 247.

¶ 950. In a complaint under a city ordinance the place of the offense is sufficiently designated as "a house on the corner" of two specified streets within the city.—City of Grand Rapids v. Williams, 112 Mich. 247.

¶ 951. A complaint charging that defendant was "found loitering about in common barrooms and wandering about the streets by day and by night, without being able to give any satisfactory account of himself" for a period of two weeks, did not purport to charge vagrancy, and was therefore not subject to the objection that it failed to conform to the settled definition of vagrancy.—In re Stegenga, 133 Mich. 55.

§ 222. Issues and variance.

Surplusage, see also ante ¶ 948.
Disability to try title to land in prosecutions under ordinances, see also Municipal Courts § 9.
Under indictments or informations, see Indictment, I, E.
Under civil pleadings, see Pleading, IX, X.

¶ 952. A city ordinance provided that moving picture and other shows should not be operated without a license and stated that no permit should be given them to show on Sunday. Defendant had a license and conducted his picture show on Sunday. He was prosecuted under the ordinance for running his show without a license. Held, the conviction must be reversed as the offense committed was not the one charged.—City of Lansing v. Brown, 172 Mich. 50.

§ 223. Pleas and objections to complaint.

Proper and available defenses, see ante § 215.
Pleas and objections to declarations, see Pleading, III, IV.
Pleas and objections to indictments, see Indictment, I, D, V.

¶ 953. In a prosecution before a justice of the peace for rescuing animals from a pound, the offenders should be required to plead to the charge contained in the warrant for arrest, rather than to the complaint on which the warrant was issued.—Sheldon v. Hill, 33 Mich. 171.

¶ 954. In a prosecution for keeping a saloon contrary to an ordinance, an objection that the warrant issued on a complaint based on information only, where it is shown that positive sworn testimony was taken by the justice before he issued the warrant, is waived by a plea of not guilty.—Village of Sparta v. Boorom, 129 Mich. 555.

§ 224. Time for trial and adjournments.

Continuances in ordinary civil and criminal cases, see Continuances; Indictment § 651.
Repudiation of postponement procured by attorney, see Attorneys ¶ 84.

¶ 955. Where the charter of a village fails to provide for or regulate the adjournment of causes commenced by warrant for the violation of ordinances, the proceedings are so far in their nature criminal, where commenced by the arrest, that the trial, unless otherwise provided for, should be controlled by the provisions of law relative to criminal proceedings before justices of the peace, where the statute authorizes the trial of the person arrested in justice's court, which trial should be had within one week after the return of the warrant, pursuant to How. St. § 7094, unless longer deferred for reasons stated in said section.—Village of Vicksburg v. Briggs, 85 Mich. 502.

¶ 956. The receipt of a telegram from an attorney as counsel for the village, and from an attorney who claimed to be the attorney for the defendants, but whose authority they denied, requesting a longer adjournment than one week, will not authorize such an adjournment.—Village of Vicksburg v. Briggs, 85 Mich. 502.

§ 225. Prosecutors and assistant counsel.

¶ 957. An objection on trial of an appeal from a conviction in justice's court for violation of a village ordinance, to the appearance by authority of the village attorney of an attorney who is not admitted to the bar, to prosecute the case, without a formal resolution of the village council, is properly overruled; no prejudice being shown on the part of such attorney.—People v. Vinton, 82 Mich. 39.

§ 226. Juries and jury trials.

General law of juries, see Jury.

Jury trial in criminal proceedings before justices of the peace, see Indictment § 652.

Propriety of jury trial notwithstanding waiver, see Jury, I.

Waiver of jury in prosecutions for breach of ordinances, see Jury § 10.

Jury trial as part of due process in prosecution for violation of ordinance, see also Constitutional Law § 131.

Duty of jury to follow instructions, see Instructions ¶ 13.

¶ 958. Juries in the Detroit recorder's court are not judges of the law and facts in prosecutions for violating ordinances, though in a police court they might be.—People v. Gardner, 136 Mich. 693, aff'd in 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106.

¶ 959. In a prosecution for the violation of a city ordinance where the violation of the ordinance is admitted and the only questions upon which a verdict was sought by the defendant were those bearing upon the validity of the ordinance, the court may properly direct a verdict of guilty.—People v. Gardner, 143 Mich. 104.

§ 227. Evidence.

For the general law of evidence and witnesses, see Evidence; Examination of Witnesses; Trial, V; Witnesses; and for criminal evidence, see Indictment, VIII.

Judicial notice and subjects thereof, see Evidence, I.

Judicial notice of municipalities, see Evidence, I; Indictment § 128.

Sufficiency of evidence of existence of alley in prosecution for obstructing, see Highways ¶ 700.

¶ 960. On a trial before the court without a jury for depositing manure in an alley contrary to the ordinance, evidence that the manure piles were offensive to occupants of adjacent premises is immaterial, but the admission thereof must be regarded as harmless error where there is ample uncontradicted evidence to justify the conviction.—People v. Bennett, 83 Mich. 457.

¶ 961. Evidence that police officers and city officials have been lax and discriminating in their enforcement of a municipal ordinance is inadmissible upon the trial of one charged with a violation of such ordinance.—People v. Baker, 115 Mich. 199.

¶ 962. Where the gist of the offense against the defendants for violation of an ordinance is that by carrying red flags in a parade they infuriated the public, and caused disorder, evidence that the people of the city considered red flags as the symbol of anarchy is material.—People v. Burman, 154 Mich. 150.

¶ 963. It is competent to identify accused prosecuted for "indecent, insulting, or immoral conduct" contrary to an ordinance, to show that witnesses observed him in the act, and that a half or three quarters of an hour later they attempted to detain him, and that he broke away and escaped.—City of Grand Rapids v. Williams, 112 Mich. 247.

¶ 964. Evidence that, at a late hour, respondent left the public sidewalk, proceeded to a lighted residence some six feet distant, and looked into a window, the shade to which was raised from six to twelve inches, is sufficient to establish the offence, under an ordinance of "indecent, insulting or immoral conduct or behavior in any public street or elsewhere" in the city.—City of Grand Rapids v. Williams, 112 Mich. 247.

§ 228. Verdict and findings.

Direction of verdict, see also ante ¶ 959.

Judgment and sentence, see post § 229.

General law of verdicts and findings, see Verdicts and Findings.

¶ 965. While prosecutions for the violation of city ordinances are not criminal in the sense that they are the enforcement of general criminal laws they partake of the nature of criminal proceedings, including a verdict of guilty or not guilty as charged, so that the practice of securing by way of findings a number of special verdicts is unwarranted.—People v. Smith, 146 Mich. 193.

§ 229. Judgment or sentence, punishments and penalties.

Finality and character of judgment essential to review, see post § 235.

Judgment as bar to prosecution for crime, see Crimes § 18.

Judgment in action for penalty as bar or evidence in civil action, see Former Adjudication § 11.

Conclusiveness of decision that compliance with ordinance is mechanically impossible, see Former Adjudication ¶¶ 194, 195.

Unlawful commitment after trial and conviction as false imprisonment, see False Imprisonment § 16.

Costs and expenses, see post § 230.

Execution on judgment for penalty or fine, see Jud. Act, chap. XXXV, §§ 4, 41-43; Comp. L. 1915, §§ 13396, 13433-13435.

Proper sentence and judgment in minor criminal cases, see Indictment § 656.

Arrest and imprisonment for debt, see generally Civil Arrest.

¶ 966. Where one is convicted before a justice of rescuing animals from a pound, a judgment of imprisonment forthwith, in case of nonpayment of the fine imposed, is void under a law which simply authorizes the immediate issue of execution commanding "the amount of the fine to be made of the defendant's property, if any can be found, and if not, then to commit the defendant to

prison, if so adjudged according to law."—Sheldon v. Hill, 33 Mich. 171.

¶ 967. It seems that a woman cannot be imprisoned for a mere violation of a municipal ordinance where the act was not of a criminal nature.—City of Ishpeming v. Maroney, 49 Mich. 226.

¶ 968. In an action for false imprisonment of plaintiff, a woman, by defendants, a justice of the peace who sentenced her and the sheriff who executed the sentence, for violation of a municipal health ordinance prescribing a fine or imprisonment for a violation thereof, promulgated under authority of Comp. L. 1897, § 3131, How. 2nd Ed., § 5653, empowering the municipality to prescribe penalties for violation of any law, rule or regulation made by its board of health or any officer thereof and §§ 4412, 4459, How. 2nd Ed., §§ 3109, 3155, declaring any such violation a misdemeanor, held that such proceeding against plaintiff was not civil process within Comp. L. 1897, § 10342, How. 2nd Ed., § 13043, exempting a female from imprisonment on any process in any civil action, and verdict for defendants was properly directed.—Stewart v. Hart, 196 Mich. 137.

¶ 969. A conviction of keeping open saloon on Sunday, under a city ordinance repealed by the general liquor law of 1887 is of no force, and hence does not bar a prosecution under that statute.—People v. Furman, 85 Mich. 110.

§ 230. Costs and expenses.

See also ante ¶ 935.

City or county liability for costs and expenses, see also Counties § 33.

Expense of keeping prisoners as city or county charge, see Counties § 35.

Adjudgment of costs of prosecution against city on prosecution brought in name of people, see Indictment ¶ 2403.

¶ 970. Upon the setting aside of a verdict and the discharge of the respondent, found guilty of violating an ordinance in proceedings brought under Comp. L. 1897, § 2761, which provided for prosecution by warrant and in the name of the people and that such proceedings shall be governed by the law governing criminal proceedings in justice court, an award of costs of both courts to the defendant, entered in the formal order, will be set aside on motion.—Village of Sparta v. Boorom, 129 Mich. 555.

§ 231. Disposal of fines when realized.

Applicability of moneys received from fines and paid into county treasury for library purposes, see Counties § 38.

¶ 971. Fines collected by the city authorities of Bay City on prosecutions before the recorder for violations of city by-laws do not belong in the county treasury.—People ex rel. Fennell v. Bay City Common Council, 36 Mich. 186.

§ 232. Appeal and review.

Certiorari or exceptions as modes of review, see post §§ 233, 234.

Right to review and waiver of the right, see post § 235.

Record, transcript, and return, see post §§ 236, 237.

Practice and trial on appeal to circuit, see post § 238.

Scope and extent of review, see post § 239.

Harmless error and ground for reversal, see post § 241.

Appeal and review of criminal judgments in minor trials before justices and magistrates, see Indictment § 662 et seq.

¶ 972. The right of appeal from the judgment of a justice of the peace to the circuit court of a county in a prosecution for violation of a city ordinance does not exist at common law.—Crary v. Marquette Circuit Judge, 197 Mich. 452.

¶ 973. The right of appeal from a judgment of a justice of the peace of a city in a prosecution for violation of an ordinance to the circuit court of the county is clearly conferred by the Home Rule Act, Pub. Acts 1909, No. 279, § 30, How. 2nd Ed., § 5471, providing that in all suits and prosecutions arising under the ordinances and charter of the city for which such justice is elected the right of appeal from such justice's court to the circuit court of the county shall be allowed as in case of appeal from justices' courts in analogous cases.—Crary v. Marquette Circuit Judge, 197 Mich. 452.

¶ 974. The right of appeal from a conviction in a justice court for violation of a city ordinance exists.—Crary v. Marquette Circuit Judge, 197 Mich. 452.

¶ 975. Convictions under city ordinances in the recorder's court of Detroit are not reviewable on writ of error.—People v. Jackson, 8 Mich. 78; Jackson v. People, 8 Mich. 262.

¶ 976. There may be a review by the supreme court upon a writ of error where after a conviction in the justice's court there has been an appeal to the circuit court, and a judgment there.—People v. Smith, 146 Mich. 193.

¶ 976a. Error is the appropriate remedy in most cases to review the final judgment of a court of law, and is appropriate after a conviction in the justice's court for the violation of a city ordinance where there has been an appeal and judgment in the circuit court.—People v. Smith, 146 Mich. 193.

¶ 977. Respondent was convicted of violating a village ordinance and sought to review the record of his conviction upon exceptions before sentence brought to the

supreme court by writ of error. Held, his case should be dismissed, and the trial court advised to proceed to judgment.—People v. Kohler, 168 Mich. 148.

§ 233. ——Certiorari.

Right to seek review and waiver of right, see post § 235.
Scope and extent of review, see post § 240.
General law of certiorari and practice thereon, see Certiorari.

¶ 978. The statutory certiorari does not lie in special proceedings, as in the case of judgment for a penalty under a village by-law.—Warner v. Porter, 2 D. 358.

¶ 979. Where a municipal charter gives a person convicted under an ordinance a remedy by certiorari from the circuit court, or by appeal thereto, the supreme court cannot be called upon to review the proceedings by certiorari.—City of Ishpeming v. Maroney, 49 Mich. 226.

¶ 980. While mandamus may be the more appropriate remedy by which to compel the superior court of Grand Rapids to proceed to the trial of an appeal from a conviction in the police court for violation of a city ordinance erroneously deemed by it to be invalid, the same result is reached by certiorari, which has been held the proper remedy to review convictions for violations of city ordinances.—City of Grand Rapids v. Braudy, 105 Mich. 670.

¶ 981. The recorder's court of Detroit, when acting in proceedings for violations of city ordinances, is exercising a jurisdiction inferior to that of the circuit court, and convictions therein are, therefore, reviewable on certiorari from the circuit.—Swift v. Wayne Circuit Judges, 64 Mich. 479.

§ 234. Exceptions and reservation of questions.

See also ante ¶ 977.

¶ 982. Convictions under city ordinances cannot be reviewed on exceptions before sentence.—People v. Jackson, 8 Mich. 110; City of Grand Rapids v. Roberts, 48 Mich. 198; People v. Hymen, 167 Mich. 216.

¶ 983. Comp. L. 1871, ch. 262, permitting exceptions before judgment to be certified up in a criminal case, does not apply to convictions under city ordinances.—City of Grand Rapids v. Roberts, 48 Mich. 198.

¶ 984. Comp. L. 1897, § 11964, providing for exceptions before sentence to be certified to the supreme court in criminal cases, does not apply to convictions had under city ordinances.—People v. Smith, 146 Mich. 193.

¶ 985. The recorder of Detroit could not reserve for the opinion of the supreme court questions arising upon the trial of offenses against the city ordinances.—People v. Jackson, 8 Mich. 78.

§ 235. Right to review and waiver of right.

¶ 986. Where a defendant prosecuted by complaint and warrant as in a criminal proceeding for the violation of a village ordinance, pursuant to the general law for the incorporation of villages, has been acquitted, an appeal cannot be taken by the village.—Village of Northville v. Westfall, 75 Mich. 603.

¶ 987. No appeal lies on behalf of a city from a judgment of acquittal for the violation of a city ordinance.—City of Muskegon v. Brenan, 156 Mich. 41.

¶ 988. Certiorari will not lie to review an acquittal of a charge under a municipal ordinance.—City of Muskegon v. Brenan, 156 Mich. 41.

¶ 989. The action of the court in refusing to proceed with the trial of an appeal from a conviction in police court for the violation of a city ordinance, and the quashing of the proceedings on the ground that the ordinance is invalid, does not amount to an acquittal irreviewable by certiorari by the city, there having been no trial on the merits.—City of Grand Rapids v. Braudy, 105 Mich. 670.

¶ 990. Certiorari will not lie to review proceedings for the violation of a municipal ordinance wherein the judgment has been satisfied by the voluntary payment of the fine or penalty imposed.—People v. Leavitt, 41 Mich. 470; Powell v. People, 47 Mich. 108; City of Ishpeming v. Maroney, 49 Mich. 226.

¶ 991. Certiorari from the supreme court does not lie to set aside the judgment where a fine imposed has been voluntarily paid by a third person and the respondent released before the writ was taken out.—City of Ishpeming v. Maroney, 49 Mich. 226.

§ 236. Record, transcript, or return.

¶ 992. On certiorari to the recorder's court of Detroit to remove the proceedings on conviction for a violation of a city ordinance, it was held that the evidence was properly returned by the clerk of the court.—Jackson v. People, 9 Mich. 111.

¶ 993. The supreme court will not review and determine upon the merits a case for the violation of a city ordinance where the matter has come before it on exceptions before sentence where the bill of exceptions does not contain all the evidence.—People v. Smith, 146 Mich. 193; City of Muskegon v. Hanes, 146 Mich. 385.

¶ 994. A change of style in appealing a criminal prosecution so that the case on appeal shall appear to be a civil suit introduces a fatal contradiction of the record, and the defect cannot be cured by the statute of amendments.—Webster v. City of Lansing, 47 Mich. 192.

§ 237. ——Construction of record and presumptions thereon.

Rules for construction of record on appeal and intendments in favor of the judgment, see Appeal, XII, C: Indictment § 611 et seq.

¶ 995. In a prosecution for the violation of a city ordinance requiring hawkers and peddlers to procure a license, it appeared that defendant, with two others, was employed by one who was claimed to be an agent of the manufacturer, to sell an article manufactured in another state, but which was not sold in original packages. The officer who made the arrest testified that defendant admitted making the sale set up in the complaint, whereupon defendant's attorney remarked, "We don't dispute the sale; we admit," and then proceeded to state as an admission what was apparently his opening of defense in the case, and upon the strength of which he claimed in the supreme court that the evidence failed to show that defendant was a hawker and a peddler. Held that said statement of counsel cannot, in the absence of both oath and assent by counsel for the people to its truth, be treated as evidence or as admissions.—People v. Thomson, 103 Mich. 80.

¶ 996. On error to a conviction of its agent for peddling without a license, the licensing ordinance being assailed as interfering with interstate commerce, the supreme court may assume that the principal, a foreign corporation, carrying on business in Michigan, has been duly admitted to do business according to the requirements of the statutes, where otherwise it would appear from the evidence to have been violating such statutes.—People v. Smith, 147 Mich. 391.

§ 238. Practice and trial on appeal to circuit.

Practice in criminal trials appealed from justices, see Indictment § 665.

¶ 997. Under Comp. L. 1897, § 3100, providing that on an appeal to the circuit court from a conviction for violation of an ordinance, the proceedings shall be the same as on appeal in criminal cases from justices of the peace, the question of trying defendants jointly or separately, rests in the discretion of the court, and is not open to review by the upper court.—People v. Burman, 154 Mich. 150.

§ 239. Scope and extent of review.

Issues and manner of trial in circuit on appeal, see ante § 238.

For analogies to be drawn from scope of issues on appeal with retrial of the facts in justice of the peace civil cases, see Justices of the Peace, V, C.

§ 240. ——On certiorari.

Office and scope of review by certiorari in general, see Certiorari.

¶ 998. Upon certiorari to review a conviction for violation of a city ordinance the sufficiency of the evidence will not be inquired into.—Jackson v. People, 9 Mich. 111; Lynch v. People, 16 Mich. 472.

¶ 999. A judgment of a court without a jury, on prosecution for violating an ordinance, that the ordinance is reasonable and valid, based upon the facts shown by the evidence, cannot be reviewed on certiorari in the absence of specific findings by the court.—People v. Detroit United Ry., 134 Mich. 682, per Montgomery, J., in concurring opinion.

§ 241. Harmless error and grounds for reversal.

Misnomer of prosecutor, see also ante ¶¶ 939, 994.

General law of harmless error, see Harmless Error; Indictment, XV.

¶ 1000. The admission, in a prosecution for violating a city ordinance, of immaterial evidence, is harmless error where there is ample uncontradicted evidence to justify conviction.—People v. Bennett, 83 Mich. 457.

¶ 1001. In an action for violating an ordinance by allowing a nuisance "to exist and remain" on the premises, the conviction of the tenant jointly with the owner is not error prejudicial to the tenant, though the owner should not have been convicted.—People v. Kent, 151 Mich. 134.

MUNICIPAL COURTS.

TREATS of courts less than circuit courts and other than justices of the peace, created for and having jurisdiction within cities and villages.

Analysis.

I. The courts; creation, status, and officers.

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I. THE COURTS; CREATION, STATUS, AND OFFICERS.

§1. In general; creation and rank of court.

See also Courts, I.

Jurisdiction of the various local courts, see post II.

Limited or general nature of jurisdiction, see post § 6.

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Power of legislature to establish or change courts or jurisdiction and procedure, see Constitutional Law § 51 et seq.

Population as basis for classification, see Constitutional Law § 215.

Exemption of recorder's court from operation of freeholders' charters, see Municipal Corporations ¶ 63.

Validity in part of statute changing judicial organization of city and void in some of its parts, see Statutes, V.

Statutory provisions for recorder's court of Detroit, see Comp. L. 1915, § 14633 et seq.

Statutory provisions for superior court of Grand Rapids, see Comp. L. 1915, § 14682 et seq.

Statutory provisions for municipal police courts, see Comp. L. 1915, § 14712 et seq.

Statutory provisions for justice courts in cities of certain size, see Comp. L. 1915, § 14726 et seq.

Recorder's court as court of record with a seal, see Comp. L. 1915, § 14652.

¶1. The police court of Detroit was the creature of an independent statute, and was perpetuated by a clause in the schedule of the state constitution; it does not derive its authority from the city charter.—People ex rel. Fennell v. Bay City Common Council, 36 Mich. 186.

¶2. Municipal courts are not created by the Constitution, art. VII, § 10, but are authorized and permitted, and they derive all their powers from the legislature.—Dunham v. Tilma, 191 Mich. 688.

¶3. The superior court of Grand Rapids is a municipal court and not a circuit court.—Dunham v. Tilma, 191 Mich. 688.

¶4. The superior court of Detroit was a court of original jurisdiction, proceeding according to the course of the common law, and as to civil jurisdiction was of the same class as the circuit courts.—Wyandotte Rolling Mills Co. v. Robinson, 34 Mich. 428.

¶5. The superior courts of Grand Rapids and Detroit in regard to the subject-matter of suits are of limited but not of inferior jurisdiction; and by plea to and trial upon the merits defendant waived all right to object to the want of averment or showing of jurisdiction.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461; Gott v. Brigham, 41 Mich. 227.

¶6. A municipal court is presumptively inferior to a circuit court so far as its jurisdiction is not of equal character.—Swift v. Wayne Circuit Judges, 64 Mich. 479.

¶7. A municipal court does not change its relative position to other courts by being invested with new powers which those courts cannot control.—Swift v. Wayne Circuit Judges, 64 Mich. 479.

¶8. The Detroit charter of 1883 repeals all conflicting acts, and gives the recorder's court exclusive jurisdiction of all prosecutions for offenses arising under it or under any ordinance. All cases theretofore triable in the central station police court arose under the charter; and all breaches of the peace had to be defined by ordinance. Held that, in the absence of any provision for the continuance of the central station court,

it was abolished.—Roberts' Case, 51 Mich. 548.

§ 2. Judges and their status.

See also generally Judges.

Judge of Detroit recorder's court as state officer, see also Judges ¶ 2.

Appointments to vacancy in office of superior judge, see Judges § 2.

Liability of magistrates and officers for malicious prosecution and false imprisonment, see Malicious Prosecution § 2; False Imprisonment § 22.

Advice of magistrate as justification for prosecution, see Malicious Prosecution § 10.

Provisions relating to office and election of judges of recorder's court of Detroit, see Comp. L. 1915, § 14633 et seq.

Provisions relative to superior court of Grand Rapids, see Comp. L. 1915, chap. 239.

¶ 9. The judge of the superior court of the City of Grand Rapids is a state officer.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

¶ 10. The judge of the superior court of Grand Rapids is a state officer.—Dunham v. Tilma, 191 Mich. 688.

¶ 11. A judge of the recorder's court of the City of Detroit is a state officer.—Murtha v. Lindsay, 187 Mich. 79.

§ 3. Court officers.

See also Courts, I.

Nature of judges' office, see ante § 2.

Proper officer to certify return on certiorari to judgment in prosecution under ordinance, see Municipal Corporations ¶ 992.

Clerk as joint respondent to mandamus with judge of recorder's court, see Mandamus ¶ 801.

Power of clerks to tax costs, see Jud. Act, chap. XLVII, § 30; Comp. L. 1915, § 13711.

Clerks and deputy clerks of recorder's court, see Comp. L. 1915, § 14639 et seq.

Bond of clerk of Detroit recorder's court under Water Craft Act, see Comp. L. 1915, § 14939.

Provisions relating to clerk and other officers of superior court, see Comp. L. 1915, § 14688.

Clerk of city justice courts, see Comp. L. 1915, § 14744 et seq.

Probation officers, see Comp. L. 1915, §§ 2035-2045.

¶ 12. The officers of the recorder's court of the City of Detroit are not within the civil service charter amendment of the city.—Detroit Civil Service Commission v. Engle, 187 Mich. 83.

¶ 13. The officers of the recorder's court of the City of Detroit are under the control of the court.—Detroit Civil Service Commission v. Engle, 187 Mich. 83.

§ 4. Substitute and assistant judges.

See also Judges, IV.

Designation of circuit judge to sit as recorder of Detroit, see Judges ¶ 43.

¶ 14. Laws 1879, § 12, p. 70, the police-court act of Grand Rapids, provides that, in case of the "absence, inability or disability" of the police judge, the assistant justice may act in his place. Held, that where a complaint was made before the judge, and the depositions of witnesses were taken before the assistant, and the judge afterwards certified that defendants waived further examination and committed them for trial, the proceeding might be sustained, especially as commitment may be made where examination is waived.—People v. Sligh, 48 Mich. 54.

§ 5. Compensations and salaries.

Salaries and emoluments of offices in general, see Officers, VIII.

Salaries of judges of Detroit recorder's court, see Comp. L. 1915, § 14638.

Salaries of superior court judges in Grand Rapids, see Comp. L. 1915, § 14687.

Statutory salaries of recorders and superior court judges, and power of supervisors or council to increase same, see Comp. L. 1915, § 12141.

Salaries and fees of city justices of the peace, statutory provisions, see Comp. L. 1915, § 14729.

¶ 15. The increasing of the salaries of the judges of the recorder's court of the City of Detroit, which are fixed by statute, by a city ordinance, as authorized by the charter amendment of November 3, 1914, does not constitute an interference with the jurisdiction of such court in matters of state concern.—Burton v. City of Detroit, 190 Mich. 195.

¶ 16. Inasmuch as the salaries of the police justices and clerk of the police court of the City of Detroit are fixed by § 764 of the city charter, the city may not by ordinance fix the salaries of such officers.—Burton v. City of Detroit, 190 Mich. 195.

¶ 17. Inasmuch as the charter of the City of Detroit, § 764, provides that the council may fix the salaries of the assistant clerks of the police courts in amounts not to exceed the salary of the clerk, the salaries of such officers may accordingly be fixed by ordinance.—Burton v. City of Detroit, 190 Mich. 195.

II. JURISDICTION AND POWERS.

§ 6. In general; limits of jurisdiction.

Power in granting changes of venue, see post § 12.

Power to enter judgments by confession under warrant of attorney, see post ¶ 56.

Pleading the jurisdictional facts, see post § 14.

Transfer from circuit to superior court and retransfer, see post § 15 et seq.
Jurisdiction of courts in general, see Courts, V.
Presumptions as to jurisdiction and necessity of record showing, see Courts §§ 79, 80.
Criminal jurisdiction in general, see Indictment, III.
Jurisdiction of recorder's and superior courts in criminal cases, see Indictment § 89 et seq.
Relative jurisdiction of Detroit recorder's and police courts, see Indictment § 90.
Power to sentence to particular prisons for crime, see Crimes § 29.
Power to call grand jury, see Grand Jury § 1.
Jurisdiction of prosecutions for violation of ordinances, see Municipal Corporations § 218.
Jurisdiction of justices of the peace, see Justices of the Peace, III; Indictment, III.
Powers in arresting, examining and committing prisoners, and in admitting to bail, see Arrest, Commitment and Bail.
Power and jurisdiction to punish for contempt, see Contempt §§ 19, 20.
Legislation encroaching on jurisdiction of constitutional courts, see Constitutional Law §§ 54, 56.
Legislative power under the constitution to confer or change jurisdiction, see Constitutional Law § 56.
Power of police judge to issue search warrant to be executed beyond city limits within county, see Searches and Seizures ¶ 4.
Jurisdiction of prosecutions for violations of ordinances, provisions of statutes, see Comp. L. 1915, § 14654.
Jurisdiction of claims under Water Craft Act, see Comp. L. 1915, § 14893.
Condemnation proceedings by cities, jurisdiction of superior courts and recorder's courts, see Comp. L. 1915, § 3377.
Jurisdiction of proceedings for separation of highway and railroad grades, see Comp. L. 1915, § 4759.
Power to solemnize marriages, see Comp. L. 1915, § 11368.
Jurisdiction of superior court of Grand Rapids, see Comp. L. 1915, § 14694.
Jurisdiction and powers of city justices of the peace, see Comp. L. 1915, §§ 14730, 14731.
Powers of judges of recorder's court at chambers, see Comp. L. 1915, § 14650.
Powers of recorder's court or judge thereof to regulate practice by rules or to regulate admission of spectators to court room during trials, see Comp. L. 1915, §§ 14650, 14651.

¶ 17a. The superior court of Grand Rapids was created by the legislature by authority of Const. art. VI, § 1, and has only such powers and jurisdiction as the legislature conferred upon it.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 18. The recorder's court of the city of Detroit is a court of limited jurisdiction, deriving its authority from the statute only.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 19. Municipal courts may have jurisdiction of the kinds of cases originally triable in the circuit courts, so long as no constitutional authority of the circuit courts is interfered with.—People v. Hurst, 41 Mich. 328.

¶ 20. Municipal courts are created only for the common judicial business of a municipal tribunal.—Scott v. Wayne Circuit Judges, 58 Mich. 311.

¶ 21. Section 18, c. 29, Act No. 648, Local Acts 1907, providing that the municipal court justice of Kalamazoo shall, as against all other justices of the county, have exclusive jurisdiction where both parties to the suit reside in the city, gave to the municipal court justice exclusive jurisdiction from the time when the act became operative; and section 3 of the same chapter, providing that he shall be considered the successor in office for all the justices in the city as their respective terms of office expire, does not mean that other justices in the city have concurrent jurisdiction until their terms expire.—Striffing v. Baden, 155 Mich. 49.

¶ 22. History and jurisdiction of the mayor's court of Detroit considered.—Welles v. Mayor, etc., of City of Detroit, 2 D. 77; People v. Hurst, 41 Mich. 328; Swift v. Wayne Circuit Judges, 64 Mich. 479.

¶ 23. The mayor's court of Detroit had no jurisdiction of attachments under R. S. 1838.—Welles v. City of Detroit, 2 D. 77.

¶ 24. The twofold jurisdiction of the recorder's court of Detroit over prosecutions for offenses committed within the city against the general laws of the state, and over prosecutions for violations of city ordinances, explained. In the former class of cases the recorder acts under general laws and exercises the power of a circuit judge; in the latter class he acts in the capacity of a municipal officer simply.—People v. Jackson, 8 Mich. 78; People v. Jackson, 8 Mich. 110.

¶ 25. Under Laws of 1875, Act No. 49, § 13, sub. 11, as amended by Laws of 1877, Act No. 147, How. St. § 6576, the superior court had no jurisdiction in bastardy cases.—People v. Harty, 49 Mich. 490.

¶ 26. Proceedings under the bastardy act are within the jurisdiction of the police court of Grand Rapids, which can hear all cases of a quasi criminal nature that were formerly within the jurisdiction of justices. But their determination by the police justice is not necessarily final.—People v. Phalen, 49 Mich. 492.

¶ 27. Under Laws 1885, Act No. 161 (How. St. § 6591*f*7), the police court of Detroit has authority to examine a person on the charge of bastardy, and bind him over for trial at the circuit court.—People v. Kaminsky, 73 Mich. 637.

¶ 28. The collection of municipal demands against other corporations is civil and not criminal business, and properly belongs to the city attorney and counselor, and not to the police justice.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

¶ 29. The jurisdiction conferred upon the recorder of Corunna is that of a justice of the peace (Laws 1869, Act No. 265), and he therefore cannot entertain an action for malicious prosecution.—Sheldon v. Sullivan, 45 Mich. 324.

¶ 30. The superior court of Grand Rapids has not exclusive jurisdiction of a civil action against the superintendent, captain and lieutenant of police of such city, they not being "city officers" within the meaning of the superior court act (How. St. § 6576). —Burroughs v. Eastman, 93 Mich. 433.

¶ 31. The police court of the city of Grand Rapids, established under Laws 1873, Act No. 3, subsequently repealed, has jurisdiction under Laws 1885, §§ 5, 6, giving to the police judge all the powers and authority of a justice of the peace, except in the trial of civil cases, to examine and hold to bail persons charged with violating the liquor-law or with other misdemeanors not triable by justices of the peace.—People v. Gooseman, 80 Mich. 611.

¶ 32. A police justice of Detroit cannot admit to bail one whom he has bound over to the recorder's court for trial (How. St. § 6591*g*1).—Mills v. Chambers, 91 Mich. 521.

¶ 33. Whether the recorder of Detroit has authority in any case to issue a habeas corpus to be served out of the city or county, quære; he certainly cannot take a prisoner out of the reform school who has been lawfully sentenced there, unless to testify as a witness.—In re Mason, 8 Mich. 70.

§ 7. Residence of parties and territorial limits.

Necessity that fact of residence appear in the record of the process, see post § 13.
Pleading residence, see post § 14.
Place for bringing actions of a transitory nature, see Venue, I.

¶ 34. Municipal courts, though not inferior tribunals, are limited in their jurisdiction by the residence of parties; and their jurisdiction should be shown on the record, though their judgments and decrees are binding until reversed even if it is not shown.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461.

¶ 35. The constitutional authority to establish local courts in cities contemplates that in transitory actions they can exercise jurisdiction over persons not shown to be residents but who are served with process within the municipal limits.—Elliott v. Farwell, 44 Mich. 186.

¶ 36. In transitory actions, residence of the defendant within the city was not necessary to give jurisdiction where personal service has been had.—Elliott v. Farwell, 44 Mich. 186.

¶ 37. Under the act of 1879 relating to the superior court of Detroit that court has no jurisdiction unless at least one of the parties resides in Detroit.—Hagar v. Coup, 50 Mich. 54.

¶ 38. The superior court of Detroit has jurisdiction of an action for false imprisonment if plaintiff was a resident of, and the action complained of as an arrest was made in, the city.—Hill v. Taylor, 50 Mich. 549.

¶ 39. The superior court of Detroit had no jurisdiction in divorce where complainant did not reside in Detroit.—Canniff v. Canniff, 49 Mich. 478.

¶ 40. The municipal courts provided for in Const. art. VI, § 1, were intended for the benefit of the cities in which they should be established, and are limited in their jurisdiction; it was not the purpose to give them a jurisdiction coextensive with the county or materially affect the jurisdiction of the circuit courts.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461.

¶ 40a. An order for the payment of alimony is not such original process as need be served within the territorial limits over which a municipal court has jurisdiction.—Edison v. Edison, 56 Mich. 185.

¶ 40b. Process from the superior court of Detroit cannot be served outside of the county.—Dewey v. Central Car & Mfg. Co., 42 Mich. 399.

§ 8. Place or time for court or sittings.

Terms and times for holding recorder's court, see Comp. L. 1915, § 14655.

¶ 41. The police justice of Detroit has no general powers to act when and where he chooses; and cases under city ordinances are not part of his general business as a justice of the peace.—In re Way, 41 Mich. 299.

¶ 42. The power of the police justice of Detroit to sit at the station-house is exceptional and limited; it is confined to the cases of persons under arrest, who are entitled to as speedy an examination as possible, and who cannot be deprived of any right they would have at the regular sessions of the court.—In re Way, 41 Mich. 299.

¶ 43. The former charter of Detroit (see Laws 1861, Act No. 136, § 35) authorized the police justice to sit at the station-house at prescribed times, where "he shall summarily examine into the case of every person confined in said station-house, and if he adjudge any person guilty of vagrancy, disorderly conduct, or any violation of the city ordinances relative to breaches of the peace, he may convict," etc., and inflict the punishment authorized by this section. Held, that the station-house sessions were not designed for the trial of ordinance cases, and that this section excluded any prosecution for vagrancy under the ordinances; that it did not refer to vagrancy and disorderly conduct in connection with the ordinances; and that even in regard to breaches of the peace punishment was to be inflicted under the charter, and not the ordinances, which were merely referred to as restrictive and descriptive, and not as grounds of procedure.—In re Way, 41 Mich. 299.

§ 9. Title to land.

Title to land as extraneous to justice's jurisdiction, see Justices of the Peace § 20 et seq.

¶ 44. Questions of title cannot be tried by a municipal court under city ordinances.—Beecher v. People, 38 Mich. 289.

¶ 45. Where it appears on the face of a prosecution for the obstruction of an alley that the question of title is not incidental, but is the main point in issue, the case is beyond the jurisdiction of the recorder's court of Detroit, and the rights of the parties must be settled in the public courts.—Jackson v. People, 9 Mich. 112.

¶ 46. Questions of title cannot be tried in the recorder's court of Detroit in a prosecution for obstructing and encumbering a public alley.—People v. Stott, 90 Mich. 343.

¶ 47. Title to lands cannot be tried in a prosecution in the recorder's court of Detroit for obstructing a street claimed to be the land in question.—People v. Wolverine Mfg. Co., 141 Mich. 455.

¶ 48. In order to oust the jurisdiction of the recorder's court of Detroit to try title to land, it must appear that by a bona fide contention the question is involved; and that does not appear where the prosecution is for obstructing a highway constituting the locus in quo and there is a clear showing that a highway exists there, and that the defendants recognized its existence.—People v. Wolverine Mfg. Co., 141 Mich. 455.

¶ 49. The superior court of Grand Rapids has no separate and original jurisdiction in partition of lands outside of the city; but it has jurisdiction of proceedings for a partnership accounting concerning land not in Grand Rapids, if either party resides in the city.—Godfrey v. White, 43 Mich. 171.

§ 10. Chancery powers.

¶ 50. The superior court of Grand Rapids, sitting in equity, has jurisdiction to determine ownership of a homestead, to construe a will, and to instruct and direct the trustee with respect to a trust estate thereunder.—Draper v. Brown, 153 Mich. 120.

¶ 51. An order of the recorder's court of the city of Detroit that building contractors refrain from continuing with their work until the decision in such court of a case relating to a violation of the building code operates as an injunction in restraining such contractors from proceeding with the work of the erection of the building, and is beyond the jurisdiction of such court, as the authority to grant injunctions is inherent in a court of equity, and the recorder's court has, under Local Acts 1883, Act No. 326, as amended, providing for such court, no equitable jurisdiction.—Adler v. Detroit Recorder's Court Judge, 197 Mich. 81. (Ostrander, J., dissenting.)

§ 11. Appellate jurisdiction.

Applicability to appeal cases of act authorizing transfers from circuit court, see post § 16.

¶ 52. The superior court of Grand Rapids can have no jurisdiction of appeals from justices' courts.—Allen v. Kent Circuit Judge, 37 Mich. 474.

¶ 53. The Detroit superior court had no jurisdiction of appeals from findings of commissioners in probate cases.—People ex rel. Schratz v. Detroit Superior Judge, 31 Mich. 407.

III. PROCEDURE AND PRACTICE.

§ 12. In general.

Necessity of record showing of jurisdiction, see also ante ¶ 34.

Scope and subjects of judicial notice in recorder's and other local courts, see Evidence, I; Indictment, VIII, A.

Judicial notice in Detroit recorder's court respecting Detroit and Wayne county, see Evidence ¶ 62.

Judicial notice of ordinances and police regulations, see Evidence § 26.

Rules of superior courts obnoxious to positive law, see Courts § 12.

Powers and functions of supreme court in making or approving rules for practice, see Courts § 13.

Appellate jurisdiction of circuit courts, see Courts § 55.

Certiorari from circuit court to municipal courts, see Certiorari § 65.

Jury fees in municipal court as county charge, see Counties § 33.

Practice of former county court, see Courts ¶ 20.

Statutory provisions relative to practice and procedure in Detroit recorder's court, see Comp. L. 1915, chap. 238.

Statutory provisions relative to procedure and practice in Grand Rapids superior court, see Comp. L. 1915, chap. 289.
Provisions regulating practice before city justices of the peace, see Comp. L. 1915, § 14731 et seq.
Exception in Judicature Act of justice courts provided for by city charters from its operation, see Jud. Act, chap. LXXX, § 16; Comp. L. 1915, § 14464.
Practice and procedure in Detroit recorder's court in condemnations for city use, see Comp. L. 1915, § 8393.
Prepayment of costs before commencing suit in superior court of Grand Rapids, see Jud. Act, chap. XLV, § 2; Comp. L. 1915, § 13670.
Fees to be prepaid before commencing suit in superior court, see Comp. L. 1915, § 14692.

¶ 54. A jury for a municipal court may properly be chosen from the municipality instead of the body of the county.—People v. Hurst, 41 Mich. 328.

¶ 55. In granting a change of venue, the recorder's court of Detroit has the same power as the Circuit Court.—Glinnan v. Detroit Recorder's Court Judge, 173 Mich. 674.

¶ 56. The Detroit superior court has, in its discretion, power to enter judgment upon confession under warrant of attorney without exacting proof of the warrant, when the time is not above a year and a day.—Elliott v. Ives, 44 Mich. 190.

§ 13. Process, service and appearance.

Service of process outside jurisdictional territory of the court, see ante § 7, ¶ 40b.
General law of civil process and appearance, see Process; Appearance.
Record showing of service on one codefendant in Grand Rapids to support jurisdiction of the superior court of Grand Rapids, see also Courts § 79.
Necessity and sufficiency of record showing of jurisdiction and presumptions in aid thereof, see also Courts §§ 79, 80.
Appearance as bar to mandamus to dismiss cause for want of jurisdictional residence, see Mandamus ¶ 34a.
Provisions relative to process from superior court, see Comp. L. 1915, § 14695.

¶ 57. In order to confer jurisdiction on the Grand Rapids superior court it must appear upon the face of the process or declaration that one of the parties resides in Grand Rapids and in the court's jurisdiction.—Denison v. Smith, 33 Mich. 155; Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461.

¶ 58. If, without any averment or showing of jurisdiction by plaintiff, defendant submits himself to the jurisdiction by pleading the general issue and going to trial on the merits, the judgment binds.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461.

¶ 59. The power of the court to reach a defendant beyond the city is confined to cases where one at least of the defendants is served within it. There must be proof of service within the city, and a return of "not found" as to those who are without, before plaintiff can sue out further process or deliver a declaration to be served out of the city upon the latter. Service out of the city cannot be made upon an absent joint-defendant until service has been made and proved upon the other in Grand Rapids.—Denison v. Smith, 33 Mich. 155.

§ 14. Pleadings.

Pleading and going to trial as waiving jurisdictional questions of residence, see ante § 13.
General law of pleading, see Pleading.
Time to appear and plead to prevent default, see also Defaults § 3, ¶ 16.
Sufficiency of declaration to show jurisdiction for basis of default, see also Defaults § 1, ¶ 3.

¶ 60. Since the passing in 1879 of the law changing the jurisdiction of the superior court of Detroit, by confining it in transitory actions to cases where one at least of the parties resides in that city (Pub. Acts 1879, p. 90), it seems that the declaration should show the jurisdiction of the court in the cause by proper averments of the residence of at least one of the parties within the city, and that a judgment by default where the proceedings fail to show the jurisdiction of the court cannot be sustained.—Bagley v. Pridgeon, 42 Mich. 550.

¶ 61. Where, in a suit by a resident of or one doing business in Detroit, the declaration describes the plaintiff as "of the city of Detroit" it is sufficient.—Elliott v. Farwell, 44 Mich. 186.

§ 15. Transfer of causes from circuit court and retransfer.

Procedure and bond for removal, see post § 17.
Nontransferability of appeal cases, see post § 16.
Transfers and successions in jurisdiction of courts, see Courts § 67.
Mandamus to correct improper transfer or denial of transfer, see Mandamus ¶ 262.
Statutory provisions as to removals of causes in superior court of Grand Rapids, see Comp. L. 1915, § 14702 et seq.

¶ 62. Under Laws 1875, Act No. 49, establishing the superior court of Grand Rapids, chancery causes in which some of the parties resided out of the city were not removable from the circuit court to superior court.—People ex rel. Jones v. Kent Circuit Judge, 35 Mich. 494.

¶ 63. The amendment of 1877 (Laws 1877, Act No. 147), in so far as it attempts to authorize a transfer of causes from the circuit to said superior court after the former has

entered upon the cause upon the merits, is inoperative.—Heath v. Kent Circuit Judge, 37 Mich. 372.

¶ 64. Causes may be transferred by stipulation between the parties actually before the court, and notwithstanding the nonassent of absent defendants who have not been brought into court. In an action against a principal and two sureties a stipulation made by plaintiff's attorney and by one of the sureties and the other's attorney, the principal himself not having been served and not appearing, was upheld.—Goebel v. Stevenson, 35 Mich. 172.

¶ 65. An application for the transfer to the superior court of Detroit, made after the act establishing said court had taken effect and a judge thereof elected, could not be denied on the ground that the court was not fully organized, the time for holding its first term not having arrived.—People ex rel. Turner v. Wayne Circuit Judge, 27 Mich. 5.

¶ 65a. Foreclosure proceedings pending in the Wayne circuit court at the taking effect of the act establishing the superior court of Detroit were removable to the latter court under that act.—Bigelow v. Booth, 39 Mich. 622.

¶ 66. An actual resident of Detroit, after service upon him within the city of the declaration in a personal action begun by a resident of another county, could remove the case to the superior court.—Butler v. Wayne Circuit Judge, 41 Mich. 654.

¶ 67. Statutory proceedings to take charge of and administer assigned estates are special and peculiar, and not like an ordinary suit in chancery. And they are not removable to a court of merely municipal jurisdiction from the court which is designated throughout the statute as the proper one to take cognizance of them.—Scott v. Wayne Circuit Judges, 58 Mich. 311.

¶ 68. Upon filing a bill for divorce in the circuit court for Kent county, a preliminary injunction restraining the defendant from disposing of his property, was granted ex parte. On the following day a petition for temporary alimony was filed, and, together with the usual subpoena to appear and answer and the injunction, was served upon the defendant, who, three days later, and before any further proceedings had been had in the case, caused his appearance to be entered, and filed a petition and bond for the removal of the case to the superior court of Grand Rapids. Held, that the case had not proceeded so far that a removal could not be made under How. St. § 6584.—Wood v. Kent Circuit Judge, 105 Mich. 378.

§ 16. ——Appeal and certiorari causes pending in circuit.

¶ 69. Laws 1877, Act No. 147, makes no provision for a transfer of appeals from justices from the circuit to the superior court of Grand Rapids.—Allen v. Kent Circuit Judge, 37 Mich. 474.

¶ 70. Appeals from commissioners on estates of deceased persons were not transferable; the circuit court alone has jurisdiction thereof.—People ex rel. Schratz v. Detroit Superior Judge, 31 Mich. 407.

§ 17. ——Procedure and bond for removal.

¶ 71. The fact that parties were residents of the city of Grand Rapids sufficiently appeared from the allegation of such fact in a petition for transfer of the cause to the superior court of that city, in the absence of any denial of the fact by the return or otherwise.—Wood v. Kent Circuit Judge, 105 Mich. 378.

¶ 72. A removal bond, otherwise sufficient in form, will not be invalid by reason of the omission, in the obligation thereof, of the names of the obligors, it being clear enough from the whole instrument who are bound by it, and after performance of the condition the bond is functus officio, and irregularities therein do not warrant dismissal of the cause.—People ex rel. Muir v. Detroit Superior Court Judge, 28 Mich. 266.

§ 18. Criminal and penal procedure.

Prosecutions for violations of municipal ordinances and procedure therein, see Municipal Corporations, XVI, B.

Juries as judges of law and facts in prosecutions under ordinances, see Municipal Corporations ¶ 958.

Appeal and review of judgments in prosecutions for violating ordinances, see Municipal Corporations § 232 et seq.

Prosecutions for crime before police and municipal minor courts, see Indictment, XVIII.

Mode of trial in criminal cases in recorder's court of Detroit, see Indictment ¶ 1514.

Fees allowable to police justices in criminal trials, see Indictment § 661.

Habeas corpus to investigate legality of sentences, see Habeas Corpus § 1.

Criminal jurisdiction of recorder's court, see Comp. L. 1915, § 14643.

Applicability to recorder's court of statutes for prosecution on information for crime, see Comp. L. 1915, § 15768.

¶ 73. The circuit court being a court of broader jurisdiction than the recorder's court of Detroit defects in the formation of the grand jury cannot be considered by the recorder, who must take indictments sent to him from the circuit court as valid if on their face they appear valid.—People ex rel. Robison v. Swift, 59 Mich. 529.

MUNIMENTS OF TITLE to NAKED TRUSTS.

Cross-References.

Muniments of Title—
See generally Deeds; Mortgages; Notice and Record of Title.

Necessity and sufficiency of writing, see Frauds, Statute of.
Mode of executing and delivering, see Execution of Instruments.
Right to possession of documents on sale of land, see Vendors and Purchasers, III.

Murder—
See Homicide.

Museums—
As private or municipal institutions, see Municipal Corporations § 105.
Taxability, see Taxes, III.
Bequests for, see Wills, VI.

Mutilation of Writings or Records—
See Alteration of Instruments.
Presumption against spoliator, see Evidence § 64.
Tearing will to revoke, see Wills, IV, C.
Injuring records, see Records; Crimes § 124.
Mutilated record as notice of title or claim, see Notice and Record of Title § 63.

Mutual Accounts—
See Account Stated; Accounting Suits.
Running of limitations, see Limitations § 51 et seq.

Mutual Insurance—
See Insurance; Fraternal Associations.

Mutual Promises—
As consideration for each other, see Contracts § 105.

Mutuality—
In contracts, see Contracts, I.
In estoppel, see Estoppel §§ 7, 25.
In mistake, see Mistake § 4.

Naked Trusts—
See Trusts, I.

NAMES.

TREATS of the general law of names of persons excluding names used in trade (see Trade Marks and Trade Names) and names of Corporations (see Corporations, III).

Analysis.

§ 1. In general; choice, adoption, and change.
§ 2. Initials and descriptive additions.
§ 3. Identity and variance in names and presumptions and evidence.
§ 4. ——Idem sonans.

§ 1. In general; choice, adoption, and change.

Initials and abbreviations as parts of name, see post § 2.
Right of adopted child to sue in adopted name, see Adoption ¶¶ 13, 14.
Name of corporation, and infringements on corporate name, see Corporations, III.
Name of fraternal benefit association, see Fraternal Associations § 4.
Conflict of name of foreign and domestic corporations, see Foreign Corporations ¶ 4.
Name in which municipality should sue or defend, see Municipal Corporations § 212.
Names used in trade other than personal individual names, necessity of registration or filings, and rights in transactions done under such trade names, see Trade Marks and Trade Names.
Sufficiency of name used for indorsement of paper, see Negotiable Instruments, VII.
Injunction to protect right of privacy, see Injunctions § 92.
Sufficiency of identification of parties in deeds, see Deeds § 6.
Names of obligor or obligee in body of bond, see Bonds.
Amendment of attachment writ to add given names, see Attachment ¶ 128.
Amendment of clerical mistake in name in equity, see Equity § 126.
Making deed or transfer as fraud on rightful owner having same name, see Fraud § 74.
Forging or uttering in fictitious name, see Crimes § 83.
Judicial proceedings for change of name, see Jud. Act, chap. LXIV, §1 et seq.; Comp. L. 1915, §§ 14138-14144.

¶ 1. The use by a person of different names is immaterial where the question is one of identity only, and the identity is clearly established.—Boyce v. Danz, 29 Mich. 146.

¶ 2. A girl who has been practically, though not formally, adopted into a family, in pursuance of an understanding that she should be in all things as a daughter, may use the name as her own in bringing suit against the head of the family.—Watson v. Watson, 49 Mich. 540.

¶ 3. One sued by actual service of process under a name by which he is called and known may be held upon a judgment under that name.—Field v. Plummer, 75 Mich. 437.

¶ 4. "Voigt Brewery Company" is not and cannot be the name of a natural person.—Voigt Brewery Co. v. Pacifico, 139 Mich. 284.

¶ 5. A bastard child can only have a name by reputation or baptism, and does not take the mother's name unless gained by reputation.—Shannon v. People, 5 Mich. 71.

¶ 6. A change of name does not necessarily destroy identity so long as that to which the name pertains remains the same.—Perkins v. Keller, 43 Mich. 53.

¶ 7. The fact that one who contracted in the name of O'Connor calls herself Connor is immaterial where she is known by both names and the identity is clearly made out.—Hibernia Ins. Co. v. O'Connor, 29 Mich. 241.

§ 2. Initials and descriptive additions.

¶ 8. An abbreviation which, according to the common understanding, fully expresses the name thereby intended, is sufficient.—People ex rel. Attorney General v. Tisdale, 1 D. 59.

¶ 9. The middle initial in a name is of no consequence.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 10. It seems that there is no rule of law which makes an invariable distinction between the written signs for I and J.—Picard v. McCormick, 11 Mich. 68.

§ 3. Identity and variance in names and presumptions and evidence.

Use of two similar but not identical names, see ante ¶ 7.

Similarity in sound overcoming misspelling or variance in spelling of names, see post § 4.

Real party to contract where names of two parties are identical, see Contracts § 11.

Construction of deed as to party intended where two bear same name, see Deeds § 18.

Materiality of variance in names as pleaded and as proved in action on negotiable paper, see Negotiable Instruments, XIV.

Presumption that father is intended where he and son have same name, see also Deeds ¶¶ 64, 65.

Presumption as to identity of names variant only as to initial of middle name, see also Evidence ¶ 2586.

Presumption as to identity on appeal, see Appeal ¶¶ 1442, 1538.

Presumption as to identity of persons from identity of names, see also Indictment § 137.

Sufficiency of sameness in name to prove identity of person, see also Indictment ¶ 1415.

Estoppel to deny identity after causing appearance contrary thereto by misleading use of similar name, see Estoppel § 143.

Misnomer or misspelling of name on ballot, see Elections § 77.

Appointment naming "William R." intending "Robert R.," see also Drains § 36.

Amendment of pleadings to cure misnomer, see Pleading, VI.

¶ 11. Identity of name raises the presumption of identity of person, unless circumstances cast doubt on it.—Goodell v. Hibbard, 32 Mich. 47.

¶ 12. Identity of persons is prima facie established by the identity of names.—Atwood v. Sault Ste. Marie Light, Heat & Power Co., 148 Mich. 224.

¶ 13. The fact that the grantor named in a deed was in state prison when the deed was executed has no force to cast a doubt upon his identity with a devisee of the same name.—Goodell v. Hibbard, 32 Mich. 47.

¶ 14. It is not a legal presumption that where the family name and initials are the same the persons are identical.—Bennett v. Libhart, 27 Mich. 489.

¶ 15. The identity of a person sued on a transcript of a foreign judgment may be presumed if his full name is identical with that of the party against whom it was recovered.—Campbell v. Wallace, 46 Mich. 320.

¶ 16. The record of a deed purporting to be signed by Harmon Sherman, and to be acknowledged by Hiram Sherman, is not admissible to prove a conveyance by Hiram Sherman. There can be no presumption, in the absence of proof, that the two names belong to the same person.—Boothroyd v. Engles, 23 Mich. 19.

¶ 17. Where the parties in ejectment claim under a person of the same name, and there is evidence to support but none to contradict, the inference of identity, it is reasonable to assume that it was the same individual.—Eames v. McGregor, 43 Mich. 313.

¶ 18. In an action for criminal conversation, proof that the plaintiff's full name is John Gottlieb Kimmell, and that the woman he claims as his wife is known by the name of Philopena Kimmell, and that her maiden name was Utz, is some evidence of the identity of these persons with those named in a marriage certificate as John Gottlieb Kimmel, and Sabrina Philopena Bauchle, born Utz, and the weight of the evidence is only for the jury.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 19. Ashhel Green, "of New York," and a person of the same name "of the township of Palisades, in the county of Bergen, and state of New Jersey," were presumed to be the same person where they followed in a chain of title.—Tillotson v. Webber, 96 Mich. 144.

¶ 20. A deed purporting to have been made by William Hommel was sustained as the deed of Wendelin Hommel on evidence that the grantor was known by the former name and answered to it.—Hommel v. Devinney, 89 Mich. 522.

¶ 21. The law presumes that in executing instruments parties use their real names.

and does not presume them to have different names. The record of a deed purporting to be signed by Harmon Sherman, and to be acknowledged by Hiram Sherman, is not admissible to prove a conveyance by Hiram Sherman. The signing of a deed is as necessary as any other part of it, and only the signer can acknowledge it as grantor. There can be no presumption, in the absence of proof, that the two names belong to the same person.—Boothroyd v. Engles, 23 Mich. 19.

¶ 22. Jonathan and John are not, in contemplation of law, the same.—Moore v. Graham, 58 Mich. 25.

¶ 23. In an action by Isaac N. Gage upon a guaranty of collection by one Reed of certain promissory notes made by one Cole, it was held competent to admit in evidence the proceedings and judgment against Cole to enforce collection of the notes, though those proceedings were taken in the name of Newton Gage as plaintiff, where it is shown that plaintiff's name is Isaac Newton Gage, and that he is the same person named as Newton Gage in the proceedings against Cole.—Reed v. Gage, 33 Mich. 179.

¶ 24. Where the issue in ejectment is solely as to the identity of the Indian woman who selected the land in controversy, and for whom the patent issued by the government was intended, it was proper, the evidence being conflicting, to refuse to direct a verdict for plaintiff on proof of title emanating from an Indian woman of that name.—Litchfield v. Ripley, 73 Mich. 464.

§ 4. ——Idem sonans.

Application of rule idem sonans in election ballots, see Elections § 77.
Sufficiency of name in warrant, name idem sonans, see Arrest ¶¶ 53, 54.
Dunton for Denton in published notice in attachment, see Attachment ¶ 220.

¶ 25. In regard to a grantee in a deed, if two names, although spelled differently, sound alike, they are to be regarded as the same.—Ensley v. Coolbaugh, 160 Mich. 299.

¶ 26. If a foreigner's identity is in doubt by reason of varying modes of spelling his name, whether the sounds of the various forms, e. g., Boyce and Bice, as pronounced by foreigners, are not sufficiently identical to make the rule of idem sonans applicable, quære.—Boyce v. Danz, 29 Mich. 146.

¶ 27. Dickson and Dixon are idem sonans.—Reading v. Waterman, 46 Mich. 107.

¶ 28. Finnegan and Finegan are idem sonans.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146.

¶ 29. Kenney and Kinney are idem sonans.—Kinney v. Harrett, 46 Mich. 87.

¶ 30. Trowbridge and Trobridge are idem sonans.—Buhl v. Trowbridge, 42 Mich. 44.

¶ 31. The proper names "Amel" and "Amiel," and "Brailey" and "Brearley," are idem sonans.—People v. Gosch, 82 Mich. 22.

¶ 32. The Indian names "Che-gaw-*ge*-quay" and "Che-gaw-*go*-quay" may be regarded as of the same sound.—Brown v. Quinland, 75 Mich. 289.

¶ 33. Marcier and Macier are idem sonans.—Detroit v. Macier, 117 Mich. 76.

¶ 34. The name Christian Ott is not idem sonans with O. H. Christian.—Ott v. Brissette, 137 Mich. 717.

¶ 35. A deed running to a grantee named Kenney may be offered in evidence by a party named Kinney, the principle idem sonans applying.—Kinney v. Harrett, 46 Mich. 87.

¶ 36. A deed to grantee is not invalidated from the fact the name is spelled "Ansley" instead of "Ensley."—Ensley v. Coolbaugh, 160 Mich. 299.

NARRATIVE STATEMENTS to NAUTICAL MATTERS.

Cross-References.

Narratives—
As res gestæ, see Evidence, VII, D; Indictment, VIII, B.
Testifying in narrative form, see Examination of Witnesses, I; Depositions § 15.
Form for stating testimony in case or bill of exceptions, see Appeal § 103.
Plea and issues as to corporate existence, see also Corporations § 193.
National Banks—
See generally Banking, IX, B.
Taxation of banks and bank stocks, see Taxes.
National Guard—
See Military and Naval Affairs.
Natural Laws—
Judicial notice respecting, see Evidence, I.
Value of evidence opposed to or in accord with natural or physical laws, see Evidence, X, § 610; Witnesses, VI.
Natural Waters and Watercourses—
See Waters; Navigable Waters.
Naturalization—
See Aliens and Citizens § 3.
Nautical Matters—
See Shipping.
Subjects for expert testimony, see Evidence, VI.

NAVIGABLE WATERS.

TREATS of the navigability of waters and the legal incidents and consequences of the character of navigability. The law of waters and of riparian ownership generally is treated in Waters, and the law of shipping and navigation in Shipping, while the law of logging and lumbering is treated in Forestry and Lumbering.

Analysis.

I. In general; what are.

§ 1. General criteria of navigability.
§ 2. Previous use or nonuse.
§ 3. Logging streams and streams for small boats.
§ 4. Particular streams and waters.

II. Public rights, control, and regulation.

§ 5. In general.
§ 6. Relative public and private rights.
§ 7. Rights in subaqueous lands.
§ 8. ——Lands partially or intermittently covered.
§ 9. Rights in banks and shores.
§ 10. Obstructions and interferences with use.
§ 11. Application, permit and approval of dam or bridge.
§ 12. Structure or form of dams and bridges.
§ 13. Harbor lines and regulations.
§ 14. Relative private rights of use.

III. Improvements and tolls for use.

§ 15. Improvements in general.
§ 16. ——Canalization of waters.
§ 17. Removal of logs and other obstructions.
§ 18. Drainage or changing of water level.
§ 19. Toll rates for use of canals and improvements.

I. IN GENERAL; WHAT ARE.

§ 1. General criteria of navigability.

Effect of previous use or nonuse to determine navigability, see post § 2.
Navigability for logging operations, see post § 3.
Streams discharging eventually into St. Lawrence, see also post ¶ 21.
Streams used for pleasure boats, see post § 3.
Character of navigable wide reach in river, see post ¶ 28.
What are "high seas" within federal criminal law, see Indictment ¶ 486.
Jurisdiction of admiralty, see Admiralty § 1.
Jurisdiction over injury to boom, see Admiralty ¶¶ 6, 7.

¶ 1. In this country those waters are regarded as navigable in law which are navigable in fact, whether tidal or not.—Lorman v. Benson, 8 Mich. 18; The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. ed. 999, reversing Brown Adm. 193; Fed. Cas. No. 8564.

¶ 2. Navigable waters at the common law are those where the tide ebbs and flows.—Lorman v. Benson, 8 Mich. 18; Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

¶ 3. The Ordinance of 1787, in providing that the "navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways, and forever free," etc., did not by its terms, or in the spirit of its enactment, dignify every little rill or brook whose waters finally reached these great rivers into a navigable stream. It was intended to and did apply only to such streams as were then common highways for canoes or batteaux in the commerce between the northwestern wilderness and the settled portions of the United States and foreign countries, and as to such rivers not then in use as would by law be embraced in the definition of "navigable waters."—Burroughs v. Whitwam, 59 Mich. 279.

¶ 4. The term "navigable waters" as used in Comp. L. 1857, § 5944, How. St. § 9420

(relating to punishment of crimes) is not confined to waters where the tide ebbs and flows.—Tyler v. People, 8 Mich. 320.

¶ 5. Rivers are navigable when they are used or susceptible of use in their ordinary condition as water highways over which trade and travel are or may be conducted in the customary modes.—The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. ed. 999, reversing Brown Adm. 193; Fed. Cas. No. 3564.

¶ 6. Water may be navigable without a current, and water having a current is not necessarily navigable.—Turner v. Holland, 65 Mich. 453.

¶ 7. The principle that navigable streams are public highways does not apply to streams which, in their natural condition, are not adapted to any valuable boat or vessel navigation.—Shepard v. Gates, 50 Mich. 495.

¶ 8. Whether a body of water is a part of a river or a part of a lake cannot be determined merely by its name.—Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61.

¶ 9. The fact that a small unmeandered lake entirely surrounded by land belonging to one person is boatable and that fish frequenting it can pass in and out by an underground channel connecting with other waters does not render such lake navigable water.—Giddings v. Rogalewski, 192 Mich. 319.

¶ 10. At the common law the term "navigable" had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed, but this definition is not applicable in this country, and all waters are held navigable in law, and subject to public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes which is the test.—Toledo Liberal Shooting Club v. Erie Shooting Club, 90 Fed. 680.

¶ 11. An unmeandered body of water, covering 100 acres which has no inlet except small spring-fed streams, has an outlet connecting through various bodies of water with Lake Erie, and through which fish can pass and a small boat can be floated, has a highway around it extending to the low-water mark, and the land underneath which, except a small portion, is owned by one person, as well as the land bordering on it, is a privately owned pond, and not a public navigable body of water.—Winans v. Willetts, 197 Mich. 512. (Kuhn, C. J., and Fellows, J., dissenting.)

§ 2. Previous use or nonuse.

¶ 12. The Ordinance of 1787 superseded the common-law doctrine of the necessity of usage or custom to establish a public right in the navigable waters of the northwest territory, even if that rule would otherwise have prevailed there.—Moore v. Sanborne, 2 Mich. 519.

¶ 13. The fact that a stream having capacity for valuable floatage has not been used by the public, or has only been used by persons following a particular occupation, does not prevent such stream's assuming a public character; in the new states of the Union user cannot, in the nature of things, be necessary to found a public right.—Moore v. Sanborne, 2 Mich. 519.

¶ 14. The public right is not affected by the fact that the stream has not a capacity for floatage, in its natural and ordinary stage, at all seasons of the year. It is a valuable, and not a continual capacity for use, which determines the right.—Moore v. Sanborne, 2 Mich. 519.

§ 3. Logging streams and streams for small boats.

See also post ¶¶ 26, 61.
Intermittent capacity for floatage as affecting navigability, see ante § 2.
Right to use navigable waters for pleasure boating, see post § 6.

¶ 15. To render a stream a public highway it need not be susceptible of navigation by boats or vessels. A capacity for use in floating rafts or logs creates a public easement, leaving the owners of the bed of the stream all other modes of use not inconsistent with it.—Moore v. Sanborne, 2 Mich. 519.

¶ 16. A stream that is capable of being used in its natural condition for important purposes of navigation, such as floating forest products to market or the place of manufacture, must be regarded as a public highway.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 17. A stream navigable only at certain seasons of the year during periodical stages of high water is to be considered a public highway at those seasons.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 18. The possibility of occasional use during annual and brief freshets does not make a stream a public highway.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 19. A stream is not a public highway if it cannot be used as such in its natural condition, nor has an upper riparian proprietor a right to make it such by detaining the water until a flood sufficient for floating logs can be caused, to the prejudice of the proprietor below.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 20. A stream in which, without improvements, no logs can be floated at any season of the year, and in which, even when improved, no logs can be floated without dams, is not navigable in any sense.—East Branch Sturgeon River Improvement Co. v. White & Friant Lumber Co., 69 Mich. 207.

¶ 21. The fact that the waters of a stream eventually find their way through the lakes into the St. Lawrence does not bear upon the stream's navigability.—Burroughs v. Whitwam, 59 Mich. 279.

¶ 22. Public use of a river, after a dam has been built across it, for pleasure-boating or fishing, has no tendency to prove navigability, and evidence of such use is inadmissible.—Burroughs v. Whitwam, 59 Mich. 279.

§ 4. Particular streams and waters.

What constitutes a harbor, see post ¶ 79.
Judicial notice of navigability, see Evidence § 9.

¶ 23. The Grand river is navigable water of the United States from its mouth in Lake Michigan to Grand Rapids.—The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. ed. 999, reversing Brown Adm. 193; Fed. Cas. No. 3564.

¶ 24. Thunder Bay river is a public highway for the purpose of running logs.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 25. The Emerson bayou, an inlet of the Saginaw river, which has a depth of from six to nine feet, and which is capable of use and is occasionally used by vessels, is navigable water.—Turner v. Holland, 65 Mich. 453.

¶ 26. The Thread river, a crooked and shallow stream never used for travel or transportation, or for the floating of logs, and abounding in "rapids" where the depth of water—except in short periods of high water—is not more than five or six inches, is not navigable.—Burroughs v. Whitwam, 59 Mich. 279.

¶ 27. Where the supervisors had granted a permit for the bridge in question, which could not be built without crossing the bayou, and the depth of water at the point was but four feet and diminishing, and there were other bridges near with no docks above the proposed bridge, there is no warrant for the conclusion that the Emerson bayou adjoining the Saginaw river in the city of Saginaw is navigable for boats or vessels of fifteen tons burden or more, within the meaning of How. St. § 495, requiring the permission of the board of supervisors for the construction of a bridge over a river navigable for boats or vessels of fifteen tons or more.—Naegely v. City of Saginaw, 101 Mich. 532.

¶ 28. A body of water, Muskegon Lake, cannot, merely because it is a theoretical expansion of Muskegon river, be treated as anything but a navigable lake if it is such in fact.—Jones v. Lee, 77 Mich. 35.

¶ 29. The Little Portage river in St. Joseph county is not a navigable stream under the tests laid down in former decisions.—Mathewson v. Hoffman, 77 Mich. 420.

¶ 30. Where marsh lands adjacent to an island in a navigable stream, the Detroit river, are dry at certain seasons of the year and are covered at other seasons by water ten or twelve inches deep, they do not lie in navigable waters.—Hall v. Alford, 114 Mich. 165.

¶ 31. The Saginaw river is a highway upon which trade and commerce are carried on between the several states.—The Tittabawassee Boom Co. v. Cunning, How. N. P. 82.

¶ 32. The waters covering the submerged lands of Maumee Bay, a bay or arm of Lake Erie, covering some 4,000 acres, and which had been surveyed and platted as swamp land by the government and later conveyed to the State of Michigan, are not navigable waters and therefore subject to the public right of navigation but are subject to private ownership, even though in certain parts there is water navigable for ordinary commercial purposes, said waters being no more or less than a marsh opening into the lake.—Toledo Liberal Shooting Club v. Erie Shooting Club, 90 Fed. 680.

¶ 33. Act March 5, 1896 (c. 49, 29 U. S. St. 54), relating to the anchorage and movements of vessels in St. Mary's river does not alter the boundary line of Lake Huron; and under it Mud Lake and Munoskong Bay are still a part of Lake Huron, and not a part of St. Mary's river.—Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61.

II. PUBLIC RIGHTS, CONTROL, AND REGULATION.

§ 5. In general.

Rights of the public and of private persons relatively to each other, see post § 6.
Relative private rights, see post § 14.
Rights in lands under water, see post §§ 7, 8.
Rights in banks and shores, see post § 9.
Obstructions and interferences with use, see post § 10.
Bridges and dams and consent to or approval of erection, see post § 11.
Structure and form of bridge or dam, see post § 12.
Harbor lines and regulations, see post § 13.
State power to regulate, see also post ¶¶ 86-88.
Criminal jurisdiction of crimes committed on Great Lakes, see Indictment § 87.
Municipal power to regulate waters and harbors, see Municipal Corporations § 95.

Provisions of Ordinance of 1787 for preservation of rights of free use of navigable waters "leading into the Mississippi and St. Lawrence," see Comp. L. 1915, preliminary chapter VI, p. 103.
Powers of health boards to establish quarantine on waters, see Comp. L. 1915, § 5069 et seq.

¶ 34. Navigable waters are public highways at common law.—La Plaisance Bay Harbor Co. v. City of Monroe, W. 155; Lorman v. Benson, 8 Mich. 18.

¶ 35. Navigable waters are public highways at the common law; and the only object of the clause in the ordinance of 1787 relating thereto was to secure to the citizens of the states such rights, in relation to such waters within the territory northwest of the Ohio, as were already possessed by the inhabitants of that territory, and to prevent any tax or duty on persons navigating them.—La Plaisance Bay Harbor Co. v. City of Monroe, W. 155.

§ 6. Relative public and private rights.

Rights of private users of waters among themselves, see post § 14.
Tolls for use of improvements, see post § 19.
Public right as an easement and riparian right as servient ownership, see post ¶ 45.
Paramountcy of navigation over title in the state of the lands under the waters, see post ¶ 49.
Paramount right of navigation over fishery rights, ice gathering, and the like, see also Shipping § 25.
Rights subject to logging uses, see also ante ¶ 15.
Public easement to navigate as distinguished from "easement" in proper sense, see Easements § 1.
Assertion of paramount right of the public as "deprivation" of private rights, see also Constitutional Law § 141.
Interference with rights of navigation as a "taking" requiring compensation, see Eminent Domain § 26, ¶¶ 72, 73.
Right to use canals, see Canals § 1.
Liability for injury to bridge in use of stream, see Bridges, IV.
Fishing rights and their extent, see Fish §§ 1, 2.
One mile limit on fishing privileges, see Fish ¶ 7.
Fishing regulations affecting particular rivers and waters, see Fish §§ 4-6.
Right to use nets in St. Mary's river, see also Fish ¶ 22.
Statutory regulations concerning floating of logs and timber, see Comp. L. 1915, chap. 127.

¶ 36. The public has the right to use a navigable stream in its fluid state for navigation purposes and in its frozen state for the purpose of traversing its surface, with due regard to the rights of riparian owners to its use for their own purposes.—Parsons v. E. I. Du Pont de Nemours Powder Co., 198 Mich. 409.

¶ 37. Frozen navigable rivers are public highways and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to.—Parsons v. E. I. Du Pont de Nemours Powder Co., 198 Mich. 409.

¶ 38. The right of navigation over a navigable river does not include the right to anchor a house boat for an indefinite length of time in one location above an island owned by a city and used for park purposes and to contaminate the water by discharging garbage and night soil into it, especially where such practice renders the water unwholesome and unfit for public bathing.—Paterson v. Dust, 190 Mich. 679.

¶ 39. Navigability for pleasure purposes is as sacred in the eye of the law as navigability for any other purpose.—City of Grand Rapids v. Powers, 89 Mich. 94.

¶ 40. The state can forbid any erections in navigable waters, and on navigable streams and along the great lakes can fix the distance beyond which private erections cannot be maintained.—Lincoln v. Davis, 53 Mich. 375.

¶ 41. The rights of the public in the use of internal water-ways for the floatage of logs are subject to the determination of the supervisors, who may, in the manner fixed by law, permit dams to be built according to such plans as they approve, and the public use is limited by these conditions and cannot be described as a right to the use of the water in its natural flow.—Wood v. Rice, 24 Mich. 423.

§ 7. Rights in subaqueous lands.

Riparian ownership and limit or boundary thereof, see Waters, IV, A; Boundaries §§ 18, 20.
Division line of submerged land between adjoining shore owners, see Boundaries § 22.
Call for navigable lake as carrying ownership of land under water out to navigable depth, see Boundaries § 18.

¶ 42. The State of Michigan holds the title of lake bed lands in trust for the people, for the purposes of navigation, fishing, etc.—State v. Venice of America Land Co., 160 Mich. 680.

¶ 43. When the state sets up proprietary rights over property in the St. Mary's river, they can only be maintained by proof of a valid grant or a legal appropriation upon an inquest in due form of law.—Ryan v. Brown, 18 Mich. 196.

¶ 44. The body of water from Point Detour to the Neebish Rapids, including Mud Lake and Munoskong Bay, is at the outlet of St. Mary's river and joins on to Lake Huron. Its water level is substantially the same as that of Lake Huron, and the current through it is very slight. Held, that the said body of water is a part of Lake Huron, and not a part of St. Mary's river; and that riparian proprietors own only to the meander line, and not to the middle thread of the same.—Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61.

¶ 45. Where one owns land bordering a stream, such ownership is private; such public rights as exist are simply easements, or privileges, and, as a general proposition, it is settled that the owner may do what he pleases with the land under the water so long as he does not interfere with the public enjoyment.—People ex rel. Bird v. Grand Rapids-Muskegon Power Co., 164 Mich. 121.

¶ 46. The depth of water upon submerged land is not important in determining the ownership.—State v. Venice of America Land Co., 160 Mich. 680.

¶ 47. The owner of the shore owns to the center of a stream or lake, and may use his submerged land as well as that lying above water, so long as in so doing he does not interfere with such use of the water of the lake as is common to all.—Fuller v. Bilz, 161 Mich. 589.

¶ 48. The title to submerged lands under a navigable river entirely within the limits of a State belongs to the State and not to the United States.—Scranton v. Wheeler, 57 Fed. 803.

¶ 49. The title of a State to submerged lands under a navigable river entirely within the State is held subject to public use, and the property rights are subservient to the power of the Congress of the United States to regulate navigation.—Scranton v. Wheeler, 57 Fed. 803.

¶ 50. The United States never had or asserted any title to the land under the waters under the Ste. Marie river, and cannot by its grant convey to a patentee any title whatever.—Scranton v. Wheeler, 57 Fed. 803.

¶ 51. As an incident to the ownership of lands on the margins of navigable rivers or streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream, and such title will accrue to the owner who has received a patent from the United States to the riparian lands.—Scranton v. Wheeler, 57 Fed. 803.

¶ 52. The right of Congress to regulate commerce, and as an incident navigation remains unaffected by the question whether the title to the soil submerged is in the State or is in the owner of the shores, and the latter's title is subject to the right of Congress to occupy the lands without compensation for the purpose of erecting structures in aid of commerce between States.—Scranton v. Wheeler, 57 Fed. 803.

§ 8. ——Lands partially or intermittently covered.

Navigability of waters over marsh lands or flats, see ante ¶¶ 30, 32.

Rights of passage over nonnavigable watered area of "swamp lands," see Easements ¶ 92.

¶ 53. Whether the lower part of an island is a part of a lake bed so as to make title to it belong to the State of Michigan depends on the condition of the land as to submergence at the time of the admission of Michigan into the Union.—State v. Venice of America Land Co., 160 Mich. 680.

¶ 54. The evidence disclosed that the lower part of a certain island was part of the time swampy and covered with the vegetation accompanying such land. At certain intervals of years the water of Lake St. Clair rose and entirely covered the said land. The land was unsurveyed and within the meandered lines. Held, it belonged to the lake bed and title to it passed to the State of Michigan upon its admission to the Union.—State v. Venice of America Land Co., 160 Mich. 680.

§ 9. Rights in banks and shores.

Right to subaqueous lands, see ante §§ 7, 8.

Rights of ownership and easements incident to riparian character of the land, see Waters, IV, A.

Right to have wharf or landing, see Wharves.

Ferry landing as highway, see Comp. L. 1915, § 4490.

§ 10. Obstructions and interferences with use.

Power to forbid erection of structures in waters, see also ante ¶ 40.

Removal of logs and other obstructions to navigation, see post § 17.

Right of dam owner to obstruct logs while repairing dam, see post ¶ 84.

Presumption as to neglect of imposed duty having been cause of drawbridge not opening, see post ¶ 78.

Statutory lien on logs for driving or breaking jams, see Forestry § 9.

Extent of county power to remove "obstructions," see also Counties § 24.

State and interstate commercial regulation, see Commerce.

Right of telegraph or telephone lines to carry wires across navigable waters, see Telegraphs.

Constitutional provisions as to bridging and damming, see Const. art. VIII, § 14.
Statutory power of supervisors to permit or prohibit erection of dam or bridge, see Comp. L. 1915, § 2284 et seq.
Right of rafting and booming companies to construct booms, rollways, etc., see Comp. L. 1915, §§ 8624, 8642.
Penalty for obstructing improved river or injuring improvement works or buildings, see Comp. L. 1915, § 8841.
Penal statute relating to obstructing stream by felling trees or casting lumber, slabs and waste into the waters, see Comp. L. 1915, § 4461.

¶ 55. A bridge over a navigable stream is not necessarily a nuisance; it may or may not be such according to circumstances; and the vessel-owner who brings suit for an injury occasioned by it must show the circumstances that make the injury fairly chargeable to some one as a wrong.—Macomber v. Nichols, 34 Mich. 212.

¶ 56. In respect to nuisances by inclosure of part of the way there is a great difference between a land highway, where any inclosure is a nuisance, and waterways, where an inclosure is not a nuisance unless the public use is interfered with.—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

¶ 57. A person lawfully using a watercourse cannot be guilty of a public nuisance, unless that nuisance is the consequence of his own conduct; and a mere change in the mode of enjoyment, which involves no increase of evil, cannot be injurious. So, a mill-dam is not a nuisance where the stream without it would produce the same extent and kind of mischief.—Beach v. People, 11 Mich. 106.

¶ 58. One whose land does not adjoin a navigable stream cannot maintain an action for damages for the obstruction of the stream unless he shows that he has thereby sustained some special damage distinct from that sustained by the public at large.—Potter v. Indiana & L. M. R. Co., 95 Mich. 389.

¶ 59. In the absence of evidence to the contrary, a dam across a navigable stream will be presumed to have been constructed under proper authority from the board of supervisors.—Pratt v. Brown, 106 Mich. 628.

§ 11. Application, permit and approval of dam or bridge.

Quo warranto to question consent or approval, see Quo Warranto.
Sufficiency of consent as condition precedent to issuance of bridge bonds, see Municipal Bonds § 5.
Bridge or dam as obstruction to use, see ante § 10.
Subsequent legislative action as legalizing bridge erected without permission, see post ¶ 104.
Power and jurisdiction of highway commissioners to establish highways over navigable waters, see Highways § 28.
Liability for injuries from defective bridge over navigable waters, see Highways § 202; and see Bridges.
Responsibility of county for acts of officers in bridging stream so that injury occurs, see Counties § 36.
Powers and procedure of county board to permit bridging or damming navigable stream, see Comp. L. 1915, §§ 2284-2287.
Statutory procedure by corporations formed for that purpose in the improvement of rivers, see Comp. L. 1915, § 8826 et seq., § 8865.

¶ 60. Const. art. 18, § 4, prohibiting the bridging or damming of navigable streams unless authorized by the board of supervisors, does not apply to waters that form part of the state boundary.—Ryan v. Brown, 18 Mich. 196.

¶ 61. Const. art. 18, § 4, prohibiting the damming or bridging of navigable streams unless authorized by the board of supervisors, has no application to streams that have no naturally valuable capacity for floatage purposes.—Shepard v. Gates, 50 Mich. 495.

¶ 62. Boards of supervisors have no jurisdiction to act upon petitions for leave to bridge navigable streams, unless the petitions comply with Comp. L. 1871, §§ 487-89 (How. St. §§ 493-495). Such a petition must specify the proposed location of the bridge with reasonable precision; this may depend largely on the extent of the commercial interests that may be involved in the location, and the convenience of the public; greater particularity would be needed if the bridge is to be built where there is a town than where there is not. The petition must also describe the bridge with particularity; as by indicating the location of the draws.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 63. The authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves; they cannot delegate it to others, especially to parties concerned in any details requiring the exercise of their judgment, such as the location or character of the bridge.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 64. Under Const. art. 18, § 4, providing that no navigable stream shall be either bridged or dammed without authority from the county supervisors under provisions of law and that no such law shall prejudice the right of individuals to free navigation of such streams and Comp. L. 1897, § 2494 et seq., giving authority to the supervisors to permit dams across navigable streams, the board of supervisors have ample power to grant the right to build a dam across a nav-

igable stream.—Valentine ex rel. Dudley v. Berrien Springs Water-Power Co., 128 Mich. 280.

¶ 65. Where a corporation has a franchise to build a dam 16 feet high across a navigable stream no public notice of a petition to raise the dam to 20 feet is necessary as the difference in the height is not material to the question of the obstruction to navigation.—Valentine ex rel. Dudley v. Berrien Springs Water-Power Co., 128 Mich. 280.

¶ 66. Where a corporation has a franchise to build a dam 16 feet high across a navigable stream no publication of notice is necessary in filing a petition to increase the height to 20 feet where option for the purchase of all flowing rights have been secured. The failure to give notice is no violation of Comp. L. 1897, § 2495, providing that the board of supervisors shall have no power to grant the right to take or injure lands by the construction of such dams.—Valentine ex rel. Dudley v. Berrien Springs Water-Power Co., 128 Mich. 280.

¶ 67. Comp. L. 1897, §§ 2494, 2495, specifying the manner in which boards of supervisors may permit or prohibit the construction of dams across navigable streams is to be read in connection with the provisions in article 18, § 4, Const. 1850, Michigan, relating to that subject, and when so read the intended purpose of both the statutes and the Constitution is that the public right of navigation in the streams of the state should be preserved, and the county supervisors have no powers outside the accomplishment of this purpose.—People ex rel. Bird v. Grand Rapids-Muskegon Power Co., 164 Mich. 121.

¶ 68. Under Comp. L. 1897, §§ 2494, 2495, giving boards of supervisors power to grant leave to construct dams on rivers, the boards may limit the time for the completion of the work but may not insist that three dams instead of one be constructed.—People ex rel. Bird v. Grand Rapids-Muskegon Power Co., 164 Mich. 121.

¶ 69. A board of supervisors granted respondent leave to build three dams across Muskegon River with a provision that if all three dams were not completed by a specified date, respondent's rights should be forfeited. Respondent built only one of them. Under quo warranto brought to test the right of respondent to maintain such dam, held, that Comp. L. 1897, §§ 2494, 2495, giving boards of supervisors power to grant leave to construct dams gives such boards power only to protect the navigation interests of the public in rivers, and since the failure to build two of the dams did not injure the navigability of said river, respondent could not be ousted of its right to maintain its dam.—People ex rel. Bird v. Grand Rapids-Muskegon Power Co., 164 Mich. 121.

¶ 70. Where leave is given a respondent by a county board to construct three dams with a provision that the fish and log chutes shall be of certain dimensions, and that respondent's rights shall be forfeited if all three dams are not completed by a certain date, and the respondent later embodies the resolution granting such leave in a second petition in which it asks permission to make said chutes smaller, such second petition can have no bearing on the right of respondent to erect and maintain only one dam instead of three.—People ex rel. Bird v. Grand Rapids-Muskegon Power Co., 164 Mich. 121.

¶ 71. Where a drawbridge has been located and maintained at a given point for twenty-nine years, first by a private corporation and then by a township which purchased from the corporation, without objection from any person or municipality, during all of which time it has been recognized by the legislature as a lawful structure, and has occasionally been made the object of appropriations by the board of supervisors, it is too late for taxpayers to question the legality of it on the ground that it is not at the exact point authorized by the board.—Dietrich v. Schremms, 117 Mich. 298.

¶ 72. Act 62 of 1889 (How. St. §§ 1310a-1310f), providing for the construction of bridges on township lines, does not apply to navigable rivers where it would be necessary to construct and maintain a drawbridge.—Ecorse Township Board v. Wayne County Sup'rs, 75 Mich. 264; Osborne v. Lindow, 78 Mich. 606.

¶ 73. A petition to the board of supervisors, under Comp. L. 1857, § 356, How. St. § 494, for leave to dam a stream and construct in connection therewith a chute or apron for the passage of rafts, but containing no description whatever of said chute or apron, is fatally defective and would not give the board jurisdiction to act. The petition must set forth in detail the whole plan of the proposed dam, and the capacity and character of any chute or passage to be constructed therein.—Powers v. Irish, 23 Mich. 429.

¶ 74. A stream being navigable, the township officers had no right to erect a bridge obstructing it without action by the board of supervisors under Const. 1850, art. 18, § 4, and How. St. § 495, which provides that, when any township officers shall wish to construct any bridge across any stream at a point where the same is navigable for boats or vessels of fifteen tons burden or more, they shall apply to the board of supervisors by petition for permission to do so.—Stofflet v. Estes, 104 Mich. 208.

¶ 75. A statute authorizing the construction by a township of a bridge across a navigable stream, is not to be held incomplete or invalid because it contains no provision

for repairing the bridge or for operating its draw; the duty to make repairs and to provide the necessary funds for operating the draw necessarily follows the acquirement of the bridge.—Dietrich v. Schremms, 117 Mich. 298.

¶ 76. The assent of the supervisors of the county being essential to the right to construct or maintain a toll-bridge over a navigable stream, and such board being also the competent authority to fix the rate of tolls, a corporation organized to build a toll-bridge over such a stream which has obtained assent by resolution of the board of supervisors "to erect, rebuild, repair and keep up and use, for its sole use and profit, a toll-bridge," etc., "for the term of twenty years," the tolls being fixed by the board at the same time, has no authority after the expiration of the twenty years to enforce the payment of tolls, notwithstanding the corporation was organized for the period of thirty years, for the purpose of building this bridge, in pursuance of a statute authorizing it.—Grand Rapids Bridge Co. v. Prange, 35 Mich. 400.

§ 12. Structure or form of dams and bridges.

Necessity and sufficiency of specification of manner or form of structure in application for permit, see ante § 11.
Right to prescribe manner or form of dam as condition of approval, see ante ¶ 68.
Construction and maintenance of bridges generally, see Bridges.
County duty to maintain fishway in dam, see also Counties § 24.
Preservation of free use of navigation against permits to make dams and bridges, see Const. art. VIII, § 14.

¶ 77. Const. art. 18, § 4, providing that no law shall authorize damming of a navigable stream so as to prejudice the right of individuals to the free navigation of such stream does not require that such dams shall have locks for the passage of vessels.—Valentine ex rel. Dudley v. Berrien Springs Water-Power Co., 128 Mich. 280.

¶ 78. Const. art. 18, § 4, providing that no navigable stream shall be bridged without permission from the board of supervisors under provisions of law and, further, that "no such law shall prejudice the right of individuals to the free navigation of such streams," coupled with How. St. § 495, authorizing the board to impose such terms on granting permission "as they may deem just and reasonable," does not raise an inference that a permit for a drawbridge must have been on terms that it would admit of the passage of boats adapted to the stream and would be kept in working order, and that a city which built the bridge must therefore have been negligent of its imposed duty when the draw failed to open properly; since even though the bridge may have become a nuisance, the city maintaining it as part of its governmental functions would have been under no liability aside from a statute making it so.—Corning v. City of Saginaw, 116 Mich. 74.

§ 13. Harbor lines and regulations.

See also ante ¶ 40.
Lines separating Lake Huron and St. Mary's river, see also ante ¶ 33.
Wharves and wharfage rights, see Wharves.
Presumption as to reasonableness of dock lines as established by authority, see Wharves.

¶ 79. The Grand river at a point three miles up from its mouth beyond where vessels usually go is not a harbor in the common-law sense or within the meaning of the statutes regulating fisheries; and the common council of Spring Lake has no power to establish harbor lines in said river.—People v. Kirsch, 67 Mich. 539.

§ 14. Relative private rights of use.

Rights of riparian owner with respect to general public, see ante §§ 7, 8.
Common rights of use under Ordinance of 1787, see ante ¶ 35.
Maritime torts and injuries in course of navigation, see Shipping, V.
Injunction to prevent interference with rights on navigable waters, see also Injunctions § 87.

¶ 80. The use of navigable waters is equally open to all persons.—Butterfield v. Gilchrist, 53 Mich. 22.

¶ 81. It is the owner's duty to see that running logs do not obstruct the watercourse.—Butterfield v. Gilchrist, 53 Mich. 22.

¶ 82. In navigating a stream for any lawful purpose, the navigator may make all such reasonable use of such stream as may be necessary, and which does not deprive the riparian proprietor of his rights.—Whitman v. Muskegon Log-Lifting & Operating Co., 152 Mich. 645.

¶ 83. A riparian owner who has used a navigable stream for many years as a means of ingress and egress from his property to a larger body of water, may enjoin a lower riparian proprietor from obstructing the stream so as to interfere with the free and unobstructed use thereof.—Lepire v. Klenk, 180 Mich. 481.

¶ 84. The owner of a dam lawfully maintained across a navigable stream is entitled to a reasonable time within which to repair an accidental break therein, and for that purpose, if necessary to the protection of the dam from further serious injury, may temporarily detain the logs of a navigator.—Pratt v. Brown, 106 Mich. 628.

¶ 85. No occupancy, in hindrance of free navigation, of the waters of a deep navigable lake, can be lawfully enjoyed.—Jones v. Lee, 77 Mich. 35.

III. IMPROVEMENTS AND TOLLS FOR USE.

§ 15. Improvements in general.

Canalization of waters, see post § 16.
Removal of sunken logs and the like, see post § 17.
Drainage or alteration of water level, see post § 18.
Toll rates for use of canals and improvements, see post § 19.
Water-power corporations and improvements, see Waters, IV, VI.
Disability of state to improve waterways, see Constitutional Law § 281 et seq.
Constitutional provisions as to bridging or improving, see Const. art. VIII, § 14.
Preservation of power of state to make improvements under permit to make dam or bridge, see Const. art. VIII, § 14.
Statutes for formation of river improvement companies, see Comp. L. 1915, chap. 171.

¶ 86. Although the public authorities can regulate and improve water highways as well as land ones, though the soil of neither belongs to the state; Const. art. 14, § 9, precludes the state from itself engaging in the work of improving its navigable waters.—Ryerson v. Utley, 16 Mich. 269; Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Watts v. Tittabawassee Boom Co., 52 Mich. 203; Manistee River Improvement Co. v. Sands, 53 Mich. 593, aff'd in 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; 123 U. S. 297, 31 L. ed. 152, 8 Sup. Ct. Rep. 117; Anderson v. Hill, 54 Mich. 477; Wilcox v. Paddock, 65 Mich. 23.

¶ 87. The public authorities can regulate and improve water highways as well as land highways, though the soil of neither belongs to the state.—Lorman v. Benson, 8 Mich. 18.

¶ 88. The navigable waters of the United States, though forever free, are nevertheless subject to state control and regulation, and may be improved by the states or bridged or dammed under their legislation.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628.

¶ 89. A state can authorize any improvement of a river wholly within its limits, which, in its judgment, will enhance its value as a means of transportation from any part of the state to another.—Sands v. Manistee River Improvement Co., 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, affirming 53 Mich. 593.

¶ 90. The state may constitutionally authorize the formation of corporations to improve its navigable streams, and to levy toll, at rates fixed by the legislature or by a board of control, upon those who make use of the improvements.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Nelson v. Cheboygan Slack-Water Navigation Co., 44 Mich. 7; Manistee River Improvement Co. v. Sands, 53 Mich. 593, aff'd in 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; 123 U. S. 297, 31 L. ed. 152, 8 Sup. Ct. Rep. 117.

¶ 91. The state may authorize the improvement of navigable waters by corporations.—La Plaisance Bay Harbor Co. v. City of Monroe, W. 155; Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Nelson v. Cheboygan Slack-Water Navigation Co., 44 Mich. 7; Watts v. Tittabawassee Boom Co., 52 Mich. 203; Manistee River Improvement Co. v. Sands, 53 Mich. 593, aff'd 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; 123 U. S. 297, 31 L. ed. 152, 8 Sup. Ct. Rep. 117.

¶ 92. Comp. L. 1871, chap. 85, How. St., chap. 111, contemplates the improvement of navigable rivers, not the creation of navigable rivers from streams not naturally navigable.—Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204.

¶ 93. Since How. St., chap. 111, does not contemplate the incorporation of companies to improve any but navigable streams, a company organized thereunder cannot subject the lands of other persons on a non-navigable stream to any easement or right of flowage.—East Branch Sturgeon River Improvement Co. v. White & Friant Lumber Co., 69 Mich. 207.

¶ 94. The right of the public for purposes of navigation must be considered as appurtenant to the ordinary means of navigation rather than to small and insignificant boats, and it is no nuisance to erect wharves and similar improvements unless under exceptional circumstances, such as narrows, bends, etc.—Ryan v. Brown, 18 Mich. 196.

¶ 95. In proceedings by quo warranto against a corporation authorized by law to deepen the channel of a river, it pleaded that it had removed obstructions by cutting channels through jams, and by confining the water at various points. Held, on demurrer, that it could not be said as matter of law that this was not an exercise of the power given to deepen the channel.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628.

¶ 96. The state has no power to authorize the entire obstruction of a navigable stream used in interstate commerce by authorizing the erection of docks.—Tittabawassee Boom Co. v. Cunning, How. N. P. 82.

¶ 97. Incorporation under How. St. § 3845 of a company to improve a navigable stream, and approval by the canal board of such company's application, cannot legalize previous unauthorized improvement and possession of the stream which was falsely described as a "proposed" improvement.—East Branch Sturgeon River Improvement Co. v. White & Friant Lumber Co., 69 Mich. 207.

§ 16. ——Canalization of waters.

¶ 98. A canal that is purely a private enterprise is like a road constructed and maintained at a private expense over which the public is permitted to travel, but in which it obtains no vested rights.—Potter v. Indiana & L. M. R. Co., 95 Mich. 389.

§ 17. Removal of logs and other obstructions.

What constitute obstructions and interferences with use, see ante § 10.
Contract to clear out sunken logs as grant of the logs, see Contracts ¶ 884.
Validity of contract with county to clear stream of sunken logs as menace to navigation, see also Forestry ¶ 10.
Rights in lodged, sunken and abandoned logs, see Forestry § 4; Abandonment.
Statutory powers of rafting and booming companies to clear obstructions and jams, see Comp. L. 1915, § 8646.

¶ 99. The internal commerce of a state—the commerce which is wholly within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels and improve them in other ways, if the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated.—Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, affirming 53 Mich. 593.

¶ 100. Comp. L. 1897, § 2494, authorizing the board of supervisors to provide for the removal of obstructions "arising from the erection of booms or collecting of logs or rafts in navigable streams by any individual," limits the power to such obstructions as have arisen from operations of the class mentioned, and does not extend to obstructions to navigation of long standing.—Gainor v. Nelson, 147 Mich. 113.

§ 18. Drainage or changing of water level.

¶ 101. Comp. L. 1897, § 4339, providing for drainage of lakes or other bodies of water surrounded by swamps, marshes or other low lands, but not so as to impair the navigation of any navigable water, does not authorize a drain for the avowed purpose of lowering the water in a navigable lake four feet, thereby rendering it less navigable for steamboats and skiffs.—Cole v. Dooley, 137 Mich. 419.

§ 19. Toll rates for use of canals and improvements.

Regulations of public service, see Public Service.
Tolls and charges of rafting and booming companies, see Comp. L. 1915, § 8648.
Statutory provisions as to tolls by canal and harbor companies, see Comp. L. 1915, § 8821.
Statutory provisions as to tolls for use of river improvements, see Comp. L. 1915, § 8834 et seq., § 8860.

¶ 102. The terms tax, impost and duty mentioned in the Ordinance of 1787 mean a charge for the use of the government, not compensation for the improvement of navigable waters.—Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, affirming 53 Mich. 593.

¶ 103. It seems not to be competent for the state to give the control of one of its navigable streams to private parties for improvement, with power to charge toll at discretion.—Nelson v. Cheboygan Nav. Co., 44 Mich. 7.

¶ 104. Where the legislature legalizes rates of toll fixed by a board of supervisors for the use of a bridge previously erected without authority of law, the action of the two bodies precludes the public from questioning the legality of the bridge.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 105. Corporations organized to improve navigable streams may be empowered to charge tolls at rates fixed by the legislature or by a board of control.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Nelson v. Cheboygan Slack-Water Navigation Co., 44 Mich. 7; Manistee River Improvement Co. v. Sands, 53 Mich. 593; aff'd in 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, 123 U. S. 297, 31 L. ed. 152, 8 Sup. Ct. Rep. 117.

¶ 106. It seems that corporations organized to improve navigable streams cannot be empowered to charge toll at their own discretion.—Nelson v. Cheboygan Slack-Water Nav. Co., 44 Mich. 7.

¶ 107. The statute (Comp. L. 1871, ch. 85; How. St., ch. 111) empowering the board of control of the St. Mary's Falls ship canal to fix the rates of toll to be charged by the river improvement companies sustained; fixing such rates is not a judicial act, and the statute is not objectionable for not requiring a hearing and notice to parties interested; and the annual affidavit required to be filed by each company (Comp. L. 1871, § 2730; How. St. § 3859) does not preclude the board from using its own methods of getting information.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628.

¶ 108. Where the rate of tolls has not been fixed by the state board of control as provided by How. St. § 3859, a navigation company organized under How. St. §§ 3845-3873, cannot recover from the owners of logs for the use of its improvements, in the absence of a special agreement by such

owners to pay for such use.—Ocqueoc Improvement Co. v. Mosher, 101 Mich. 473.

NAVIGATION to NECESSITY.

Cross-References.

Navigation—
See Shipping; Navigable Waters; Admiralty.
Navy—
See Military and Naval Affairs.
Necessaries—
To wife, see Husband and Wife § 62.
To child, see Parent and Child, II.
To infants and insane persons, see Infants § 18; Insane Persons § 24.
Necessary Parties—
See Parties.
Necessity—
Basis for easements, see Easements § 10.
Ground for condemnation, see Eminent Domain, II, IV.
Justification of Sunday contracts and work, see Sunday.
Implications from necessity in construing writings, see Contracts, VI, A; Deeds, III, A; Statutes, V; Wills, VI, A.

NE EXEAT.

TREATS of the writ to prevent a defendant from departing from the state pending the decision of the court.

Analysis.

§ 1. In general.

¶ 1. In general.
Constitutional inhibition of imprisonment for debt, see Constitutional Law § 194.
Disability of court commissioner to issue writ, see Courts § 86.
Construction of conditions for release from forfeiture of bond, see Contracts ¶ 794.
Power of circuit courts to issue writ, see Jud. Act, chap. VI, § 1, ¶ 2; Comp. L. 1915, § 12299, ¶ 2.
Provisions relative to second application for ne exeat after refusal, see Jud. Act, chap. IV, §§ 15, 16; Comp. L. 1915, §§ 12262, 12263.

¶ 1. History of the practice as to the writ in England and the United States.—Bailey v. Cadwell, 51 Mich. 217.

¶ 2. The writ is never granted in any case except as equitable bail for a sum due and ascertainable as a money demand.—Fitzhugh v. Maxwell, 34 Mich. 138.

¶ 3. A statute is invalid which gives a circuit judge or court the power to issue a ne exeat against a debtor at discretion.—Risser v. Hoyt, 53 Mich. 185.

¶ 4. In general the writ of ne exeat will not be granted unless a case of equitable debts and claims and the debts must exist at the time or so far matured that present payment can rightly be demanded.—Drolet v. Drolet, How. N. P. 14.

¶ 5. Ne exeat cannot issue in divorce cases before decree.—Bailey v. Cadwell, 51 Mich. 217.

¶ 6. A writ of ne exeat is not authorized in cases of temporary alimony.—Drolet v. Drolet, How. N. P. 14.

¶ 7. A circuit court commissioner or injunction master cannot issue a ne exeat in any case.—Bailey v. Cadwell, 51 Mich. 217.

¶ 8. A subpoena is the first process. It is irregular to have injunction and ne exeat issued and served before the issue of subpoena.—Peltier v. Peltier, H. 19; Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

¶ 9. The writ cannot be issued and served before service of subpoena.—Peltier v. Peltier, H. 19.

¶ 10. In a bill of ne exeat the existence of a debt should be positively stated, except in matters of account, and there should be also a positive averment of the defendant's intention to go abroad or of his threats or declarations so to do.—Drolet v. Drolet, How. N. P. 14.

¶ 11. A writ of ne exeat by a wife who had commenced suit against her husband for divorce, alleging that the complainant's husband "has given out that in case proceedings for a divorce are commenced against him he will speedily leave this State and go to Canada, and will thus endeavor to avoid the payment of alimony," is insufficient to confer jurisdiction on the court.—Drolet v. Drolet, How. N. P. 14.

NEGATIVE to NEGLECT.

Cross-References.

Negative Covenants—
See Real Property; Deeds, III, E; Buildings § 15 et seq.; Landlord and Tenant, IV.
Injunction against breach, see Injunctions, II, A.

Negative Easements—
See Easements; Buildings § 15 et seq.; Real Property.
Negative Evidence—
Admissibility, see Evidence § 80; Indictment § 158.
Sufficiency, see Evidence §§ 605, 606; Indictment § 303 et seq.
Negative Pregnant—
In pleading, see Pleading; Indictment, I.
Negativing Exceptions—
In indictments, see Indictment § 32.
In pleading, see Pleading, I.
In setting up mechanics' liens, see Mechanics' Liens § 46.
See also generally portions of specific topics devoted to pleading.

Neglect—
As actionable tort, see Negligence, and also specific topics treating of negligence in particular relations.
As crime, see Crimes, II; Homicide § 12
As official nonfeasance or misfeasance, see Officers, VI; Sheriffs, IV.
Of assumed duty as ground for dismissal from service or as breach of contract, see Master and Servant § 17; Agency, IV, A; Attorneys, II, F; Medicine and Surgery § 9 et seq.
Neglect in the sense of laches, see Equity, IV.
See also cross-references under "Diligence."

NEGLIGENCE.

TREATS of the general law of negligence as actionable tort, excluding to specific topics the specific application of the law of negligence to them. See for example Carriers; Electricity; Gas; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways. Criminal negligence is treated in Crimes, II; Homicide. The tort of nuisance is treated in Nuisances. Other matters excluded from the topic will be covered by cross-references at appropriate places in the body of the topic.

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§ 27. Contributory negligence of trespasser.
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§ 31. Negligence of driver of vehicle imputed to person injured.
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§ 35. Imputing to one spouse negligence of the other.
§ 36. Imputing to employee negligence of employer.

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§ 37. In general.
§ 38. Pleading in general.
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B. Burden of Proof, Presumptions and Evidence.

§ 42. Burden of proof and presumptions.
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Towards passengers by carriers resulting in personal injuries, see Carriers, IV, E.
Negligent use of highways causing injuries to other users, see Highways, XIII.
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§ 1. In general.

Contributory negligence, see post § 17.
Doctrine of comparative negligence, see post § 29.
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Evidence as to negligence, see post § 45 et seq.
Jury questions as to negligence, see post § 51.
Duty of electric light company owning fixtures on premises of another for safety of third persons, see Electricity § 7, ¶¶ 19-20.

¶ 1. Negligence consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable injury.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 2. Negligence is neither more nor less than a failure of duty.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 3. Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it.—Flint & P. M. Ry. Co. v. Stark, 38 Mich. 714; Kendrick v. Towle, 60 Mich. 363.

¶ 4. Negligence is the failure to observe, for the protection of another's interests, such care, precaution and vigilance as the circumstances justly demand and the want of which causes him injury.—Brown v. Congress & B. St. Ry. Co., 49 Mich. 153.

¶ 5. Negligence is the want of ordinary care.—Montgomery v. Muskegon Booming Co., 88 Mich. 633.

¶ 6. Negligence is a failure of duty. It implies fault.—Burke v. Parker, Webb & Co., 107 Mich. 88.

¶ 7. Negligence is correctly charged "a failure of duty to observe that degree of care which the law imposes for the protection of interests likely to be injuriously affected by the want of it."—Webster v. Symes, 109 Mich. 1.

¶ 8. Negligence consists of a failure to exercise due care depending upon the circumstances attending action or the failure to act.—Hemmila v. Cleveland Cliffs Iron Co., 184 Mich. 567.

¶ 9. Negligence is the absence of such care as persons of ordinary prudence are expected to exercise under like circumstances.—Lillebridge v. McCann, 117 Mich. 84.

¶ 10. Actionable negligence is the absence of ordinary care.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 11. Ordinary care is that exercised by the great mass of mankind.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 12. Negligence consists of a want of that reasonable care which should be exercised by a person of ordinary prudence under all the existing circumstances in view of probable injury; it is the failure to observe for the protection of another's interest such care, precaution, and vigilance as the circumstances justly demand, and the want of which causes injury.—Smith v. Detroit United Ry., 155 Mich. 466.

¶ 13. Where a right and duty concur, as where the exercise of the right is contingent on the performance of the duty, the mere failure to discharge the duty is negligence if a third person is injured in consequence.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 14. Gross negligence is an intentional disregard of duty or a reckless disregard of

the consequences of an act.—Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 216.

§ 2. Necessity of existent duty toward injured person.

Predicating negligence on lawful use of one's own premises, see post § 11.
Duty toward licensees, volunteers and trespassers, see post § 12.
Violation of statutory duty as proximate cause of injury, see post § 14.
Liability of seller of dangerous substances and articles for injury to son of purchaser, see post ¶ 48.
Necessity of pleading the duty which has been neglected, see post § 38.
Immunity of Bay County Bridge Commission from liability for negligent operation of bridge, see Bridges § 4.
Statutory basis of public liability for injury suffered from neglect to keep highway safe for travel, see Highways § 266.
Liability for act of independent contractor, see Independent Contractors, II.
Statutory duty to maintain guards and fences along railroads, see Railroads.

¶ 15. To charge a person or a corporation for negligence in the performance of any public work, whereby any person has sustained special damage, the law must have imposed a duty, so as to make that neglect culpable.—Dermont v. City of Detroit, 4 Mich. 435.

¶ 16. One who ships lumber over a railroad is not liable for an injury to a brakeman while coupling cars which happened because of the lumber's shifting, it having been negligently loaded; there being between the parties no relation upon which an action for negligence could be based, and it having been the railroad company's duty to provide for the inspection of the car before it came to the brakeman.—Fowles v. Briggs, 116 Mich. 425.

¶ 17. The general rule is that one who lets property for use, like one who sells it, is not responsible to third persons injured by reason of defects.—Griffin v. Jackson Light & Power Co., 128 Mich. 653.

¶ 18. In an action for negligent injury to property rightfully stored on another's premises, it is unimportant that a third person was joint owner of it with the plaintiff, or that defendant was not aware of plaintiff's interest; plaintiff was not bound to give notice of his interest.—Moomey v. Peak, 57 Mich. 259.

¶ 19. A duty owing to every one in general cannot become the foundation of a private action at law until some individual is placed in a position which gives him particular occasion to insist upon its performance.—Molin v. Wisconsin Land & Lumber Co., 177 Mich. 524.

¶ 20. One who invites another to bring upon his premises for use a dangerous implement, knowing it to be such, will take upon himself the consequences which naturally follow.—Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169.

¶ 21. Where the jury's special findings, in an action for a negligent injury, negative not only the case made by the declaration, but also any agency of defendant's in plaintiff's going upon the place of danger at any time, judgment should be entered for defendant upon such findings.—Thorsen v. Babcock, 68 Mich. 523.

§ 3. Mere damage without legal negligence.

Res ipsa loquitur doctrine, see post § 43.
Bite of rabid dog as inevitable accident, see Animals ¶ 60.
Nonliability of innkeepers for inevitable accidents, riots and accidental fires, see Inns § 2.

¶ 22. No action lies for injuries from extraordinary or accidental circumstances for which no one is at fault.—Elliott v. Herz, 29 Mich. 202; Underwood v. Waldron, 33 Mich. 232; Brown v. Marshall, 47 Mich. 576; Barry v. Peterson, 48 Mich. 263; Mitchell v. Chicago & G. T. R. Co., 51 Mich. 236; Lewis v. Flint & P. M. R. Co., 54 Mich. 55; Palmer v. Harrison, 57 Mich. 182; Allen v. Johnston, 76 Mich. 31.

¶ 23. Falling downstairs, where the mishap is not imputed to unknown or concealed defects, belongs to that class of ordinary accidents which ought to be imputed to the carelessness or misfortune of the sufferer.—Davis v. Buss Mach. Works, 169 Mich. 498.

When "disease" not an "accident," see note, 3 N. C. C. A. 238.
Death by drowning as an accident arising out of and in course of employment, see note, 12 N. C. C. A. 64-82.
Injuries to children en ventre sa mere, see note, 13 N. C. C. A. 1113.

§ 4. Contracts affecting duty.

Validity of stipulations against liability for negligence, see Contracts § 51; Carriers §§ 67-70.
Negligence of master toward servant, see Master and Servant, III.

¶ 24. A paving contractor tearing up a public street is liable for an omission to properly guard and protect the public against injury, and his duty so to do can neither be increased nor diminished by his contract with the city to provide such protection.—Williams v. Sager, 165 Mich. 635.

§ 5. Measure of duty and degree of care required.

Definition and nature of negligence, see ante § 1.

Duty toward licensees, volunteers and trespassers, see post § 12.
Violation of statutory duty as proximate cause of injury, see post § 14.
Duty and care of plaintiff to discover and avoid dangers, see post § 18.
Age, sex, experience or capacity as affecting contributory negligence, see post § 19.
Care required of children, see post § 20.
Duty and care in use of manufacturing premises, see also post ¶ 53.
Negligence as immaterial to liability for injury by animal, see Animals §§ 12-17.
Degree of care in driving trespassing cow from unfenced land by setting on dog, see Animals ¶ 98.
Inspection as duty of carriers, see generally Carriers.
Duty and care of municipalities in maintenance of streets and highways, see Highways, XII.
Negligence of persons obstructing tramways on wharves, see Wharves.
Degree of care required of bailee, see Bailments, §§ 5-7.
Care required of keeper of captive wild animal, see Animals § 12 et seq.
Degree of care required of livery stable keeper in caring for horse left with him, see Animals § 24.

¶ 25. The law does not hold any one responsible upon the ground of negligence for not doing that which it was practically impossible to do.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

¶ 26. The law does not impose impracticable rules of duty, but is satisfied with what is fairly reasonable under the circumstances.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 27. The degree of care required in any business must be in proportion to its nature and risks, but the law cannot require business to be conducted on any unusual basis, though the business be one of great risks, and requiring great caution. All rules applied must be reasonable and not oppressive, and must be applied with reference to the ordinary conduct of affairs.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 28. The nature of the business determines whether the degree of care exercised by those employed in it is such as the law requires.—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

¶ 29. Ordinary care has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilance and attention.—Baker v. Flint & P. M. R. Co., 68 Mich. 90.

¶ 30. Where the danger is to human safety the care required is such as may reasonably be regarded as enough to prevent the probability of mischief.—Carver v. Detroit & S. Plank-Road Co., 69 Mich. 616.

¶ 31. Reasonable care is that care which an ordinarily reasonable man would take under the particular circumstances.—Burroughs v. Postal Tel. Cable Co., 199 Mich. 672.

¶¶ 32, 33. What constitutes reasonable care in a given case depends upon all the facts and circumstances of that case.—Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519.

¶ 34. Whether a person's act is negligent depends on whether he omits to do something which a reasonable man guided by considerations which ordinarily regulate the conduct of human affairs, would have done, or did something which a prudent and reasonable man would not have done.—Schneider v. C. H. Little Co., 184 Mich. 315.

¶ 35. Where there is a comparatively safe and a more dangerous way of discharging a duty, it is negligence to select the more dangerous way.—Wight v. Michigan Cent. R. Co., 161 Mich. 216.

Duty to skaters of persons carrying on operations resulting in melting or cutting of ice, see note, 16 N. C. C. A. 625-632.
Signal from traffic officer as affecting question of negligence of driver of vehicle, see note, 13 N. C. C. A. 1117-1126.
Violation by driver of automobile of statute or ordinance as to speed as constituting negligence, see note, 13 N. C. C. A. 982-1009.

II. PARTICULAR DUTIES, ACTS AND OMISSIONS.

A. PERSONAL CONDUCT OR MISDOING.

Personal assaults with direct violence or menace thereof, see Assault, II.
Negligent killing as manslaughter, see Homicide § 12.
Negligent failure to maintain highways in safe condition, see Highways, XII.
Negligent operation of railroads, see Railroads; Street Railways.
Negligent operation of ships, see Shipping.
Negligence in maintaining dams, see Waters.
Negligence in conducting wharves, see Wharves.

§ 6. In general.
Negligent use of machinery and substances, see post § 7.
Negligent use of firearms, see post § 10.
Negligent use of land, buildings and structures, see post § 11.
Coliability of agent with principal, see Agency § 85.
Liability of agent to principal for neglect or want of diligence, see Agency § 96.
Liability of assignee for creditors for neglect in caring for estate, see Assignments for Creditors § 22.
Negligence of medical practitioners, see Medicine and Surgery § 9.

Of hospital authorities in care of inmates or conduct of business, see Asylums § 3.
Of title abstracter, see Abstracts of Title § 2.
Liability of attorney for neglect or want of skill, see Attorneys, II, F.
Degree of care required of bank officials, see Banking §§ 63, 64.
Negligence of bank in handling paper for collection, see Banking §§ 36-39.
Negligence of bank in protecting deposit against claims, see Banking § 15.
Of architect to employer, want of skill, see Building Contracts § 45.
Negligence of surgeons or physicians in treating injury whereby it was aggravated, see Damages § 23.
Diligence or want of diligence of party or attorney as bearing on right to have default set aside, see Defaults, VI.
In performance of rafting and towing contracts, see Forestry § 6.
Neglect of official duties as ground for removal of officer, see Officers § 47.

¶ 36. Breach of an ordinance is evidence of negligence, not negligence per se.—Scott v. Dow, 162 Mich. 636.

Absence of vehicular license as affecting right of driver, owner or occupant to recover for injuries, and as affecting his liability for injuries inflicted upon others, see note, 16 N. C. C. A. 58-70.

B. DANGEROUS MACHINERY, SUBSTANCES OR PRACTICES.

§ 7. In general.

Negligent conduct or misdoing, see ante § 6.
Injury from dangerous implement brought on premises by invitation, see ante ¶ 20.
Negligent use of lands, buildings and structures, see post § 11.
Duty and care in use of manufacturing premises, see also post ¶ 53.
Jury questions as to safety of threshing machine, see post ¶ 303.
Weight and sufficiency of evidence as to defects in machinery and appliances, see post § 49.
Offense of negligently setting out fire, see Crimes § 81.
Injuries from negligence in use of electric current, see Electricity §§ 4-8.
Master's liability for servant's negligent use of vehicles on highway, see Highways § 375.
Blasting near private way, see Highways ¶ 1684.
Duty and negligence in cutting ice on waters and guarding openings, see Waters, IV, D.
Negligence in leaving hatchway open and unprotected by railings, see Shipping.

¶ 37. Negligence and consequent liability of the renter of a rowboat for the death of occupants by drowning cannot be predicated upon the failure to furnish a boat, which, when capsized, would float, supporting in the water four clinging passengers.—Clark v. Detroit & M. Ry. Co., 197 Mich. 489, 15 N. C. C. A. 1033.

Taking blind horse upon highway as negligence, see note, 14 N. C. C. A. 512-520.
Liability of owner of animals for spread of contagious disease, see note, 8 N. C. C. A. 1058-1064.
Liability of hospital for spread of contagious disease, see note, 9 N. C. C. A. 378-383.
Liability of railroad company for spread of contagious disease, see note, 1 N. C. C. A. 651-657.
Duty to skaters of persons carrying on operations resulting in melting or cutting of ice, see note, 16 N. C. C. A. 625-632.
Liability of owners of property in custodia legis for injuries to third persons caused thereby, see note, 9 N. C. C. A. 1018-1020.

§ 8. Machinery and other objects attractive to children.

¶ 38. Children must be expected to act upon childish instincts, and those who are answerable for their safety must take precautions accordingly, and must expect them to meddle with anything that is likely to tempt them if left exposed to their view and within their reach.—Powers v. Harlow, 58 Mich. 507.

¶ 39. The principle of the "attractive nuisance" or turntable cases as applied to children is condemned and held to be exceptional and in contravention of well established rules of law.—Ryan v. Towar, 128 Mich. 463. (Montgomery, C. J., and Moore, J., dissenting.)

¶ 40. The proprietor of premises leased from a railroad company is not liable for injury caused to a child who trespasses on the railroad premises and crawls through a hole in a building for the purpose, on that occasion, of rescuing another child crying for help, in immediate danger of injury from a water wheel upon which the children were in the habit of playing without permission or authority.—Ryan v. Towar, 128 Mich. 463.

¶ 41. A small, four-wheeled, flat car is not such a dangerous machine as to render guilty of negligence one who leaves it upon his property so unsecured that children may put it in motion.—Kaumeier v. City Electric R. Co., 116 Mich. 306.

¶ 42. It is negligence to leave a wagon alone and unattached in a public street, where it carries a tank full of explosives and had its top vent open, and where a custodian of the wagon had seen boys playing on the highway and on the wagon and had put them off of the wagon and told them to keep away but had taken no further precautions to keep them away, after which they returned and ignited it by putting a match to the vent.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, affirming judgment by divided court, four justices dissenting on the

ground that the boys were trespassers, and one of them on the ground that it was for the jury to say if the result ought to have been foreseen.

Care required of children, see post § 20.
Imputing negligence to children, see post §§ 33, 34.
Evidence as to dangerous condition of machine, see post § 45.
Negligent injury to children playing in streets, see also Highways § 240.
Duty and care of master toward infant employees, see Master and Servant, III.
Moving vehicles or cars as attractive nuisances, see note, 8 N. C. C. A. 803-812.
Liability of municipalities for injuries to children from attractive nuisances, see note, 4 N. C. C. A. 167-181.
Pond covered with ice as attractive nuisance, see note, 10 N. C. C. A. 243-249.

§ 9. Manufacture or sale of dangerous substances or articles.

Proximate cause of poisoning from spoiled meat, see post ¶ 79.
Contributory negligence as preventing recovery for injury from spoiled meat, see post ¶ 104.
Sufficiency of evidence to show knowledge on the part of the manufacturer, see post § 47.
Liability of seller of hogs, infected with dangerous and infectious disease, to ultimate purchaser, see Animals § 22.
Manufacturer's or seller's liability to user for injuries from explosives or combustibles, see also Explosives and Combustibles § 3.
Personal liability of corporate officer of manufacturer of dangerous substance to purchaser injured by it, see Corporations ¶ 602.
Liability to person made sick by negligently selling impure or deleterious food, see Food § 6.
Rights and liabilities growing out of sales generally, see Sales.

¶ 43. The seller of an article of commerce, not in itself dangerous, is not responsible for consequences to a purchaser from his vendee resulting from defects in the article sold, which were unknown to the original seller.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 44. One who manufactures goods ordinarily not of a dangerous nature so negligently that they will obviously endanger those using them, is liable, in case he sells such articles without notice of their dangerous character, to anyone into whose hands they may come for use in the usual course of business, and who is injured without fault on his part, although there is no contractual relationship.—Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 328.

¶ 45. A vendor of an article is not liable on account of his carelessness or negligence, to others than the immediate purchaser, for mistakes in the nature or quality of an article sold, where the thing sold is in itself harmless, so far as the vendor knows, and where he has no false representations.—Gerkin v. Brown & Sehler Co., 177 Mich. 45.

¶ 46. Where it is known that a commodity apparently harmless contains concealed dangers, and when distributed through the usual course of trade and properly used is sure to injure the health of a small percentage of purchasers, the manufacturer and dealer has a duty to warn the ignorant consumer of the hidden danger.—Gerkin v. Brown & Sehler Co., 177 Mich. 45.

¶ 47. Where a wholesaler buys dyed fur coats, harmless in themselves, in the usual course of trade and sells them to a retailer without warning, knowing that in some cases the dye may be injurious to some persons, a purchaser of a coat from the retailer, injured by the dyed fur coming into contact with his skin, may recover from the wholesaler.—Gerkin v. Brown & Sehler Co., 177 Mich. 45.

¶ 48. A nineteen-year-old son residing with his parents is not a bare licensee in the household and a stranger to the duty which defendant seller of kerosene owes to the household not to supply a dangerous combustible, and hence the vendor of such oil through an intermediate dealer is answerable for injuries to the son due to lighting a fire with the aid of what was sold as kerosene but was in fact gasoline.—McLawson v. Paragon Refining Co. of Michigan, 198 Mich. 222.

Liability of manufacturer of automobile for personal injuries caused by defects in machine, see notes, 3 N. C. C. A. 79-84; 13 N. C. C. A. 1029-1043.
Liability of manufacturer or seller of gasoline or acetylene lighting system for injury to purchaser, see note, 12 N. C. C. A. 499-518.
Liability of manufacturer or seller of cloth or wearing apparel for injuries caused by poisonous dyes or other substances in material, see note, 4 N. C. C. A. 254-265.
Liability of maker or distributor of serum or vaccine for injury to animals treated therewith, see note, 14 N. C. C. A. 880-891.
Liability of manufacturer or retailer of shoes for injury caused by defects therein, see note, 13 N. C. C. A. 801, 802.
Liability of manufacturer or independent contractor for injury to third person caused by instrumentalities dangerous only because of defective construction, see note, 12 N. C. C. A. 562-589.
Liability of one, illegally selling gun or pistol to infant, for injuries to third person caused by infant's use of same, see note, 7 N. C. C. A. 447-453.

§ 10. Misusing firearms.

Criminal negligence in use of firearms, see Crimes § 134.

Negligence in use of explosives and combustibles, see Explosives and Combustibles.

¶ 49. One who snaps a gun, knowing it to be pointed at another person, is guilty of negligence per se, and is liable to such person in damages, both at the common law and under the statute (How. St. §§ 9110-9113) designed to prevent the careless use of firearms, for injuries occasioned by the discharge of the weapon; and it is no defense that he used the ordinary means to satisfy himself that the gun was unloaded, and believed it to be so when he snapped it off.—Babel v. Manning, 112 Mich. 24.

¶ 50. An air gun is not so obviously and intrinsically dangerous as to charge a father with negligence in placing it in the hands of his nine-year-old son, and make him liable for injuries sustained by reason of its use by another boy not a member of his family to whom it is delivered by his wife in his absence and without his knowledge or consent.—Chaddock v. Plummer, 88 Mich. 225.

Liability for injury growing out of the negligent use of firearms, see note, 9 N. C. C. A. 518-529.

Liability for personal injuries caused by toy pistol, gun or cannon, see note, 3 N. C. C. A. 149-151.

C. USE OR CONDITIONS OF LAND, BUILDINGS OR STRUCTURES.

§ 11. In general.

Jury questions as to negligence in allowing materials to fall from building, see post ¶ 301.

Contributory negligence of tenant injured by a defective floor, see post ¶ 126.

Contributory negligence as defeating recovery for injury from falling shed, see post ¶ 105.

Liability of agricultural societies, see Agriculture § 4.

Duty to maintain division fences as affecting right to distrain cattle, see Animals § 7.

Of adjoining owner in withdrawing support or undermining buildings, see Adjoining Owners.

Notice of defect in bridge, see Bridges § 9.

Evidence of general condition of bridge on issue of nonrepair, see Bridges §§ 16-19.

Protection due from occupier of premises, see Buildings §§ 4, 5.

Statutory liability for negligence in permitting fire to escape to premises of another as a "taking," see Eminent Domain ¶ 76.

Duty and liability for negligence in conduct of public shows, expositions and theater, see Exhibitions and Shows.

Liability for injuries by animals because of want of fence or imperfect fence, see Animals § 6 et seq.; Fences § 2; Railroads, VIII, F.

In using or setting out fire, see Fires §§ 2, 3.

Liability of landlord for injury arising from negligence of tenant in making alterations under landlord's permission, see Landlord and Tenant ¶ 370.

Negligent management of ships and vessels, see Shipping.

¶ 51. Negligence implies fault, and cannot be predicated of a lawful and customary use of one's own premises.—Alpern v. Churchill, 53 Mich. 607.

¶ 52. The rule is well settled that there can be no fault in a perfectly lawful and customary use of one's own premises.—Pittsburgh & Conneaut Dock Co. v. Detroit Transp. Co., 122 Mich. 445.

¶ 53. Persons engaged in a manufacturing business must be allowed to use the premises for that purpose in such manner as they choose, so long as that management is not dangerous to the ordinary use of the public having business with the manufactory, or to the employees.—Armstrong v. Medbury, 67 Mich. 250.

¶ 54. Where the owner of an opera-house, fronting on a public street, provided side entrances opening on a private alley, which was used by the public as a common way with his permission, and only protected them from falling into an area, opening into a cellar belonging to said building, by an iron railing so low as to come below the knee of a man of ordinary height, he was guilty of negligence.—Brezee v. Powers, 80 Mich. 172.

¶ 55. In a building where the public is invited, one passing through its halls is not required to bestow upon the placing of his feet the same degree of attention as he would upon a public highway.—Branch v. Klatt, 165 Mich. 666.

Liability of owner of premises for injury to employee of public utility company on premises in connection with service furnished owner, see note, 15 N. C. C. A. 313-315.

Liability for injury to person catching foot between planking and rail at crossing, see note, 16 N. C. C. A. 198-208.

Injury by vicious animal to person visiting owner's premises on business errand, see note, 16 N. C. C. A. 380-388.

Liability of proprietor of tent show for injury to patron by blowing down of tent, see note, 16 N. C. C. A. 535-548.

Liability for injuries caused by revolving doors, see note, 16 N. C. C. A. 975-982.

§ 12. Duty toward licensees, volunteers and trespassers.

See also ante ¶ 48.

Necessity of existent duty toward injured person, see ante § 2.

Duty and care required in general, see ante § 5.
Contributory negligence of trespassers, see post § 27.
Imputing to voluntary passenger negligence of the driver, see post § 32.
Injuries resulting from voluntary exposure to risks, see post § 24.
Duty and negligence in respect to persons in buildings other than defendant's servants, see Buildings §§ 4-6.
Liability to licensee or trespasser falling into open mine shaft or pit, see Mines ¶ 52.
Licensees and trespassers on railroad property, see Railroads; Street Railways.
Duty of electric railway toward trespassers, see also Electricity § 6, ¶ 18.

¶ 56. Whoever expressly or impliedly invites others upon his premises assumes the duty of warning all who may accept the invitation of any danger in coming of which he knows or ought to know but of which they are not aware.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 57. The owner of land is liable in damages to those coming thereon, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises, which is known to him, which he has suffered negligently to exist, and of which they have received no notice.—Donaldson v. Wilson, 60 Mich. 86.

¶ 58. A gas manufacturer, who has provided driveways to and from the gas house for teams coming to haul coke is not obliged to anticipate that customers will use the premises in other than the customary ways of ingress and egress, or to make the premises safe for any purpose not reasonably to be anticipated.—Armstrong v. Medbury, 67 Mich. 250.

¶ 59. The rule that even as to mere licensees, the owner of premises cannot change their condition, so as to render them dangerous, without giving reasonable warning of the danger, is limited to cases where the use by the licensees is definite, long, open, and continuous.—Habina v. Twin City General Elec. Co., 150 Mich. 41.

¶ 60. If a licensee has been using a well defined path over the property of another openly and continuously he takes only such risks as have existed during the time of using the same, but not risks on said path made afterwards by the licensor without the knowledge of the licensee.—Morrison v. Carpenter, 179 Mich. 207.

¶ 61. Though owing no duty of reasonable care to prevent the injury of trespassers, the owner of premises must make them reasonably safe for invitees.—Blakely v. White Star Line, 154 Mich. 635.

¶ 62. After the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence.—Schmidt v. Michigan Coal & Mining Co., 159 Mich. 308.

¶ 63. Defendant provided a regular road approaching its dock. Another way was frequently used as a short cut across defendant's lot, and the lot of another. Plaintiff was injured by falling over an embankment while taking this latter way. Held, defendant could not be held liable on the theory that it had invited the public to use the way in question.—Woods v. White Star Line, 160 Mich. 540.

¶ 64. Where uninclosed premises adjacent to a power plant have been used in connection therewith for the storage of fuel, ashes, and refuse, and persons have crossed such premises at different places to suit their own convenience, and to the extent that the condition of the ground and the material upon it permitted, such public use must be regarded as casual, in an action by a girl who, becoming frightened while walking upon a sidewalk adjoining the premises, ran across them, fell into an open ditch, and was injured.—Habina v. Twin City General Elec. Co., 150 Mich. 41.

¶ 65. Where defendant's occupancy and use of uninclosed premises is visible and constant, and for the purpose of its business exclusive, and no path or way is shown to have existed at or over them, the fact that persons are allowed to go upon the premises, and to cross them, does not confer upon them or the public any right upon the premises.—Habina v. Twin City General Elec. Co., 150 Mich. 41.

¶ 66. One whose uninclosed grounds people cross without objection is not liable for injury caused by falling into an unguarded cistern; nor is he any more liable in the case of a child's falling into such cistern than he would be in the case of an adult's doing so.—Hargreaves v. Deacon, 25 Mich. 1.

¶ 67. Where contractors excavate under a railway track along which the public have established a pathway without guarding the same, they are liable to a pedestrian using the pathway and falling into the excavation.—Morrison v. Carpenter, 179 Mich. 207.

¶ 68. Where an automobile company engages a person to inspect and test machines it purchases before they leave the factory, such employee is not a mere volunteer as he has a direct interest in the work, and can recover for injuries sustained through the negligence of an employee of the factory assisting in the tests.—Johnson v. E. C. Clark Motor Co., 173 Mich. 277.

¶ 69. A mere volunteer who receives injuries due to a fall from a defective ladder while assisting in putting out a fire cannot recover for the injuries sustained by him.—Smedley v. Mashek Chemical & Iron Co., 189 Mich. 64.

Ponds, wells or reservoirs, and pools or water holes, as attractive nuisances, see notes, 10 N. C. C. A. 243-249; 12 N. C. C. A. 966-983.

Liability for drowning of trespassing child in place attractive to children, see note, 3 N. C. C. A. 186-209.

Liability of owner for injury to policeman caused by defects in or instrumentalities upon premises, see note, 11 N. C. C. A. 706-709.

Persons entering wrong room, apartment, or building by mistake, as trespassers, exempting owner from liability for negligence, see note, 11 N. C. C. A. 1012-1016.

Injury to trespasser by fellow trespasser, see note, 11 N. C. C. A. 611-617.

III. PROXIMATE CAUSE; CONCURRENT CAUSES; ACT OF GOD.

§ 13. Proximate and intervening causes.

Weight and sufficiency of evidence as to proximate cause, see post § 48.

Jury questions as to cause of accident, see post § 52.

Instructions as to proximate cause, see post § 59.

Dog bite as proximate cause of kick by horse, see Animals ¶ 56.

Doctrine of proximate cause in losses during carriage, see generally Carriers, II-V.

Misinforming passenger as to his whereabouts as proximate cause of subsequent injury, see also Carriers ¶ 498.

Sudden stop or nearness of invalid's cot to baggage as proximate cause of injury from falling baggage, see Carriers ¶ 562.

Open car door as proximate cause of death of passenger thrown through it by lurch, see Carriers ¶ 470.

Wreck as proximate cause of injury to passenger in passing around it, see also Carriers ¶ 464.

Slipping or condition of street as proximate cause of injury to passenger, see Carriers ¶ 442.

Rule of proximity of damages to wrong, see Damages, I, A.

Proximate cause of fires, see Fires § 4.

Proximate cause of injuries from defective highways, see Highways § 241.

Proximate cause of injuries to users of road by other users, see Highways § 381.

Defective bridge as proximate cause of injury, see Bridges § 11.

Negligence of notary as proximate cause of loss of loan made on falsely acknowledged mortgage, see Notaries Public.

Proximate cause of injuries to servants, see Master and Servant § 42.

¶ 70. Proximate cause is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred.—Wilmarth v. Michigan United Traction Co., 198 Mich. 428.

¶ 71. There can be no recovery for an injury that is not a proximate consequence of the negligence complained of; the court cannot select some cause back of the proximate one whereon to base an action.—Lewis v. Flint & P. M. R. Co., 54 Mich. 55.

¶ 72. When a particular consequence results from a wrong the wrong is the proximate cause of that consequence, unless there intervenes between the wrong and the consequence something which may properly be denominated a cause.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

¶ 73. To make negligence the proximate cause of an injury, the injury must be the natural and probable consequence of a negligent act which under the circumstances an ordinary prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act.—Baker v. Michigan Cent. R. Co., 169 Mich. 609.

¶ 74. Where an act is negligent, to render it the proximate cause, it is not necessary that the one committing it might have foreseen the particular consequence or injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been anticipated that some injury might occur.—Baker v. Michigan Cent. R. Co., 169 Mich. 609.

¶ 75. A proximate cause is such as operates to produce particular consequences, without the intervention of any independent unforeseen cause without which the injuries would not have occurred.—Stoll v. Laubengayer, 174 Mich. 701.

¶ 76. A negligent person may not be held liable for his original negligent act unless that act produces the consequences for which recovery is sought, without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred.—Calliari v. Fisher, 190 Mich. 56.

¶ 77. Negligence which, although proven, does not cause or contribute to the injury complained of affords no ground for recovery.—Switzer v. Ann Arbor R. Co., 190 Mich. 35, 16 N. C. C. A. 198.

¶ 78. A township is not liable for an injury where, though negligent, such negligence is not the proximate cause of the injury.—Bell v. Village of Wayne, 123 Mich. 386.

¶ 79. Blood poisoning from failure to cleanse or protect one's hands after handling spoiled meat sold by defendant was prox-

imately caused by the plaintiff's own act and not by selling the meat.—Williams v. Weidman, 135 Mich. 444.

¶ 80. Where a sound cable, an effective safety device, or a proper inspection would prevent an accident, the lack of them is the proximate cause of an injury resulting therefrom.—Wilson v. Escanaba Woodenware Co., 152 Mich. 540.

¶ 81. The proximate cause of the injury to a driver of a team which became frightened and ran away as a result of a horse, which was a notorious runaway and which had been standing unsecured and unattended close to the team, becoming frightened and running away, was not the negligence of the owner of the horse in allowing it to remain unsecured and unattended, but the act of the driver of the team, where, upon his team becoming frightened, he ran and jumped on the step of his closed sleigh and was injured as a result of his leg coming into contact with a sleigh driven by a third person before he could get his leg inside his sleigh.—Calliari v. Fisher, 190 Mich. 56.

§ 14. ——Violation of statutory duty.

Necessity of existent duty toward injured person, see ante § 2.

Alleging neglect of statutory duty, see post § 39.

Breach of statutory duty by master as resulting in liability to servant, see also Master and Servant § 35.

¶ 82. Although disobedience of a statute may be conclusive evidence of negligence, a condition of recovery by one urging the disobedience, is that such disobedience must be the proximate cause of the injury complained of.—Syneszewski v. Schmidt, 153 Mich. 438.

¶ 83. A breach of a statutory duty by an employer is not actionable unless either proximately or concurrently resulting in an injury to an employee.—Fifelski v. Grand Rapids Gas Light Co., 181 Mich. 503.

¶ 83a. Under Comp. L. 1897, § 4160, providing for treble damages for injuries to a public bridge by logs drawn over it or in any other way, a party driving logs on a river is not liable for injuries caused by a jam and freshet after notice, except where the act is wilful or the negligence so gross as to amount to culpable and wanton negligence.—Overseer of Highways of Road District No. 4 of St. Ignace Township v. Pelton, 129 Mich. 31.

§ 15. Contributing and concurring causes.

See also post ¶ 97.

Contributory negligence of plaintiff, see post § 17.

¶ 84. The two contributing causes must be held to be concurring, where the concurrence of both was essential to produce the injury.—Welch v. Jackson & B. C. Traction Co., 154 Mich. 399.

¶ 85. Where two concurrent acts, one of which is negligent and the other is not, produce the injury and it would not have been produced but for the negligent act, such act is the proximate cause.—Cavanaugh v. Michigan Cent. R. Co., 175 Mich. 156.

§ 16. Act of God.

Act of God as relieving carrier of liability for injury to goods, see Carriers § 40.

¶ 86. An act of God, relieving a party from a charge or liability of negligence, is a natural cause, such as a storm of wind, whatever its characteristics may be, which cannot be prevented by the exercise of ordinary care and the use of those appliances which the situation of the party renders it reasonable that he should employ.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

IV. CONTRIBUTORY AND IMPUTED NEGLIGENCE AND RULE AS TO GROSS OR WANTON ACTS.

§ 17. In general; definition and nature.

See also post ¶ 92.

Negativing contributory negligence, see post § 40.

Burden of proof and presumptions as to contributory negligence, see post § 44.

Evidence as to contributory negligence, see post § 46.

Weight and sufficiency of evidence as to contributory negligence, see post § 50.

Jury questions as to contributory negligence, see post § 54.

Instructions on contributory negligence, see post §§ 60, 61.

Contributory negligence of owner of horse left with stable keeper, see Animals ¶ 116.

Contributory negligence of person injured in or near building, see Buildings §§ 7, 8.

Contributory negligence of passengers, see Carriers, IV, E, 7.

Contributory negligence of passenger as to baggage, see Carriers § 252.

Rule that plaintiff cannot recover damages due to his neglect to avoid consequences, see Damages, I, A.

Contributory negligence of person killed as defense to action for death under Death Act, see Death by Wrongful Act § 7.

Contributory negligence of persons injured at exhibitions and shows, see Exhibitions and Shows § 3.

Contributory negligence in use of explosives and combustibles, see Explosives and Combustibles § 4.

Contributing to injury from fire, see Fires § 5.

Contributory negligence of persons injured from vehicles in streets, see Highways § 382.

Contributory negligence in use of defective bridge, see Bridges §§ 13, 14.
Contributory act of victim as affecting question of manslaughter by negligence, see Homicide ¶ 31.
Contributory neglect of guests at inns, see Inns § 4.
Right of railroad to urge contributory negligence where it is in default of statutory duty, see Railroads.
Contributory negligence of servant, see Master and Servant, III, G.

¶ 87. Contributory negligence is such action as contributes by direct consent to, or participation in, the wrong complained of.—Briant v. Detroit, L. & N. R. Co., 104 Mich. 307; Smith v. Detroit United Ry., 155 Mich. 466.

¶ 88. Contributory negligence presumes a careless act or omission.—Swoboda v. Ward, 40 Mich. 420.

¶ 89. A person is not guilty of contributory negligence as a matter of law unless all reasonable minds would reach the same conclusion under undisputed facts.—Beach v. City of St. Joseph, 192 Mich. 296.

¶ 90. Where an injury of which a plaintiff complains is the result of his own negligence or fault, or of the fault of both parties, without intentional wrong on the part of the defendant, no action can be maintained.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 91. One cannot recover for an injury caused by another's negligence if his own negligence contributed thereto.—Michigan Cent. R. Co. v. Leahey, 10 Mich. 193; Le Baron v. Joslin, 41 Mich. 313; Joslin v. Le Baron, 44 Mich. 160.

¶ 92. In an action to recover for an injury arising from the defendant's negligence in carrying on his lawful business without wanton or intentional wrong, plaintiff cannot recover if his own negligence directly or proximately contributed to produce the injury.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 93. Every one may use his own property as he pleases, provided he does not use it to the injury or annoyance of others; and his own neglect of his own property does not excuse another for injuring it, nor constitute contributory negligence.—Underwood v. Waldron, 33 Mich. 232.

¶ 94. Where the plaintiff by his negligence contributed to his injury, he cannot recover unless the defendant is guilty of gross negligence.—Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 216.

¶ 95. Though defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury was the want of ordinary care and caution in the person injured.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

¶ 96. One who participates in the negligence of the driver of an automobile in which he is a passenger cannot hold the driver's father responsible for injuries sustained as the result of the driver's negligence.—Webber v. Billings, 184 Mich. 119.

¶ 97. One who voluntarily and unnecessarily exposes himself to an imminent, known danger, and so contributes to his injury, cannot escape the consequences because the negligence of another concurred in producing the injury.—Wight v. Michigan Cent. R. Co., 161 Mich. 216.

¶ 98. A party who assumes to have knowledge of a danger of which another may be ignorant, and knowingly makes false assurances regarding it upon which the other relies to his injury, is estopped from affirming as a defense to negligence that the other in relying on such statements was guilty of negligence as precludes him from recovering compensation for injuries inflicted on him under cover of the falsehood.—Eaton v. Winnie, 20 Mich. 156.

Breach of rule habitually violated as contributory negligence, see note, 6 N. C. C. A. 515-516.
Violation of law of road by driver as contributory negligence barring recovery for injury to person or property, see note, 6 N. C. C. A. 313-329.
Driving motor vehicle at excessive speed as contributory negligence barring recovery by operator in action to recover damages for injuries to person or property, see note, 10 N. C. C. A. 830-833.
Contributory negligence of beneficiary as affecting recovery in action for wrongful death, see note, 16 N. C. C. A. 1050-1062.
Contributory negligence as defense in action against railroad company to recover for damage to or destruction of property by fire, see note, 10 N. C. C. A. 946-962.

§ 18. Duty and care to discover or avoid dangers.

Duty and care required of persons in general, see ante § 5.
Care required in passing through buildings, see ante ¶ 55.
Exclusion from damages of consequences which injured person neglected to avoid, see Damages, I, A.

¶ 99. Nothing short of gross negligence on the part of an injuring party can relieve the injured party from the exercise of care; and what constitutes reasonable care depends upon the facts and circumstances.—Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519. See Barnum v. Terpening, 75 Mich. 557.

¶ 100. The law requires a person to use his faculties in a reasonable manner to discover danger, but extraordinary care is not required.—Leary v. Houghton County Traction Co., 171 Mich. 365.

¶ 101. In an action for personal injuries a plaintiff cannot recover if he was guilty of any want of ordinary care and prudence, however slight, which neglect contributed directly to produce the injury.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 102. Courts are bound to know that there is a difference between reasonable care and no care at all, or utter negligence, and that if one who has good reason to apprehend danger does not make some use of his faculties to ascertain and avoid it, he does not exercise the ordinary or reasonable care demanded by the circumstances.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 103. It is not contributory negligence not to look out for danger when there is no reason to apprehend any; every one has a right to presume that others, owing a special duty to guard against danger, will perform that duty.—Engel v. Smith, 82 Mich. 1.

¶ 103a. A conclusion of law based upon a holding that plaintiff in an action for negligent injury was called upon to exercise a greater degree of care than persons of ordinary care and caution are expected to exercise under the circumstances cannot be sustained.—Barnes v. Brown, 95 Mich. 576.

¶ 104. A wholesale butcher was not liable to an experienced employee of a retailer to whom putrid meat had been sold, for being poisoned by the handling of such meat, where the employee knew of its condition and handled it thereafter, since the duty, if any, to disclose the condition was fully met by plaintiff's knowledge.—Williams v. Weidman, 135 Mich. 444.

¶ 105. Where the defendant, the part owner of a barn, demolished it with the consent of his co-owner, and an employee of latter's tenant, without occasion to do so, went into the barn after it was nearly demolished and was injured by the fall of a shed or lean-to attached to it, held that the defendant was not answerable where there was no breach of duty on his part, and the danger was as apparent to the injured person as to the defendant.—Groesbeck v. Shelden, 185 Mich. 583.

¶ 106. Plaintiff went upon defendant's premises to ask for work, and was standing in the space between a mortar box and a private road which ran close to said mortar box, and which curved to the right toward the box just as it passed it. Plaintiff saw a heavily loaded team approaching along the road and stood between the road and the mortar box while the load was passing, despite the warning to get out of the way. His foot was injured by the hind wheel of the wagon. Held, plaintiff was barred from recovery by contributory negligence.—Klimowicz v. Parker, Webb & Co., 166 Mich. 208.

Use of sidewalk with knowledge of defective condition as contributory negligence, see notes, 13 N. C. C. A. 505-543; 14 N. C. C. A. 366-377.

Liability of carrier for injury to prospective passenger while attempting to board moving street-car, see note, 16 N. C. C. A. 1-57.

Failure of passenger or guest in hired vehicle to control driver as contributory negligence, see note, 16 N. C. C. A. 485-592.

Liability for injuries resulting from driving traction engine or like slowly moving vehicle over railway crossing, see note, 16 N. C. C. A. 415-427.

§ 19. ——Age, sex, experience or capacity of injured person.

Contributory negligence of children, see post § 20.

Evidence as to the capacity and competency of injured person, see post § 46.

As bearing on contributory negligence of servant, see Master and Servant § 59.

¶ 107. The law does not exact of anyone judgment or caution not naturally to be expected from persons of his age and capacity.—Hargreaves v. Deacon, 25 Mich. 1.

¶ 108. In judging of negligence all the circumstances are to be taken into the account, and among others the age and sex of the person injured, so far as these are important.—Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205.

¶ 109. The age, intelligence and experience of one who has suffered from an injury are admissible, as they help determine whether he has been guilty of contributory negligence.—Swoboda v. Ward, 40 Mich. 420.

¶ 110. It is not a rule of law that a less degree of care in circumstances of danger is required in a woman than in a man; and an instruction to that effect is erroneous. The rule of reasonable care and prudence knows nothing of sex.—Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205.

¶ 111. The age of a person injured in crossing a railway track in a cutter driven by another may properly be considered in an action against the company for the injury, as bearing upon contributory negligence.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

Use of negligently maintained street, road or sidewalk by intoxicated person, as contributory negligence, barring recovery from city or township, see note, 14 N. C. C. A. 634-645.

Lack of familiarity with conditions at railway crossing as bearing upon alleged contributory negligence of traveler injured or killed thereat, see note, 16 N. C. C. A. 358-378.

§ 20. ——Care required of children.

Contributory negligence of child's parent or custodian, see post § 25.
Imputing to child negligence of its parent or custodian, see post § 34.
Imputing to infant passenger in automobile or carriage negligence of the driver, see post § 33.
Jury questions as to contributory negligence of children, see post § 55.
Instructions on contributory negligence of children, see post § 61.
Contributory negligence of children as passengers, see also Carriers § 189.

¶ 112. Negligence cannot be imputed to very young child.—Shippy v. Village of Au Sable, 85 Mich. 280; Schindler v. Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

¶ 113. Contributory negligence or liability for trespass is not imputable to a child thirty months old so as to preclude its recovering for a railway injury.—Keyser v. Chicago & G. T. R. Co., 56 Mich. 559.

¶ 114. A child of tender years is not expected or required to exercise the same degree of care as an adult, and one cannot be guilty of contributory negligence unless failing to exercise the degree of care that would be reasonably expected of a child of her sex, age and intelligence, under all the surrounding circumstances.—Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261.

¶ 115. When contributory negligence is sought to be attributed to a child the child can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence and judgment.—Baker v. Flint & P. M. R. Co., 68 Mich. 90.

¶ 116. A legal duty can only be predicated by one who has capacity to understand and ability to perform, and the care to be exercised by children, while it must be ordinary care, must be proportioned to their age and capacity.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 117. When a child is old enough to be chargeable with some degree of care for his own safety, then, as to any given event, a child is responsible for just such care for his own safety as may reasonably be expected of one of his age, development, and intelligence under the circumstances characterizing the particular event.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 118. Duty can only be predicated of one who has capacity to understand and perform it; and therefore a child not of an age or discretion to understand the danger in riding upon the front platform of a street-car cannot be charged with negligence in so doing.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

¶ 119. A nine-year-old child injured by the negligence of a railroad company will not be denied a recovery because, at the time of the accident, he was not in the exercise of the prudence and foresight which the law might require of an adult under the same circumstances.—Lehman v. Eureka Iron & Steel Works, 114 Mich. 260.

¶ 120. If an eight-year-old boy has sufficient intelligence to appreciate the danger of crossing a street-car track without looking to see whether a car is coming, and if he has in mind the necessity of taking precautions, it is not necessary, to preclude a recovery for an injury to him, that he should have "the intelligence of a grown person fully."—Henderson v. Detroit Citizens' St. R. Co., 116 Mich. 368.

¶ 121. While the care of an infant is measured in some degree by age, experience, and intelligence as a matter of law they may be guilty of negligence, if not too immature to understand the danger and the necessity of acting carefully.—Beghold v. Auto Body Co., 149 Mich. 14.

¶ 122. In a suit for personal injuries due to plaintiff's touching the end of defendant city's electric wire, which was burnt off in a storm and hung near the ground in the public street, contributory negligence cannot be attributed to plaintiff, a child of five years and four months.—Johnson v. City of Bay City, 164 Mich. 251.

¶ 123. Contributory negligence cannot be imputed to a child for a failure to anticipate the negligent operation of an automobile.—Winckowski v. Dodge, 183 Mich. 303.

¶ 124. A boy who was injured by a negligently operated automobile, while attempting to cross a street after having jumped from the rear of a loaded wagon on which he had been riding, is not guilty of contributory negligence as a matter of law, because he did not anticipate the approach of the automobile from the opposite direction on the wrong side of the street.—Winckowski v. Dodge, 183 Mich. 303.

§ 21. ——Appearance or assurance of safety.

¶ 125. Where it appears that plaintiff in an action for negligent injury was thrown off his guard by defendant's own act, and was led to believe that vigilance was not needed, his lack of care will not bar a recovery.—Kinney v. Folkerts, 78 Mich. 687.

¶ 126. In an action by a tenant against the owner for personal injuries due to the breaking of a defective floor, plaintiff was

held not guilty of contributory negligence in using the floor with knowledge of its weakness where she testified that the attention of defendant's agent had been called to the defect and he had assured plaintiff that the floor was safe and specifically promised to repair.—Nutter v. Colyer, 180 Mich. 107.

§ 22. ——Acts in emergencies or in face of danger.

¶ 127. Where, by reason of the failure of a township to keep a highway in repair, travelers upon it are placed in a perilous position, no negligence can be imputed to a party in charge, if, acting upon the occasion, as it appeared to him to be, for the safety of himself and those in his charge, he did not take the precaution which upon consideration a more prudent man might have taken.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 128. One put suddenly in peril is not imperatively required to do that which, after the danger is ended, it appears would have led to safety. The law allows for fright and for the lack of cool judgment incident to such peril.—Fehnrich v. Michigan Cent. R. Co., 87 Mich. 606.

§ 23. ——Alternative involving risk.

¶ 129. Where there are two known ways of doing a thing to adopt the more dangerous way because it is the more convenient is contributory negligence in case of accident.—Rohlfs v. Township of Fairgrove, 174 Mich. 555.

¶ 130. It is not necessarily negligence to take a choice of risks, or to do, without freedom of choice, an act involving danger; but it is negligence to risk life or limb merely to escape inconvenience or mental vexation.—Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470.

§ 24. ——Voluntary acts of exposure.

¶ 131. One who voluntarily exposes himself to evident risks caused by another's negligence cannot recover against the latter for bodily injuries resulting from such exposure, even though the exposure was for the purpose of saving property or the life of an animal.—Cook v. Johnston, 58 Mich. 437.

¶ 132. Defendant telephone company, while making an excavation in an alley, removed a service cock from a city water main laid four feet in the ground. The water spouted up into a second story window where plaintiff was in charge of a woman's athletic club. Plaintiff went to the window to close it in order to protect the property, and was knocked down and wetted by the stream of water and suffered illness as a result. Held, she was guilty of contributory negligence and could not recover.—Taylor v. Home Tel. Co., 163 Mich. 458.

Liability for injury to person coasting in street, see note, 16 N. C. C. A. 648-657.

Liability for injuries resulting from driving traction engine or like slowly moving vehicle over railway crossing, see note, 16 N. C. C. A. 415-427.

Attempting to stop runaway horse, as negligence, see note, 16 N. C. C. A. 167-173.

§ 25. Contributory effect of plaintiff's negligence.

Contributory and concurring causes of injury, see ante § 15.

Avoidable damages denied because of plaintiff's neglect, see Damages §§ 22, 23.

¶ 133. In an action for negligent injury negligence by plaintiff which did not contribute to the injury need not be regarded.—Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 134. Contributory negligence in order to constitute a defense must have been negligence contributing to the injury itself for which the action is brought. If it was subsequent negligence, and only contributed to increase the injurious consequences, it goes to the amount of recovery only.—Brown v. Marshall, 47 Mich. 576.

¶ 135. It is not necessary that contributory negligence shall have "materially contributed" to the injury; it is enough if it contributes however slight the negligence is.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 136. The doctrine of responsibility notwithstanding discovered or discoverable negligence of the plaintiff does not apply where the plaintiff's negligence is subsequent or concurrent in the order of causation.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 137. Where plaintiff is guilty of contributory negligence and such negligence ceased before that of defendant began, and did not again occur before or at the time of the accident, the jury should find for the plaintiff.—Fike v. Pere Marquette R. Co., 174 Mich. 167.

§ 26. Gross and wanton negligence of defendant; "last clear chance" rule.

See also ante ¶ 94.

What constitutes gross negligence, see also ante § 1.

Duty toward trespassers, see ante § 12.

Necessity of alleging wanton and wilful negligence, see post ¶ 205.

Proof of ordinary negligence where gross and wanton negligence alleged, see post § 41.

Instructions on gross negligence of defendant, see post § 62.

Inapplicability of doctrine of contributory negligence where injury is wilful, see Assault ¶ 51.

Last clear chance rule applied to passengers, see Carriers § 205.
Application to railroad accidents, see Railroads.

¶ 138. Contributory negligence is no defense if defendant's own conduct is wanton, wilful or reckless, and results in the injury complained of.—Bouwmeester v. Grand Rapids & I. R. Co., 63 Mich. 557.

¶ 139. Gross negligence such as authorizes a recovery for a negligent injury notwithstanding plaintiff's contributory negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them.—Denman v. Johnston, 85 Mich. 387; Frost v. Milwaukee & N. W. R. Co., 96 Mich. 470.

¶ 140. If a plaintiff is guilty of contributory negligence he cannot recover unless the negligence of the defendant is wanton or wilful.—Rouse v. Michigan United Rys. Co., 158 Mich. 109.

¶ 141. The term "gross negligence," when referred to as authorizing a recovery for a negligent injury notwithstanding the contributory negligence of the plaintiff, means the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and implies a thoughtless disregard of consequences without the exercise of any effort to avoid them.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 142. Recovery for a negligent injury can be had despite the contributory negligence of the plaintiff's deceased only where there is evidence of gross and wanton negligence on the part of the defendant.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 143. Gross negligence may be a deliberately wilful act; an act so reckless as to be akin to wilful, and therefore presumed in law to be wilful; a failure to exercise ordinary care to prevent injury to another, after his peril is, or should have been, discovered in the exercise of ordinary care.—Walter v. Detroit, J. & C. Ry., 191 Mich. 181.

¶ 144. Where gross negligence of defendant caused the injury, the plaintiff may recover notwithstanding his contributory negligence.—Simon v. Detroit United Ry., 196 Mich. 586.

¶ 145. Gross negligence is the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another, and it implies a thoughtless disregard of the consequences, without the exercise of any effort to avoid them.—Wexel v. Grand Rapids & I. Ry. Co., 190 Mich. 469; Vought v. Michigan United Traction Co., 194 Mich. 343; Simon v. Detroit United Ry., 196 Mich. 586.

¶ 146. The doctrine of contributory negligence does not apply to the case of one who omits ordinary care to avert an obvious injury to another.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 147. Reckless acts do not preclude the defense of contributory negligence if it can be said that they are not coincident with probable disaster.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 148. Where plaintiff's previous negligence has been discovered by defendant or his servant, or should, by the exercise of ordinary care, have been discovered in time to have avoided the injury, and the subsequent negligence of the defendant results in an injury to the plaintiff, the previous negligence of the plaintiff is not a bar to recovery.—Strong v. Grand Trunk Western Ry. Co., 156 Mich. 66.

¶ 149. The contributory negligence of plaintiff does not prevent recovery where the defendant who knows, or ought to know, by the exercise of ordinary care, of the precedent negligence of plaintiff, by his subsequent negligence injures plaintiff, the latter negligence being the proximate cause.—Fike v. Pere Marquette R. Co., 174 Mich. 167.

¶ 149a. The doctrine of discovered negligence is applied upon the ground that defendant's conduct, after the negligence of plaintiff was discovered, shows deliberate wrong, or intentional failure to perform a manifest duty, with thoughtless disregard of consequences, and without the exercise of any effort to avoid them.—Cardinal v. Houghton County St. Ry. Co., 174 Mich. 22.

¶ 150. Where the defendant discovers the peril of the plaintiff seasonably to prevent the accident, but in reckless, wanton or wilful disregard of the consequences omits to do what he ought to do or does what he ought not to do to avoid the accident, he is liable for such gross negligence.—Simon v. Detroit United Ry., 196 Mich. 586.

¶ 151. Where one has placed himself in a dangerous position the danger cannot excuse the negligence in having done so, by the fact that defendant also was under a duty to avoid it.—Daniels v. Bay City Traction & Elec. Co., 143 Mich. 493.

§ 27. Contributory negligence of trespasser.

¶ 152. Where a clandestine intruder upon another's premises is accidentally injured while the lawful possessor is expelling him, his contributory negligence should be considered in fixing responsibility therefor.—Taylor v. Adams, 58 Mich. 187.

The doctrine of "the last clear chance," see note, 5 N. C. C. A. 101-156.
Application of doctrine of last clear chance to cases involving imputed negligence, see note, 5 N. C. C. A. 155, 156.
Application of last clear chance doctrine to negligent acts occurring after the infliction of an injury, see note, 13 N. C. C. A. 829-843.
Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to trespassers by railroads, see note, 11 N. C. C. A. 463-482.
Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to licensees by railroads, see note, 11 N. C. C. A. 385-405.
Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to pedestrians at railroad crossings, see note, 11 N. C. C. A. 306-319.
Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to drivers of vehicles at railroad crossings, see note, 11 N. C. C. A. 127-148.
Doctrine of "last clear chance" or "discovered peril" applied to accidents to children, see notes, 3 N. C. C. A. 946-964; 5 N. C. C. A. 154, 155.
Presumption that traveler on street or highway will take notice of railway crossing, warning signals or approaching train, as limiting application of last clear chance rule, see note, 16 N. C. C. A. 291-326.

§ 28. Contributory negligence of injured child's parent or custodian.

Imputing to child negligence of its parent or custodian, see post § 34.

¶ 153. Where a parent sues for the loss of services from the death of the child, the suit will be defeated by the parent's contributory negligence.—Feldman v. Detroit United Ry., 162 Mich. 486.

¶ 154. Where the child's personal representative sues for loss of services from the death of the child under the Death Act, Comp. L. 1897, §§ 10427, 10428, the suit will be defeated by the parent's contributory negligence where the parent is the real beneficiary.—Feldman v. Detroit United Ry., 162 Mich. 486.

¶ 155. A parent who allows an unattended child to ride on a street-car is not chargeable with negligence.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

Contributory negligence of parent or custodian as preventing recovery for personal injury to child, see note, 7 N. C. C. A. 124-133.
Contributory negligence of parent or custodian as defeating action to recover for negligence or wrongful death of child, see note, 7 N. C. C. A. 486-497.

§ 29. Comparative negligence.

Comparative negligence of master and servant, see Master and Servant § 59a.

¶ 156. The doctrine of comparative negligence does not prevail in this state.—Matta v. Chicago & W. M. R. Co., 69 Mich. 109; Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

§ 30. Imputed negligence of another.

General doctrine of responsibility of principal for negligence of agent, see Agency § 49.
Notice to agent as charging principal with duty, see also Agency, II, E.
Negligence by bank in identification of payee, see Banking § 14.
Liability of one party to logging contract for injury caused bridge by other party, see Bridges ¶ 79.
Liability of master for negligence of his servant, see Master and Servant, IV.

¶ 157. Contributory negligence to defeat a right of action must be that of the party injured.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

¶ 158. Where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one in whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other.—Galloway v. Detroit United Ry., 168 Mich. 343.

¶ 158a. One who contracts for logs to be cut and delivered at the mouth of a stream is not liable under Comp. L. 1897, § 4160, for injuries caused to a bridge through the negligence of the other party to the contract.—Overseer of Highways of Road District No. 4 of St. Ignace Township v. Pelton, 129 Mich. 31.

Liability of owner of automobile for death or injury due to negligent operation of car by member of family, see note, 14 N. C. C. A. 453-481.

§ 31. Negligence of driver of vehicle imputed to person injured.

¶ 159. Where a passenger in a conveyance can have no control over those in charge of it he cannot be held to be so identified with them as to be considered a party to their negligence.—Cuddy v. Horn, 46 Mich. 596.

¶ 160. The rule by which one who rides in a private conveyance is presumed to control or be identified with the driver, and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or

steamboats, even though they have chartered the conveyance.—Cuddy v. Horn, 46 Mich. 596.

¶ 161. The negligence of the driver of a fire engine is not imputable to the engineer standing on the rear of the engine so as to preclude his recovery for personal injuries caused by a collision with a street car.—McKernan v. Detroit Citizens' St. Ry. Co., 138 Mich. 519.

Negligence of chauffeur as imputable to passenger, see note, 4 N. C. C. A. 22, 23.
Injury to passenger caused by negligent operation of automobile, see note, 13 N. C. C. A. 910-926.

§ 32. ——To voluntary passenger or guest.

Duty toward volunteers, see ante § 12.

¶ 162. Where a woman who has arrived at the age of discretion voluntarily enters the private carriage of another, to ride, and, by his carelessness in driving over an obstruction in a public street, is injured, his negligence is imputable to her, and bars a recovery by her against the municipality for the injuries received.—Mullen v. Owosso, 100 Mich. 103.

¶ 163. The negligence of the driver is imputed to one riding with him in a wagon.—Pike v. Pere Marquette R. Co., 174 Mich. 167.

¶ 164. A person riding as a guest of another person in the latter's automobile is precluded from recovery for personal injuries against a street railway company by the contributory negligence of said other person in running the car.—Kneeshaw v. Detroit United Ry., 169 Mich. 697.

¶ 165. Where a woman of mature years voluntarily entered an automobile belonging to a friend to ride with him, and was injured by collision with a street car. Held, that the negligence of the driver was properly imputed to her.—Colborne v. Detroit United Ry., 177 Mich. 139.

¶ 166. In an action for personal injuries sustained in a collision between two automobiles held that the contributory negligence of the driver might be imputed to a passenger injured while riding in the car on the driver's invitation.—Granger v. Farrant, 179 Mich. 19.

¶ 167. The negligence of the driver of a private conveyance is imputable to a voluntary passenger of mature years.—Lake v. Township of Springville, 187 Mich. 305.

¶ 168. One who is injured from a defect in a highway while a voluntary passenger in a private conveyance driven by another, in order to recover must show that neither of them was guilty of negligence which caused or contributed to the injury.—Lake v. Township of Springville, 187 Mich. 305.

¶ 169. A voluntary passenger in a private conveyance assumes the risk of the driver's negligence.—Lake v. Township of Springville, 187 Mich. 305.

¶ 170. A township is not answerable for injuries sustained by the plaintiff who was thrown from a private conveyance in which he was riding as a voluntary passenger, where the driver unnecessarily deviated from the traveled portion of a highway and encountered an obstruction at the side of the road which he saw and unsuccessfully attempted to avoid, since the negligence of the driver was imputable to the plaintiff.—Lake v. Township of Springville, 187 Mich. 305.

Liability of partner for negligent act or omission of copartner, see note, 11 N. C. C. A. 779-786.
Liability of owner or operator of automobile for injury to guest, see note, 13 N. C. C. A. 858-871.
Injury to passenger caused by negligent operation of automobile, see notes, 1 N. C. C. A. 134-138; 13 N. C. C. A. 910-926.

§ 33. ——To infant.

¶ 171. In an action by a child five years old for personal injuries where the declaration charged gross negligence, and the jury found the defendant guilty of such gross negligence, the defendant is not excused though the driver of the team which was struck may have been guilty of contributory negligence.—Schindler v. Milwaukee, L. S. & W. Railroad Co., 87 Mich. 400.

¶ 172. A 13-year-old infant riding in a carriage through invitation of its driver is not chargeable with his contributory negligence so as to prevent recovery for injuries received in a railroad grade crossing accident.—Hampel v. Detroit, Grand Rapids & W. R. Co., 138 Mich. 1.

¶ 173. The negligence of the driver of an automobile cannot be imputed to an infant occupying the car as a passenger.—Donlin v. Detroit United Ry., 198 Mich. 327.

§ 34. Negligence of parent or custodian imputed to child injured.

Contributory negligence of parent or custodian, see ante § 28.

¶ 174. A parent is not guilty of negligence, imputable to the child, in allowing a child to take the street railway cars by itself, if the company consents so to receive it, and if it is of an age which would justify its being alone in the public streets, because the company undertakes to provide a safe conveyance.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

¶ 175. A child less than four years of age cannot be guilty of negligence, nor can the

negligence of its parents be imputed to it where suit is brought in its behalf.—Shippy v. Village of Au Sable, 85 Mich. 280.

¶ 176. Quære, whether the negligence of the parents of a three-year-old child, injured where it strayed upon a railroad track, could be imputed to it.—Battishill v. Humphreys, 64 Mich. 494, Morse, J., writing that it could not, Campbell, C. J., with Champlin, J., regarding the question as not involved, and Sherwood, J., concurring only in the result.

¶ 177. Failure of parents to restrain a child, which wanders upon a railroad track and there is injured, is not negligence imputable to the child unless there was ability on the part of the parents to give better care than was given.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390, Champlin, J., concurring in the result, and Morse, J., also concurring in the result with the reservation that negligence of the parents cannot affect recovery by the child.

¶ 178. Negligence of a father in leading his boy, aged four years and three months, on a sidewalk that was negligently allowed to have holes in it cannot be imputed to the boy injured by stepping into a hole.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 179. Where a child sues in his own right, his suit cannot be defeated by reason of the negligence of his parent.—Feldman v. Detroit United Ry., 162 Mich. 486.

¶ 180. In an action under the Survival Act for injuries causing the death of a child five years old, the negligence of the parents cannot affect recovery.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 181. A child of five years cannot be charged with contributory negligence, and the negligence of his parents cannot affect recovery for injuries resulting in his death in a suit under the Survival Act (Comp. L. 1897, § 10117).—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 182. Negligence of parents of a child in permitting servant girls to bring a vicious dog into their home, where it attacked the child, cannot be imputed to such child.—Fye v. Chapin, 121 Mich. 675; writ of error dismissed in 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

§ 35. Imputing to one spouse negligence of the other.

¶ 183. Where a child of five years suffers injuries resulting in his death, and suit is brought by the father as administrator under the Survival Act (Comp. L. 1897, § 10117), the contributory negligence of the mother in permitting the accident is not imputable to the father so as to bar recovery.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 184. A wife's right to damages for being thrown—by reason of the negligence of intoxicated persons to whom defendant sold liquor—from a carriage in which she was riding with her husband is not affected by her husband's contributory negligence.—Wright v. Treat, 83 Mich. 110.

§ 36. Imputing to employee negligence of employer.

¶ 185. In an action against receivers of a street railway company for the death of a yardmaster in a collision between a street-car and a backing railroad train which was in charge of such roadmaster, the negligence of the railroad company in not keeping a watchman, was not imputable to the deceased.—Philip v. Heraty, 135 Mich. 446.

V. ACTIONS.

A. CAUSE OF ACTION, PARTIES AND PLEADING.

§ 37. In general.

Survivability of cause of action, see Abatement § 16.

Negligence of third person as defense to liability of keeper of vicious animal, see Animals ¶ 62.

Actionable death by negligence, see Death by Wrongful Act.

Actions for injuries in exhibitions and shows, see Exhibitions and Shows §§ 4-6.

Actions for injuries from negligence in use of explosives and combustibles, see Explosives and Combustibles §§ 5-7.

Liability of grand lodge of fraternal benefit association for negligence of local lodge, see Fraternal Associations § 14.

Actions for injuries from defective highways, see Highways, XII, H.

Notice of claim as requisite of actionable highway negligence and defendants as to whom such notice must be given, see Highways § 266.

Necessity of setting forth negligence of defendant in notice of claim for highway injuries, see Highways § 267.

Contribution as between persons liable for negligence, see Indemnity § 17.

¶ 186. Where more than one party is guilty of a negligent act the injured party may sue them jointly or severally.—Richard v. Detroit, R. R. & L. O. Ry., 129 Mich. 458.

Liability of motor boat operator for injury to bather, see note, 13 N. C. C. A. 1098.

Liability of generating company for negligence of electric distributing company, see note, 12 N. C. C. A. 1038-1048.

Liability of prospective purchaser for injury to automobile while learning to drive, see note, 13 N. C. C. A. 761-762.

§ 38. Pleading in general.

Pleading damages, see Pleading, X.

¶ 187. A declaration for negligent injury must set forth the duty which has been neg-

lected, and aver the neglect, and the case fails if such neglect is not proved.—Flint & P. M. R. Co. v. Stark, 38 Mich. 714.

¶ 188. A declaration for negligent injury must aver the fact and the manner of negligence, and plaintiff should be confined to what is set forth in his declaration.—Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433.

¶ 189. A party suing for negligent injury is bound to set forth in his declaration the material facts relied on as his cause of action, and to prove the same combination of circumstances.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 190. Where the facts stated in a declaration for negligence clearly imply the defendant's duty, it need not be expressly averred.—Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589.

¶ 191. One seeking to recover for negligence must state in his declaration the duty and the neglect of duty upon which he relies, and he is confined in his proof and recovery to the allegations of his declaration.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 192. In actions on the case for negligent injury the plaintiff must allege in his declaration and prove on the trial that the injury complained of was occasioned by defendant's negligence, particularly specifying the duty and the breach thereof which constituted negligence, and averring also that plaintiff himself was in the exercise of ordinary care, and did not by his own negligence contribute to the injury.—Thompson v. Flint & P. M. R. Co., 57 Mich. 300.

¶ 193. A declaration in an action of trespass on the case for negligence is sufficiently certain when the neglect of duty relied on and the resultant injury are described with substantial accuracy.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 194. In an action on the case for negligence, the injury complained of, and for the consequences of which suit is brought, must be charged with reasonable certainty, so that there can be no difficulty in knowing what to meet in the proofs.—Shadock v. Alpine Plank Road Co., 79 Mich. 7.

¶ 195. A declaration for a negligent injury is fatally defective if it alleges neither the exercise of due care on plaintiff's part nor negligence on defendant's.—Torongo v. Salliotte, 99 Mich. 41.

¶ 196. When plaintiff properly avers the negligence of the defendant, it is not essential that he should set out the facts which go to establish it.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 197. Where, in a suit for personal injuries, the declaration alleges the negligence of the defendant in not providing a certain attachment, as the cause of the accident, it is not necessary to deny all other possible causes.—Cristanelli v. Saginaw Min. Co., 154 Mich. 423.

¶ 198. In suing for damages from negligence plaintiff must count on the negligence relied on; but when this is properly averred he need not set out the facts which go to establish it. When defendant is notified with what negligence he is charged, he is thereby informed that the circumstances which tend to show whether he was wanting in due care in that particular will be in issue.—Lucas v. Wattles, 49 Mich. 380.

¶ 199. In an action to recover for property destroyed by fire alleged to have been negligently set by defendants, the words "wilfully, wantonly, negligently and unlawfully" if used in the declaration in connection with other words imputing negligence on the defendant's part, do not imply that the act of setting fire was done with the direct purpose of injuring plaintiff, nor require evidence that the defendants acted maliciously.—Richter v. Harper, 95 Mich. 221.

¶ 200. The case of Montgomery v. Muskegon Booming Co., 88 Mich. 633, as to declaration for wilful negligence, overruled, in so far as "wilful" and "wanton" imply a direct purpose to injure plaintiff.—Richter v. Harper, 95 Mich. 221.

¶ 201. In an action against two defendants for negligence it is unnecessary to allege or prove a joint duty towards plaintiff and, if defendants are charged with several duties and the neglect of them concurs to injure plaintiff an action may be maintained and recovery had against both.—Boyle v. Waters, 199 Mich. 478.

§ 39. ——Neglect of statutory duty.

Amendment alleging different negligence as ground for continuance, see Continuances § 4.

¶ 202. A declaration for damages arising from the neglect of a duty imposed by a general statute—e. g., that requiring railroads to be fenced—need not be specially framed upon the statute or refer to it.—Grand Rapids & I. R. Co. v. Southwick, 30 Mich. 444.

§ 40. Negativing contributory negligence.

Contributory negligence in general, see ante § 17.

¶ 203. A declaration for negligent injury is not demurrable for failing to state that the injured person did not know of the danger, if it does aver that he was without fault.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 204. A declaration for negligent injury must, ordinarily, not only allege that the injury was caused by defendant's negligence, but also that plaintiff was free from negligence materially contributing to the injury. —Denman v. Johnston, 85 Mich. 387.

¶ 205. If plaintiff cannot set up such a combination of facts as show that he is free from negligence on his part, he must by proper allegation charge that the injury was caused by the wanton or wilful negligence of defendant, such as in law amounts to gross negligence, and a reckless disregard of the consequences of his neglect.—Denman v. Johnston, 85 Mich. 387.

§ 41. Issues, surplusage, necessary proofs, and variance.

See also ante ¶¶ 188, 191, 198.

Nature of plaintiff's interest in the injured property and defendant's notice thereof, see also ante ¶ 18.

General law as to issues and variance, see Pleading, IX, X.

¶ 206. In a personal injury case it is not necessary for the plaintiff to prove all the acts of negligence alleged. If any negligent act of defendants is charged which resulted in the injury to plaintiff he is entitled to recover, although the declaration may have charged other acts of negligence which are not proven, or which may not in law be negligent.—Warren v. Porter, 144 Mich. 699.

¶ 207. It is not necessary for a plaintiff to prove all of the acts of negligence charged; if any unlawful neglect of defendant is charged which resulted in the injury to the plaintiff complained of, he is entitled to recover, although the declaration may have charged other acts of defendant as negligence which were not proven.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 208. In a declaration for a negligent injury the only negligence that need be alleged is that which caused the mischief complained of; and redundant charges, of specific duties and neglects if allowed to be proved, may confuse the real issues.—Thorsen v. Babcock, 68 Mich. 523.

¶ 209. Under a declaration in one count alleging that the injury was due to the concurrence of each of several acts of negligence set out, for the lack of any of which the injury would not have happened, each element of negligence so alleged must be proved to warrant a recovery.—Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

[Note. Official syllabus 1 of above case is condemned in Whipple v. Michigan Cent. R. Co., 143 Mich. 41, and limited to what is above stated.]

¶ 210. The introduction of the words "falsely and fraudulently" as well as the words "carelessly and negligently" is surplusage in a count the gravamen of which is expressed to be negligence merely.—Smith v. Holmes, 54 Mich. 104.

¶ 211. It is proper to allow a recovery for ordinary negligence, although the declaration alleges gross and wanton negligence.—Gorton v. Harmon, 152 Mich. 473.

¶ 212. Although the declaration for a personal injury characterizes defendant's negligence as gross and wanton, plaintiff need only prove actionable negligence.—Keating v. Detroit B. C. & A. R. Co., 104 Mich. 418.

¶ 213. The fact that a declaration in a negligence action characterizes the negligence of the defendant as wilful and wanton does not prevent a recovery for ordinary negligence.—Hook v. Soloman, 194 Mich. 517.

¶ 214. Where several concurrent acts of negligence are alleged in a single count of a declaration, plaintiff's right of recovery is not affected by his failure to introduce evidence under an allegation that is immaterial. —Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

¶ 215. In an action for a negligent injury a recovery cannot be had upon a ground of negligence not alleged in the declaration.— Mitchell v. Prange, 110 Mich. 78.

¶ 216. There can be no recovery in an action for negligent injuries, on the theory of the gross negligence of the defendant after discovering the plaintiff's peril, where such theory is not disclosed by the declaration.— Wells v. Ann Arbor R. Co., 184 Mich. 1.

Admissibility of evidence of specific original injuries not alleged eo nomine in the complaint, petition or declaration in negligence actions, see note, 15 N. C. C. A. 618-630.

Admissibility of evidence as to unpleaded physical injuries or conditions when symptomatic of injuries alleged to have been sustained through negligence on part of defendant in personal injury actions, see note, 15 N. C. C. A. 736-744.

B. BURDEN OF PROOF, PRESUMPTIONS AND EVIDENCE.

Presumption of negligence of bailee from loss by theft, see Bailments § 9.

§ 42. Burden of proof and presumptions.

Necessity of proving all the acts alleged, see also post ¶ 275.

Weight and sufficiency of evidence, see post § 47.

Instructions on burden of proof, see post § 58.

General law as to burden of proof and presumptions, see Evidence, II.

Presumption against plaintiff failing to testify and explain cause and circumstances of injury, see also Evidence § 68.

Burden of proof in action by or against carrier, see Carriers §§ 87, 107, 210, 257.
Presumptions in action for death, see Death by Wrongful Act §§ 17, 18.
Burden of proof in actions for injuries from defective highways, see Highways, XII, H.
Burden of proof and presumptions as to negligence in actions for injuries upon highways, see Highways §§ 230, 387.

¶ 217. Where the declaration in an action for personal injuries does not allege that plaintiff is mentally weak, evidence as to such weakness is not admissible to negative contributory negligence or assumption of risk.—Hill v. Abram Smith & Son, 176 Mich. 151.

¶ 218. Negligence cannot be presumed in an action for injury arising therefrom, but it must be proved affirmatively.—Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537; Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51; Brown v. Congress & B. St. R. Co., 49 Mich. 153; Mitchell v. Chicago & G. T. R. Co., 51 Mich. 236.

¶ 219. In an action for negligent injury plaintiff has the burden of showing defendant's negligence.—Le Baron v. Joslin, 41 Mich. 313; Bradley v. Fort Wayne & E. R. Co., 94 Mich. 35.

¶ 220. Negligence cannot be presumed against the defendant in an action for personal injury if it did nothing outside of the usual course of its business, unless that course of business was itself improper, or special circumstances required particular caution.—Mitchell v. Chicago & G. T. Ry., 51 Mich. 236.

¶ 221. Negligence must be affirmatively proved; but, like other facts, it may be shown by irresistible inference from circumstances.—Alpern v. Churchill, 53 Mich. 607; Schoepper v. Hancock Chemical Co., 113 Mich. 582.

¶ 222. In a personal injury case, the negligence of defendant may be proved by showing the manner and circumstances of the injury.—O'Donnell v. Lange, 162 Mich. 654.

¶ 223. An inference of negligence may be drawn from all the circumstances of a case by the jury.—Dyer v. Peoples Ice Co., 188 Mich. 203.

¶ 224. Negligence, when relied upon as a cause of action, must be proved. It may be inferred from facts proved, but not from mere conjecture.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 225. Negligence cannot be presumed, but must be alleged and affirmatively shown.—Perry v. Michigan Cent. R. Co., 108 Mich. 130.

¶ 226. Where a presumption of defendant's negligence exists in a suit for personal injuries, the burden of proof does not shift to the defendant, but rests all the time upon the plaintiff.—Sewell v. Detroit United Ry., 158 Mich. 407.

§ 43. ——Presumptions from mere happening of accident; res ipsa loquitur.

Presumptions as to negligence from occurrence of injury, see also Carriers § 210; Master and Servant § 63a et seq.
Insufficiency of mere loss to establish negligence, see also Carriers § 88.

¶ 227. Negligence must be founded on competent evidence, and will not be presumed from the mere fact of the occurrence of the accident on the defendant's land.—Early v. Lake Shore & M. S. R. Co., 66 Mich. 349.

¶ 228. Negligence will not be presumed from the mere fact of accident, which is as consistent with the presumption that it was unavoidable as it is with negligence, and there should be some evidence that it could have been avoided with proper diligence and precaution.—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

¶ 229. Negligence will not be presumed from the bare fact of the accident; in order to make defendant liable as for negligence, there must have existed before its occurrence some suggestion of danger.—Werbowlsky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 230. Negligence cannot be inferred merely from an accident and consequent injury.—Robinson v. Charles Wright & Co., 94 Mich. 283.

¶ 231. The general rule is that negligence cannot be inferred from the mere fact of an accident and injury and cannot be founded on guess or conjecture; at least this is true where there is no obligation to exercise that high degree of care which applies in cases of common carriers or warehousemen.—Redmond v. Delta Lumber Co., 96 Mich. 545.

¶ 232. The mere happening of an accident raises no presumption of negligence so as to change the burden of proof.—Gardner v. Detroit St. R. Co., 99 Mich. 182.

¶ 233. The mere happening of an accident, or proof of injury resulting therefrom, raises no presumption of negligence.—Massachusetts Bonding & Ins. Co. v. Park, 197 Mich. 142.

¶ 234. Negligence cannot be presumed; the mere fact of an accident is not sufficient to impose a liability for negligence.—Renders v. Grand Trunk R. Co., 144 Mich. 387.

¶ 235. Negligence in a personal injury case cannot be proved by plaintiff merely by

showing the fact of injury.—O'Donnell v. Lange, 162 Mich. 654.

¶ 236. The mere fact of an accident occurring is no evidence of negligence.—Fuller v. Wurzburg Dry Goods Co., 192 Mich. 447; Gaines v. Grand Trunk Ry. Co. of Canada, 193 Mich. 398; Bury v. Detroit United Ry., 198 Mich. 447; Elsey v. J. L. Hudson Co., 189 Mich. 135.

¶ 237. No presumption of negligence arises from the fact that an automobile in charge of the defendant's servant, ran into the rear of the plaintiff's vehicle and injured him.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 238. While negligence, like any fact, may be inferred from the circumstances, yet something more must be shown than the mere happening of an accident.—Fuller v. Wurzburg Dry Goods Co., 192 Mich. 447.

¶ 239. The occurrence of an accident (sinking of a boat) does not raise a presumption of negligence but the accident may be taken into consideration along with the other facts of the case to determine the question of negligence.—La Fernier v. Soo River Lighter & Wrecking Co., 129 Mich. 596.

¶ 240. While it is true that the mere fact of an injury does not impute negligence on the part of anyone, yet where a thing happens which would not ordinarily have occurred, if due care had been used, the fact of such happening raises a presumption of negligence in someone.—Barnowsky v. Helson, 89 Mich. 523.

¶ 241. The rule that where an injury occurs that cannot be accounted for, and the occasion of it rests wholly in conjecture, the case may fail for want of proof, will not be extended so as to deny a right of action to an injured person where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon his theory than upon that of the defense.—Schoepper v. Hancock Chemical Co., 113 Mich. 582.

¶ 242. When a personal injury is connected with defective or unsafe machinery or appliances, or some improper conduct in the operating or management of a particular business carrying with it exclusive knowledge of the cause of such injury, a presumption of negligence may arise from mere proof of the accident.—Serviss v. Ann Arbor R. Co., 169 Mich. 564.

Application of doctrine of res ipsa loquitur in action for injuries caused by falling objects, see note, 5 N. C. C. A. 58.

Application of doctrine of res ipsa loquitur in action for injuries by falling walls, see note, 5 N. C. C. A. 54.

Application of res ipsa loquitur rule in actions under Federal Employers' Liability Act, see note, 15 N. C. C. A. 591-617.

Physical facts as overcoming presumption of due care in case of fatal accident in absence of eyewitness, 12 N. C. C. A. 535-549.

§ 44. ——Contributory negligence.

Contributory negligence in general, see ante § 17.

Evidence as to contributory negligence, see post § 46.

Weight and sufficiency of evidence as to contributory negligence, see post § 50.

Presumption against contributory negligence of person dying unwitnessed, see Death by Wrongful Act § 18.

Presumption that person killed exercised due care for self-preservation, see Negligence, V, B.

¶ 243. If plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not guilty of negligence; and if he gives no evidence to establish that fact, the court may properly instruct the jury that they should return a verdict for defendant.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 243a. In cases of collision of vessels the burden of proof is on plaintiff not only to show negligence on defendant's part but ordinary care on his own.—Drew v. The Chesapeake, 2 D. 33.

¶ 244. In an action for a negligent injury the burden of proof is on plaintiff to show that she acted with due care, or that her own negligence did not contribute to the injury, as well as that the company was guilty of such negligence. It was error to charge that "the plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to herself, and if she does this, she is entitled to recover unless the defendant produce evidence sufficient to rebut the presumption."—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 244a. The burden of proof of negligence resting on plaintiff requires him to show that the defendant was entirely responsible and that no negligence of plaintiff contributed to the injury.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 245. The burden is on the plaintiff to show as part of a prima facie case that he was free from contributory negligence; but it need not be shown by direct evidence.—Billings v. Breinig, 45 Mich. 65.

¶ 246. Negligence is not to be presumed, but must be affirmatively proved by the party alleging it in the manner pleaded; and the burden of proof is on plaintiff to show

that defendant was entirely responsible for the injury complained of by reason of the neglect pleaded, and that the party injured did not contribute to it.—Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

¶ 247. In an action to recover damages sustained because of defendant's negligence the burden of proof is on plaintiff to show that the injured party was exercising ordinary care at the time of the injury, and that the injury was the result of defendant's negligence.—Mynning v. Detroit, L. & N. R. Co., 67 Mich. 677.

¶ 248. Reasonable care on plaintiff's part to avoid the injury for which he sues need not be shown by direct or conclusive evidence.—Carver v. Detroit & S. Plank Road Co., 69 Mich. 616.

¶ 249. One who seeks damages for defendant's negligence must show not only that the injury was caused thereby, but also that he himself was not guilty of any negligence materially contributing to such injury.—Denman v. Johnston, 85 Mich. 387.

¶ 250. It cannot be assumed that a drinking man, or one addicted to the use of liquors, is always drunk, or always in a condition which excludes the possibility of the exercise of due care.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 251. One seeking to recover for the negligence of another must show freedom on his own part from negligence causing or contributing to his injury.—Webber v. Billings, 184 Mich. 119.

Physical facts in overcoming presumption of due care in case of fatal accident in absence of eyewitness, see note, 12 N. C. C. A. 535-549.

§ 45. Admissibility of evidence.

Evidence that others than plaintiff had interest in the property injured, see also ante ¶ 18.
Weight and sufficiency of evidence, see post § 47.
General law as to evidence, see Evidence.
Judicial notice as to care or negligence, see Evidence § 17.
Admissibility of negative evidence, see Evidence § 80.
Admissibility of cumulative evidence, see Evidence § 79.
Declarations and admissions by agents and servants as evidence binding principal, see Evidence, VII, C.
Stationing watchman after accident as an admission, see Evidence ¶ 2118.
Statements out of court as evidences of asserted dominion and responsibility, see Evidence, VII, A.
Opinions and conclusions as to cause and effect, see Evidence §§ 220, 221.
Conclusions and opinions as to care or neglect, danger or safety, see Evidence §§ 228, 229, 269.
Safety or danger as subject for experts, see Evidence § 269.
Res gestæ evidence, see generally Evidence, VII, D.
Res gestæ explanations of injury, see also Evidence § 469.
Acts of driver as res gestæ against guest, see Evidence § 467.
Tangible things and experiments and demonstrations as evidence, see Evidence, IX.
Cross-examination as to negligence or care, see Examination of Witnesses § 51.
Evidence as to negligence and duty in care of buildings, see Buildings §§ 10-14.
Fact of derailment or other accident as evidence of negligence by carrier, see also Carriers § 216.
Evidence to prove custom bearing on duty of care, see Customs § 7.
Evidence of negligence in use of fire, see Fires § 7.
Evidence in actions for injuries from defective highways and bridges, see Highways § 283.

¶ 252. In an action for negligence actual knowledge on the principal's part of the danger likely to result may be shown even though his agent's knowledge would be enough to render him liable; since it tends to show a higher duty of care.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 253. In an action for injuries received by falling into a turn-table pit in a railroad company's yard, evidence of accidents which happened to others in the same place is inadmissible.—Early v. Lake Shore & M. S. R. Co., 66 Mich. 349.

¶ 254. In an action for injuries caused to an inspector by the explosion of a boiler where the negligence alleged was want of reasonable inspection of the boiler, it is error to exclude evidence tending to show that it was not practicable to remove the flues from the boiler for the purpose of examining the braces, and to show the construction of the boiler, since such testimony had a bearing on the question whether ordinarily prudent and careful men would make such inspection.—Merryman v. Hall, 131 Mich. 406.

¶ 255. In an action for injuries to a two-year-old child resulting from its placing its hand on a wire cable running through a pulley and employed in moving a house, evidence by defendant that the agencies employed were those customarily used in moving houses, held admissible.—Slack v. Curry, 177 Mich. 437.

¶ 256. In the absence of evidence pointing to one cause or another as to the sinking of a rowboat with its passengers, so long as the cause is plainly conjectural, it is proper to prove, in an action for the negligent death of an occupant of such rowboat against the

one letting it to prove, as accounting for the disappearance of the boat, that the youths who were in it had a few minutes earlier rocked the boat.—Clark v. Detroit & M. Ry. Co., 197 Mich. 489, 15 N. C. C. A. 1033.

¶ 257. It is not competent for the plaintiff in a negligence case to make proof of other accidents only for the purpose of proving the condition or dangerous nature of the place complained of, since that would be raising collateral issues.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 258. In a suit for personal injuries on the ground of the negligence of the defendant in maintaining an unsafe place, it is not competent to prove an absence of accidents as tending to show an absence of negligence. —Larned v. Vanderlinde, 165 Mich. 464.

¶ 259. The condition of a machine at the time of an injury to an employee cannot be shown by evidence of its condition and operation at a previous date, where the evidence tends to show that it had been repaired before the accident.—Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649.

¶ 260. In an action against the letter for hire of a rowboat for the death of an occupant, alleged to be due to the sinking of the boat because of its defective condition, evidence of the condition of other rowboats of defendant is inadmissible.—Clark v. Detroit & M. Ry. Co., 197 Mich. 489, 15 N. C. C. A. 1033.

¶ 261. In an action for personal injuries caused by plaintiff's horse taking fright through defendant's negligence, it is proper to show the animal's character for gentleness and plaintiff's knowledge concerning it.—Wiltse v. State Road Bridge Co., 63 Mich. 639.

¶ 262. Proof of the reasons for precautions taken after an accident does not indicate foreknowledge of their necessity, and is irrelevant in an action for resulting injury if evidence is given of the real condition and appearance of the premises beforehand.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 263. Where a party sued for services in moving a building seeks recoupment for injury to the building, the opinion of a third person expressed before the removal to plaintiff, as to the proper method of guarding against such injuries, is immaterial on the question of unskilfulness and neglect in moving it in another way.—Curren v. Ampersee, 96 Mich. 553.

§ 46. ——As to contributory negligence.

See also ante ¶¶ 109, 256.

Contributory negligence in general, see ante § 17.

Burden of proof and presumptions as to contributory negligence, see ante § 44.

Weight and sufficiency of evidence as to contributory negligence, see post § 50.

Evidence on question whether injured person was negligent in caring for personal injury, see Damages § 324.

Contributory negligence in actions for death as jury or court question, see Death by Wrongful Act § 30.

¶ 264. In an action for personal injuries sustained by stumbling over a flagstone left upon a sidewalk evidence of plaintiff's defective eyesight is admissible as bearing upon the question of due care on her part. —Wedderburn v. City of Detroit, 144 Mich. 684.

¶ 265. In an action for a personal injury caused by an obstruction in a highway it cannot be shown that plaintiff was addicted to the use of intoxicating liquors, but only whether he was intoxicated on the night of the accident; as it cannot be assumed that a drinking man is always drunk or in a condition which excludes the possibility of the exercise of due care.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 266. Evidence that a spectator, who was injured at a circus by the negligent explosion of a firecracker, had been intoxicated on other occasions is proper as bearing on the question of his capacity to earn money, but for no other purpose.—Herrick v. Wixom, 121 Mich. 384.

Validity of statute making occurrence of injury or damage prima facie evidence of negligence of railroad company, see note, 2 N. C. C. A. 243-249.

§ 47. Weight and sufficiency of evidence.

Burden of proof and presumptions, see ante § 42.

Mere happening of accident as proof of negligence, see ante § 43.

Admissibility of evidence, see ante § 45.

Questions of law and fact, see post § 51.

Sufficiency of cause of injury to passenger, see Carriers § 219.

Insufficiency of admission of liability where legal liability does not exist, see also Evidence ¶ 2920.

Conflict of positive and negative evidences as to signals and conditions, see also Evidence §§ 605, 606.

Right to resort to presumption where evidence is inconclusive on issue of negligence, see also Evidence § 30, ¶ 195.

Evidence as to permission or license to cross railroad premises, see Railroads.

¶ 267. The negligence of the defendant must be established in an action for personal injuries, from competent evidence or reasonable inferences therefrom, and not from mere conjecture.—Broudy v. Detroit, J. & C. Ry. Co., 184 Mich. 330.

¶ 268. In an action for personal injuries sustained through negligence it is sufficient

for the plaintiff to prove sufficient of the substantive charges of negligence contained in his declaration to make out a liability in fact, although negligent acts may be charged which are not proven.—Whipple v. Michigan Cent. R. Co., 143 Mich. 41.

¶ 269. Where several acts of negligence are charged in the declaration in an action for personal injuries it is not necessary for plaintiff to prove all of the acts but if any unlawful neglect is charged which resulted in the injury complained of plaintiff is entitled to recover though other acts of negligence charged have not been proved.—Le Fleur v. Michigan Alkali Co., 175 Mich. 404.

¶ 270. In an action for personal injuries alleged to have been caused by defendant's negligence, plaintiff cannot recover upon proof of facts equally as consistent with the absence of negligence as with its presence.—Heath v. Calkins, 157 Mich. 288.

¶ 271. Where the facts and circumstances surrounding an injury are such as to justify an inference of negligence, no further proof of negligence is required.—Mirabile v. Simon J. Murphy Co., 169 Mich. 522.

¶ 272. Where there is evidence to justify a finding that a manufactured article was, inherently, imminently dangerous to life and limb, the same evidence raises an implication of knowledge on the part of the manufacturer.—Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323.

¶ 273. In determining whether or not a party has been guilty of contributory negligence as a matter of law, it is the duty of the court to accept as truthful the testimony offered on behalf of plaintiff, and to give such testimony, when subject to different inferences, that construction most favorable to the plaintiff.—Strong v. Grand Trunk Western Ry. Co., 156 Mich. 66.

¶ 274. In a suit by a child for personal injury on a merry-go-round, evidence must be introduced to connect the defendant with the injury, and it is not enough to show that he filed a bond to release the merry-go-round from an attachment.—Harris v. Crawley, 161 Mich. 383.

¶ 275. In a suit for personal injuries, plaintiff alleged in his declaration that defendant and himself were engaged in unloading an iron box from a truck; that defendant let go of his side of the box, causing it to fall on plaintiff; and that defendant ordered the teamster to start the truck, causing the box to fall on the plaintiff. Held, the plaintiff might recover though he failed to prove that defendant ordered the truck started, where he did prove the other allegation.—Malkowski v. Olfs, 161 Mich. 303.

¶ 276. While negligence cannot be inferred from the bare fact of the accident, or guilt found upon mere speculation and conjecture without facts from which reasonable and logical inferences can be drawn, recovery is not limited to those cases where plaintiff can produce direct testimony of the specific defect in a certain part of the mechanism, or diagnose the particular cause of inefficiency and prescribe the remedy.—Ammer v. Postal, 168 Mich. 405.

¶ 277. Malice, warranting a charge on a theory of malicious negligence, does not appear from testimony that plaintiff, an employee of a lumber company engaged at the time in unloading a car, was injured by the act of the defendant in loosing another car for a proper purpose and letting it run down the grade so that it struck plaintiff while at work, and that defendant had had some minor disagreement with the son of plaintiff's employer; where it also appears that defendant did not know plaintiff or any of his coemployees and denied any malice toward the employer or any of its officers or employees and had said or done nothing which betokened any ill feeling.—McCallum v. Davidson, 95 Mich. 382.

§ 48. ——As to proximate cause.

Proximate cause in general, see ante § 13.
Jury questions as to cause of accident, see post § 52.
Instructions as to proximate cause, see post § 59.

¶ 278. Where the evidence in an action for personal injuries, leaves it uncertain whether one's physical condition was due to a fall caused by another's negligence, or an ailment of long standing, there can be no recovery.—Blair v. Seitner Dry Goods Co., 184 Mich. 304.

¶ 279. Where one having in his custody a small child, in attempting to catch a falling post, was knocked down by it and the child was injured either by the post or the person, in whose charge he was, falling on him, the evidence was held to show that the proximate cause of the child's injury was the falling of the post.—Butler v. Watson, 193 Mich. 322, 16 N. C. C. A. 1013.

§ 49. ——Defects in machinery or appliances.

Negligent use of machinery, substances and appliances, see ante § 7.

¶ 280. In an action for personal injuries sustained through the giving way of a rope on a swinging scaffold furnished by the defendant under contract with the plaintiff who was to paint an elevator, evidence that the plaintiff had 17 years' experience in the business, that he examined the rope carefully, that the defect, if any, was not apparent and that neither the plaintiff nor the defendant's servants had any knowledge of an alleged tendency of elevator dust to cause dry rot in rope, as testified by several witnesses, is sufficient to show no negligence in

the defendant.—McGregor v. Grand Trunk Elevator Co., 129 Mich. 469.

¶ 281. It is error to direct a finding for the defendant in a case for personal injuries sustained by the plaintiff a government inspector, by the explosion of a boiler upon a dredge causing plaintiff to be thrown, where the plaintiff offered testimony to support the theory that the explosion was caused by the negligence of the fireman in leaving the boiler for a considerable period without checking the drafts thus causing the steam to be raised beyond capacity.—Merryman v. Hall, 124 Mich. 263.

¶ 282. In an action for personal injuries caused by the explosion of a boiler a prima facie case is made out by testimony that more than 60 pounds pressure was dangerous, that the safety valve was set at 90 pounds, that immediately before the explosion the boiler carried 80 pounds, and that this pressure was necessary to do its work, that an inspection after the accident indicated that the explosion was caused by overpressure.—Beunk v. Valley City Desk Co., 128 Mich. 562.

¶ 283. In an action for personal injuries sustained in a boiler explosion, where defendant claimed to have done all that due care required to discover any defect in the boiler, a judgment for plaintiff, a government inspector of vessels, upon a third trial of the case was not disturbed, where the testimony as to the good condition of the boiler was contradictory and was discredited by the event.—Merryman v. Hall, 136 Mich. 296.

§ 50. ——Contributory negligence.

Contributory negligence in general, see ante § 17.

Burden of proof and presumptions as to contributory negligence, see ante § 44.

Admissibility of evidence as to contributory negligence, see ante § 46.

Instructions on contributory negligence, see post §§ 60, 61.

¶ 284. Testimony to prove want of reasonable care on the part of the injured person need not be such as to drive the jury to that conclusion.—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

¶ 285. While knowledge of the existence of a defect or danger is evidence of contributory negligence, it is not conclusive.—Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519.

¶ 286. In an action by an administrator against a railroad to recover for the death of a boy nine years and six months, the allegation of his age in the declaration, coupled merely with proof thereof at the trial, is not sufficient to establish that freedom from contributory negligence essential to recovery.—Mollica v. Michigan Cent. R. Co., 170 Mich. 96.

¶ 287. The question of contributory negligence upon the part of a child twelve years old who was drowned by falling into an old, partially concealed and unguarded mining hole situated about 200 feet from a highway and 15 feet from a much traveled footpath should not be presented to the jury where no witness saw the child fall in the hole and no conditions about the hole were shown which would lead to a reasonable theory as to how he got in the hole.—Peklenk v. Isle Royale Copper Co., 187 Mich. 644.

Failure of passenger or guest in hired vehicle to control driver as contributory negligence, see note, 16 N. C. C. A. 485-502.

C. TRIAL AND JUDGMENT.

Allowable argument of counsel, see Argument of Counsel.

§ 51. Questions for court and jury.

Weight and sufficiency of evidence, see ante § 47.

General law as to jury questions, see Trial, VI.

Questions for jury in actions for death, see Death by Wrongful Act §§ 29, 30.

Putting ashes in wooden receptacle in violation of ordinance, as negligence per se, see Fires ¶ 36.

Negligence of workmen in failing to discover steam pipes in street as jury question, see also Highways ¶ 612.

Unskillful or negligent performance of contract as jury question, see Contracts § 342; Master and Servant, II.

¶ 288. The question of negligence, where there is any evidence fairly tending to prove it, is for the jury.—Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205; Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93; Nelson v. Lumberman's Min. Co., 65 Mich. 288.

¶ 289. A question of negligence is a question of fact as a general rule.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Lake Superior Iron Co. v. Erickson, 39 Mich. 492; Le Baron v. Joslin, 41 Mich. 313; Sheldon v. Flint & P. M. R. Co., 59 Mich. 172; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

¶ 290. To warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence the case must be so clear against him as to warrant no other inference.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 291. If the question of negligence depends upon a disputed state of facts, or if the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot

give positive instructions, but must leave the jury to draw their own conclusions upon the facts and upon the question of negligence depending upon them.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 292. The degree of care required of a party is a question of law for the court and should not be left to the jury to determine, as it would be by a charge that he must exercise "such a degree of care as the law requires."—Anderson v. Thunder Bay River Boom Co., 57 Mich. 216.

¶ 293. Where, in an action for negligence, the facts are not in dispute, but are such that different minds may honestly draw different conclusions from them, the question of negligence is for the jury.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567; Grand Trunk R. Co. v. Ives, 144 U. S. 108.

¶ 294. The question of diligence or reasonable care is generally one of mixed law and fact and never exclusively one of fact; juries may act upon it only where there is evidence tending to prove it; the existence of such evidence and its relevancy, and tendency to prove diligence, are questions of law; so, also, where there is no evidence tending to prove diligence and where facts found or admitted are such that all reasonable men will be likely to draw from them the same inference.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 295. The question whether there is evidence tending to show negligence is one of law, to be determined from the testimony only. Where the court is in doubt, the case should go to the jury.—Palmer v. Harrison, 57 Mich. 182.

¶ 296. Negligence may sometimes be inferred from all the evidence taken together, even though the only direct evidence on the subject tends to negative it; and wherever the facts might support different inferences it is a question for a jury.—Crosby v. Detroit, G. H. & M. Ry. Co., 58 Mich. 458.

¶ 297. The question of negligence is usually for the jury to determine under all the circumstances of the case; but when shown by undisputed evidence that the owner of an opera house left unguarded, except by a railing 19 inches high, a hole at the side of a sidewalk on the opera house premises, such sidewalk being used by the public with his permission, it is a question of law for the court.—Brezee v. Powers, 80 Mich. 172.

¶ 298. The court cannot properly pass upon the question of negligence, except in cases where the facts are such that all reasonable men would be likely to draw from them the same inference.—Sadowski v. Michigan Car Co., 84 Mich. 100; Snyder v. King, 199 Mich. 345.

¶ 298a. The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them; and a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can properly be taken of the facts the evidence tends to establish.—Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140.

¶ 299. Negligence and contributory negligence are questions for the jury except when the evidence is so clear that reasonable minds could not differ, in which case they are for the court.—Scharman v. Bay County Bridge Commission, 158 Mich. 77.

¶ 300. Whether ordinary care has been exercised in a given case is a question for the jury.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

¶ 300a. Whether a defendant had notice prior to the time of the injury complained of is a question of fact for the jury, where the evidence is conflicting in an action for negligence.—Wendt v. Village of Richmond, 164 Mich. 173.

¶ 301. In a suit for personal injuries arising from the falling of materials from a building, although the facts concerning the conduct of defendant complained about are not in dispute, still if different minds may honestly draw different conclusions respecting them, the question whether there was negligence on the part of defendant is a question for the jury.—Brown v. Bryant, 166 Mich. 180.

¶ 302. Evidence of negligence on the part of a person renting a minor a boat whereby the minor is drowned is sufficient to constitute a question for the jury, where the person drowned is presumed to have been in the exercise of due care.—Lincoln v. Detroit & Mackinac Ry. Co., 179 Mich. 189.

¶ 303. The question of whether the construction of a threshing machine the deck of which was supported only by four-penny nails, driven upward into a cleat, is such as to make the machine imminently dangerous to life and limb, is one of fact for the jury. —Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323.

¶ 304. The question of negligence is to be decided according to the facts in the particular case.—Dier v. Voorhees, 200 Mich. 510.

¶ 304a. Plaintiff's intestate, a conductor on a freight train, was riding on the footboard of the engine. Defendants, a telephone and a construction company, had piled poles along the railroad track. There was evidence by plaintiff that defendants had piled the poles in a careless manner and one of

them had fallen across the track, striking plaintiff's intestate, causing him to fall before the engine, which ran over and killed him. Defendant introduced evidence to show that a piece of railroad iron was lying on the footboard, and that this iron projected out across the rail, struck, and threw the pole down. Held, under this conflicting evidence, the question of defendant's negligence was properly left to the jury.—Larson v. Home Tel. Co., 164 Mich. 295.

§ 52. ——As to cause of accident.

Proximate cause of accident in general, see ante § 13.
Weight and sufficiency of evidence as to cause of accident, see ante § 48.
Cause of death as jury question, see Death by Wrongful Act § 29.

¶ 305. Where the evidence leaves it very doubtful what caused the injury complained of, the case should be left to the jury.—Alexander v. City of Big Rapids, 70 Mich. 224.

¶ 305a. Plaintiff sued defendant village for injuries suffered from an illness, which she alleged was caused by the defendant's negligence in allowing sewage to collect in ditches and drains in front of plaintiff's house. The evidence was disputed whether the alleged cause was the real cause of her illness. Held, the question was for the jury. —Wendt v. Village of Richmond, 164 Mich. 173.

¶ 305b. It is a jury question what was the cause of death and whether a waiting passenger was contributively negligent, where the death occurred at night with no eyewitness, and where evidence was that her body was found beside the track when her train arrived and two other trains had passed meantime, one running backwards with lights on the advancing end that might have been mistaken in the darkness for switch lights, but both trains were operated with the customary lights and signals, the trainmen on neither noticed anything unusual or any indication of running over any person or thing, and the condition of the body and the surroundings showed no appearance of having been ground between the wheels and the track.—Richardson v. Detroit & M. R. Co., 176 Mich. 413.

§ 53. ——As to gross negligence and "last clear chance."

Gross negligence and last clear chance rule, see ante § 26.
Instructions on gross negligence of defendant, see post § 62.

¶ 306. In an action for personal injuries by a bicyclist against four owners of horses alleged to have been driving recklessly on a boulevard after dark conflicting testimony by the parties and several witnesses concerning the speed of the horses and the speed of the bicyclist justifies leaving the question of liability to the jury under an instruction requiring due care by the plaintiff, the evidence being held not to show gross negligence so as to render all of the defendants liable regardless of the plaintiff's conduct.—Mahnke v. Freer, 126 Mich. 572.

§ 54. ——As to contributory negligence.

See also ante ¶¶ 89, 273, 299.
Contributory negligence in general, see ante § 17.
Contributory negligence of children, see also ante § 20.
Instructions as to contributory negligence, see post §§ 60, 61.

¶ 307. Whether the conduct of a person amounts to contributory negligence is usually a question for the jury.—Paskvan v. Allouez Min. Co., 185 Mich. 329.

¶ 308. When the fact of contributory negligence depends on the credibility of witnesses or upon inferences in which intelligent persons may honestly differ, it is a question for the jury.—Swoboda v. Ward, 40 Mich. 420.

¶ 309. In an action for negligent injury, if the proofs are such that reasonable minds may differ as to the fact of contributory negligence, the case should go to the jury; its absence need not be conclusively shown. —Teipel v. Hilsendegen, 44 Mich. 461; Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 310. In an action for injury the neglect of any precaution by plaintiff can only raise a question of contributory negligence for the jury.—Lewis v. Flint & P. M. R. Co., 54 Mich. 55.

¶ 311. The fact of contributory negligence is for the jury to determine from all the circumstances, if the facts tending to establish it are disputed, and especially if it appears that the plaintiff had exercised care and would not have been likely to be hurt if defendant had done his duty.—Palmer v. Detroit, L. & L. M. R. Co., 56 Mich. 1.

¶ 312. Contributory negligence depends on what the party is bound to expect, and the case should not be taken from the jury when to do so will prevent their giving to either party the benefit of any inference which might be drawn from a comparison of all the facts.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

¶ 313. Where the whole of the testimony and all legitimate inferences therefrom show that injury arose from want of due care on the part of the injured person, the question of contributory negligence is one of law for the court.—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

¶ 314. Direct or conclusive evidence is not necessary to show reasonable care on plaintiff's part to avoid the injury for which he

seeks to recover. If the circumstances out of which the injury arose tend to show such care, the question is for the jury, and it must be a very extraordinary case that will justify the court in taking it from them.—Carver v. Detroit & S. Plank-Road Co., 69 Mich. 616.

¶ 315. The question of plaintiff's contributory negligence should be submitted to the jury where the testimony is conflicting, where the case is not free from doubt upon the facts, or where candid and intelligent men might reach different conclusions upon the facts.—Luke v. Wheat Mining Co., 71 Mich. 364; Dundas v. City of Lansing, 75 Mich. 499; Adams v. Iron Cliffs Co., 78 Mich. 271; Brezee v. Powers, 80 Mich. 172; Underhill v. Chicago & G. T. R. Co., 81 Mich. 43; Guia v. Lake Shore & M. S. R. Co., 81 Mich. 291; Engel v. Smith, 82 Mich. 1; Glover v. Scotten, 82 Mich. 369; Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519; Graves v. City of Battle Creek, 95 Mich. 266; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

¶ 316. Where the question of plaintiff's contributory negligence depends upon the finding of a certain fact for or against his contention, as to which the testimony is conflicting, it should be submitted to the jury.—Fox v. Spring Lake Iron Co., 89 Mich. 387.

¶ 317. Where there was some evidence on that issue it is proper to go to the jury on the question of contributory negligence.—Ellis v. Hilton, 92 Mich. 439.

¶ 318. In an action for fatal injury the jury may properly consider how far the victim had knowledge of the danger and how far he relied on the action and the presumed knowledge of his superiors.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 319. In an action for personal injuries, where the testimony shows affirmatively that the party injured through the negligence of another was himself negligent, and such negligence contributed to bring about the result complained of, and the testimony is neither conflicting nor contradictory, it becomes a question of law for the court to decide whether there is any fact disclosed by the testimony to go to the jury upon the question of contributory negligence.—Apsey v. Detroit, L. & N. R. Co., 83 Mich. 440.

¶ 320. Whether plaintiff was guilty of contributory negligence is a question for the jury, where defendant testifies that plaintiff sat in range of a gun, and requested defendant to snap it off, both believing it to be unloaded, and where plaintiff, while admitting having suggested that defendant "try" the gun, further testifies that until defendant took it up to discharge it he was not in its range, and that after it was pointed at him he had no time to protest or get out of the way.—Babel v. Manning, 112 Mich. 24.

¶ 320a. A telephone company owned the poles in defendant city and used the two upper cross-arms for its wires. The city had the right to use the third cross-arm for its electric light wires. Plaintiff's deceased, in the employ of the telephone company, stood upon the fourth cross-arm from the top of the pole, astride of the defendant's wire, while engaged in repairing the telephone company's wires. He was killed by a defectively insulated wire of the defendant. Held, the deceased was not, as a matter of law, guilty of contributory negligence.—Hodgins v. Bay City, 156 Mich. 687.

¶ 321. Where a father sues as administrator of a child killed at the age of four, by a street car, to recover under the Death Act (Comp. L. 1897, §§ 10427, 10428), the fact that the child was alone on the street when killed is prima facie proof of the father's negligence, requiring the court to submit the question of such contributory negligence to the jury.—Feldman v. Detroit United Ry., 162 Mich. 486.

¶ 321a. Plaintiff sued defendant village for negligently maintaining an insanitary ditch or drain in front of her house, because of which she contracted an illness and suffered injury. Defendant requested the court to charge that plaintiff could not recover if by reasonable care she could have protected herself and avoided evil results from the alleged nuisance. The court did instruct that plaintiff could not recover if the insanitary condition of her own premises materially contributed to the creation of the alleged nuisance. Held, the instruction sufficiently protected defendant's rights.—Wendt v. Village of Richmond, 164 Mich. 173.

¶ 322. Where the public had established a pathway along a railway track and a person using such pathway was injured by falling into an unguarded trench made by sewer contractors, held, in an action against the contractor, that the question of plaintiff's contributory negligence was properly submitted to the jury.—Morrison v. Carpenter, 179 Mich. 207.

¶ 323. Whether it was contributory negligence for the plaintiff to actively participate in overloading an automobile and riding therein, held properly submitted to the jury.—Webber v. Billings, 184 Mich. 119.

¶ 324. In an action for damages for personal injuries sustained by the owner of an automobile in putting out a fire in the automobile against a garage proprietor whose employee had repaired the car and had left waste on the exhaust pipe near the gasoline tank so that the operation of the car at low speed heated the exhaust pipe to the point of setting the waste on fire, held that it was a question for the jury whether plaintiff was guilty of contributory negligence in grabbing the floor boards to remove them upon discov-

ering fire and smoke coming up through the lever holes near the gasoline tank, instead of adopting some other means to put out the fire, especially where it appeared that his own family and a neighbor's family were in the car, and he thought the fire came from the gasoline tank and acted quickly so as to prevent injury to them.—Leary v. Becker, 190 Mich. 697. (Brooke, Ostrander, and Steere, JJ., dissenting.)

¶ 325. It is reversible error to submit to the jury the question of contributory negligence in an action by an employee, when not raised by the defendant, but by his concessions expressly eliminated from the case.—Kochin v. Superior Copper Co., 181 Mich. 543.

Attempt to pass over protected crossing, in reliance upon fact that gates are up, as contributory negligence as a matter of law, see note, 16 N. C. C. A. 110-140.

§ 55. ——Negligence or contributory negligence of children.

Instructions on contributory negligence of children, see post § 61.

¶ 326. A boy less than ten years old is not required to exercise the degree of care and maturity of judgment required of a person of mature age; but the question of such a boy's negligence, in firing an air-gun whereby plaintiff's eye was destroyed, was for the jury, on evidence that upon firing the shot and seeing plaintiff in the street, the boy stepped from behind some vines 60 feet away and denied firing at plaintiff, and asked forgiveness, that he looked before he fired and saw no one, but saw plaintiff right in front of the gun immediately afterward.—Chaddock v. Tabor, 115 Mich. 27.

¶ 327. Where a fourteen-year-old boy was injured by an engine suddenly backing up while he was on the track in a public street, it was for the jury to determine his capacity for understanding the danger, and whether he used such capacity prudently for one of his years and under all the circumstances of the case.—Fehnrich v. Michigan Cent. R. Co., 87 Mich. 606.

¶ 328. Where, in a case of an eight-year-old boy's being run down on a car track, the boy's father testified that the boy was perfectly competent to take care of himself upon the street, and where the boy's testimony showed he possessed sufficient intelligence to appreciate the danger in crossing the tracks, it was error to submit to the jury the question of his capacity in this respect.—Henderson v. Detroit Citizens' St. R. Co., 116 Mich. 368.

¶ 329. It is, as a matter of law, contributory negligence in a thirteen-year-old boy to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thou to look to see whether such a machine any other vehicle is approaching.—Zolto v. Gzella, 159 Mich. 620.

¶ 330. What constitutes the exercise due care by a boy of twelve years who struck and injured by a negligently o ated automobile, is a question for the j to determine in light of his age and exp ence.—Winckowski v. Dodge, 183 Mich.

¶ 331. Whether requisite care was e cised by a child of twelve years in cros a street, and by the driver of a negligen operated automobile, is a question for jury.—Winckowski v. Dodge, 183 Mich.

¶ 332. The question of contributory ligence of a child seven years of age wh injured as the result of the negligence of automobile driver is usually one of fact the jury.—Barger v. Bissell, 188 Mich. 36

¶ 333. In an action against the owner gas reducing plant for the death of a seven years old by drowning caused by ing through soft ice near an opening in ice caused by warm water from defenda plant, where it appeared that there were eyewitnesses to the accident and the s that gathered on the opening had the app ance of dark ice, held that it was a quest for the jury whether decedent was gu of contributory negligence.—Parsons v. E Du Pont De Nemours Powder Co., 198 M 409.

§ 56. ——Directing verdict.

See also ante ¶ 290.

General law as to directing verdict, see recting Verdict.

Direction of verdict on plaintiff's own because contributory negligence appe see also Directing Verdict ¶ 35.

¶ 334. It is error to direct a verdict defendant on the ground of plaintiff's tributory negligence, when, in order to vict plaintiff of such negligence, it is ne sary to assume that he must, contrary to positive testimony, have heard a bell or sound of the car, which other unimpeac witnesses did not hear, or that he must h seen what they did not see.—Little v. Gr Rapids Street R. Co., 78 Mich. 205.

¶ 335. In an action for wrongful de of an eleven-year-old boy, who was driv a wagon, caused by a defective culvert, fact that the father, who was riding in other wagon ahead, knew of the defect had forgotten it, does not necessitate a rected verdict on the ground of contribut negligence, where it is not clear that boy did not know of the defect and using due care and that the father's for fulness contributed to the injury.—Mille Township of Meade, 128 Mich. 98.

¶ 336. Verdict in a negligence case should be directed for defendant, where under the evidence there may have been any of two or more causes which produced the injury and not all of them imputable to defendant and nothing but a guess which was the cause. —Fuller v. Ann Arbor R. Co., 141 Mich. 66.

¶ 337. Where it clearly appears from undisputed facts that one has not exercised such care as men of common prudence usually exercise in positions of like exposure or danger, or when the evidence is of such conclusive character that the court would be compelled to set aside a verdict in opposition to it, the case may properly be withdrawn from the jury and a verdict directed by the court.—Hodge v. City of St. Louis, 146 Mich. 173.

¶ 338. The University of Michigan Athletic Association, a voluntary organization of students and alumni, erected a bleacher, which fell during the course of a game, and plaintiff was injured. In a suit against the association and against one Baird, its director, and one Pipp, the builder of the bleacher, as defendants, it appeared that the University simply consented to the erection of the stand, whereas the association directed the work and supplied the funds. Held, it was error to direct a verdict for the defendants on the ground that the University, and not they, were the parties liable.—Scott v. University of Michigan Athletic Ass'n, 152 Mich. 684.

¶ 339. Plaintiff, a miner, went on Saturday to the pit-boss of defendant, and asked for work. He was told to return Monday, when the pit-boss said he could tell more about the probability of an opening. Plaintiff returned Monday and saw the superintendent who told him the pit-boss was the one to know if there was a vacancy. Plaintiff sat down in the tipple to wait to see the pit-boss and was injured by the explosion of a compressed air tank. Held, the court erred in directing a verdict for defendant on the ground that plaintiff was a mere licensee, as there was evidence to go to the jury that he was impliedly invited on the premises.—Schmidt v. Michigan Coal & Mining Co., 159 Mich. 308.

¶ 340. Where the only evidence as to the manner in which an accident occurred was given by plaintiff, and in his testimony he gave two inconsistent and contradictory versions, the refusal of the trial court to direct a verdict for defendant was held erroneous as the verdict for plaintiff would necessarily be based purely on speculation.—Mero v. Michigan Cent. R. Co., 180 Mich. 1.

§ 57. Instructions and requests.

Instructions as to degree of care required of defendant, see also ante ¶ 292.

Positive instructions as to negligence, see also ante § 51.

Directing verdict, see ante § 56.

General law of instructions, see Instructions.

Instructions emphasizing facts bearing on negligence and contributory negligence, see also Instructions ¶ 478.

¶ 341. In an action for injuries caused by defendant's engine colliding with plaintiff's wagon it was not error to refuse to charge that the doctrine of comparative negligence in actions of this kind as recognized by the courts of some other states is not recognized in this state, such being immaterial to the issue and there being no necessity therefor. —Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 342. A request giving a general definition of negligence was properly refused where the court drew the jury's attention to the issues to be determined and stated what facts, if found, would constitute negligence on defendant's part.—St. Clair Mineral Springs Co. v. City of St. Clair, 96 Mich. 463.

¶ 343. Where several grounds of negligence are alleged in the declaration, and there can be no recovery upon some of them, the court, in instructing the jury, should eliminate such from their consideration.— Heller v. Chicago & G. T. R. Co., 109 Mich. 53.

¶ 344. An instruction to the jury in an action for negligent injury that "if you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case," is always a dangerous method of submitting a case, but is necessarily damaging to defendant where the facts testified to by plaintiff's witnesses might be true and yet no liability exist.—Henderson v. Detroit Citizens' St. R. Co., 116 Mich. 368.

¶ 345. Plaintiff sued defendant thresher company for personal injuries due to his breaking through the deck of a threshing machine manufactured by the defendant. The court charged the jury that to recover, the plaintiff must prove that the construction of the deck was "imminently dangerous," and defined "imminent danger" as such danger as must be instantly met and cannot be guarded against by calling on others for assistance. Held, that this charge, taken with other language indicating that the danger must be impending, was not erroneous.— Pierce v. C. H. Bidwell Thresher Co., 158 Mich. 356.

¶ 345a. Where a defendant village in a suit for injury to health makes no request for a specific instruction that the village, to be liable, must have had notice of the defective drainage causing the injury, no error can be predicated on the court's omission so to instruct.—Wendt v. Village of Richmond, 164 Mich. 173.

¶ 346. For the court to confuse the duty of inspection to ascertain whether repairs might be needed with the duty of inspection and repair after defects had become notorious, and for it to charge on the duty of inspection, is not reversible error, though improper, where the negligence charged in a declaration is that defendant permitted the premises to get out of repair, and with knowledge of their condition permitted them to remain out of repair, where it also fully and properly charges on the theory of negligence alleged in the declaration.—Bannigan v. Woodbury, 166 Mich. 491.

¶ 347. Plaintiff hired a taxicab and told the driver to go to a certain point, and thereafter gave him no further directions. He was injured by a collision between said taxicab and defendant street-car. The trial court instructed that plaintiff could not recover unless he showed that the driver of the taxicab acted without negligence. Held, such an instruction was reversible error.—Galloway v. Detroit United Ry., 168 Mich. 343.

§ 58. ——On burden of proof.

Burden of proof in general, see ante § 42.

¶ 348. An instruction that the burden is on the plaintiff, in an action for personal injuries to show freedom from contributory negligence, is erroneous where such a defense was not made by the defendant.—Kochin v. Superior Copper Co., 181 Mich. 543.

¶ 349. The trial court in his charge perhaps intended to say that the duty of going forward is upon defendant where plaintiff has made out a prima facie case of negligence. He in fact used language seeming to indicate that the burden of proof shifted to defendant. Held, the charge was error.—Sewell v. Detroit United Ry., 158 Mich. 407.

¶ 350. In a suit for personal injury the court instructed: "You are the best twelve men to determine this accident, because of this negligence, as the case may be, of any twelve men." In other places the court instructed that the burden of proving negligence was on the plaintiff. Held, that, in view of the latter instruction, the former one could not be considered as an instruction by the court that the defendant's negligence was established.—Malinowski v. Detroit United Ry., 154 Mich. 104.

¶ 351. Plaintiff's intestate was killed by grasping a hanging wire used to raise and lower an electric street light. Plaintiff requested the court to instruct that the jury should not find plaintiff guilty of contributory negligence unless they found from all the circumstances that the intestate did something which an ordinarily prudent and careful person would not have done under the circumstances. Held, this instruction was properly refused, as casting on the defendant the burden of proving the intestate's contributory negligence, and as implying, a matter of law, that the grasping of the w was not of itself contributory negligenc Charette v. Village of L'Anse, 154 Mich.

§ 59. ——On proximate cause.

Proximate cause in general, see ante § 1
Jury questions as to cause of accident, ante § 52.
Weight and sufficiency of evidence as proximate cause, see ante § 48.

¶ 352. An instruction to a jury in an tion for negligence that, if the plaintiff guilty of that negligence without which accident would not have occurred, she can recover, but if the defendant's servant al was negligent, and his negligence occasio the injury, she could recover, is equival to an instruction that the plaintiff must sh that the sole proximate cause of the accid was the negligence of such servant, and correct.—Williams v. Edmunds, 75 Mich.

¶ 353. In charging a jury in an action negligence the court should distinguish tween the negligence which caused the inj and that which contributed to it.—McKe v. Township of Monitor, 78 Mich. 485.

¶ 354. In an action for negligence a quest that leaves out of consideration proximate cause of the accident and pla tiff's contributory negligence is prope refused.—St. Clair Mineral Springs Co. City of St. Clair, 96 Mich. 463.

¶ 355. In an action against the letter hire of a rowboat to recover for the de of plaintiff's intestate, alleged to be due the sinking of the boat because of its fective condition while plaintiff's intest and three other persons, who were drowned, were in it, held that the co should have instructed the jury that n ligence of defendant was not made out, that, if negligent, it was purely conjectu whether the loss of the boat and of li was the result of its negligence.—Clark Detroit & M. Ry. Co., 197 Mich. 489, 15 C. C. A. 1033. (Kuhn, C. J., Moore Bird, JJ., dissenting.)

¶ 356. In an action by a foreman charge of a gin pole and engaged in erect the iron and steel work of a building damages for personal injuries sustained a result of the falling of the pole because the insufficiency of the platform on wh it rested, an instruction on proximate ca held not erroneous.—Barkow v. Dono Wire & Iron Co., 190 Mich. 563.

§ 60. ——On contributory negligence.

See also ante ¶ 348.
Contributory negligence in general, see a § 17.
Instruction as to care required of fema see also ante ¶ 110.

Instruction as to contributory negligence erroneous as not supported by evidence, see also Instructions ¶ 322.
Instructions upon contributory negligence improper where argumentative, see also Instructions ¶ 34.
Modification of requested instruction as to negligence and contributory negligence, see also Instructions § 28.

¶ 357. In an action for personal injury resulting in the death of a boy under fifteen years of age, it was held error for the court to omit to instruct the jury, though there was no request on the point, that in determining the question of contributory negligence the same degree of caution is not required of such an infant as is required in the case of an adult.—Wright v. Detroit, G. H. & M. R. Co., 77 Mich. 123.

¶ 358. A plain and unambiguous charge as to contributory negligence need not be repeated when stating the elements which plaintiff must prove to make out a case.—Knowles v. Mulder, 74 Mich. 202.

¶ 359. In an action for injuries a request for an instruction that, if defendant, a customer, then using the saw, knew plaintiff was about to oil a saw and assented to it, and while plaintiff was oiling it negligently pushed plaintiff upon the saw, he may recover damages for injuries thereby occasioned, is properly refused, as plaintiff could not recover unless free from contributory negligence.—Ribble v. Starrat, 83 Mich. 140.

¶ 360. An instruction on the question of contributory negligence cannot be regarded as holding that plaintiff was not guilty thereof where it gave the jury to understand that, since men of equal candor might differ as to whether plaintiff exercised due care, two different views might reasonably be taken, so that it was a question for the jury to decide.—Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607.

¶ 361. Where the charge elsewhere instructs the jury on the law applicable to contributory negligence, an instruction that the jury may find for plaintiff if the defect continued so long prior to the accident that the want of knowledge implied want of due care on defendant's part, is not objectionable because it does not repeat the charge on contributory negligence.—Alberts v. Village of Vernon, 96 Mich. 549.

¶ 362. It is not error for the court, in the absence of a request therefor, to fail to give the jury a definition of the term "contributory negligence," as used in the charge.—Germaine v. City of Muskegon, 105 Mich. 213.

¶ 363. An instruction that plaintiff's failure to attempt to avert the injury complained of does not render him guilty of contributory negligence, if his efforts in that direction would have necessarily been unavailing, is not open to objection.—Darling v. Thompson, 108 Mich. 215.

¶ 364. In an action against a city for the death of a bicyclist by riding through an open drawbridge at night and drowning, where the deceased knew that he was approaching a place of danger, it is not error to refuse an instruction that if he momentarily forgot the condition, it would excuse his failure to act upon his knowledge.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 365. In an action against a city for death caused by plaintiff's intestate riding his bicycle at night into an open drawbridge and drowning, an instruction that the love of life is instinctive and that men do not usually expose themselves to great discomfort and great danger without some strong motive, and that his estate is entitled to any presumption that may arise from this instinct of self-preservation and that the jury should not find the decedent guilty of negligence without "satisfactory proof or strong inference" that he was so, is properly refused as argumentative and also because the inference which a jury may draw in case of death may be overcome by any proof which in the opinion of the jury reasonably tends to show want of care.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 366. In an action for personal injuries sustained through a defective sidewalk an instruction to the jury that in case the plaintiff "was intoxicated she cannot recover unless she was exercising greater care than would be required on her part if she were not intoxicated" is properly refused, because no higher degree of care is required of an intoxicated person than one in his sober senses.—Epelett v. City of Sault Ste. Marie, 144 Mich. 392.

¶ 366a. Defendant city used one of the cross-arms of a telephone company's line of poles for stretching its electric wires used in supplying light. Plaintiff's deceased, a lineman in the employ of the telephone company, was killed by one of the city's defectively insulated wires. The court in instructing the jury on the due care required by the plaintiff's deceased, stated that he had a right to assume that the city had properly inspected the wire and was liable to use only the reasonable care of a prudent lineman in looking out for obvious defects. Held, the instruction sufficiently protected defendant.—Hodgins v. Bay City, 156 Mich. 687.

¶ 367. A charge to the effect that if plaintiff was intoxicated and this condition contributed to his injury, no recovery could be had, approved.—Peters v. Detroit & Mackinac Ry. Co., 178 Mich. 481.

¶ 368. A refusal to charge that plaintiff is not to be barred from recovering unless his negligence contributed to the injury, is not

ground for reversal where, from the facts of the case, any negligence on his part must have contributed to the injury.—Charette v. Village of L'Anse, 154 Mich. 304.

§ 61. ——On contributory negligence of children.

Care required of children, see ante § 20.
Jury questions as to contributory negligence of children, see ante § 55.

¶ 369. An instruction in an action for injuries to a boy, stating that it was for the jury to determine whether the boy used such care as boys of his age and discretion usually exercise on like occasions, and such as they thought the boy ought to have used, was not open to the objection that it excluded the question that the boy was one of unusual intelligence.—Beaudin v. Bay City, 136 Mich. 333.

¶ 370. In a suit for personal injuries, the charge of the court is not open to the objection of laying down a rule that plaintiff, thirteen years of age, was required to exercise the same degree of care and prudence as an adult person, where it in three or more instances calls the attention of the jury to the rule that they must consider the age, intelligence and experience of the plaintiff, and where taken as a whole it states the rule of law correctly.—Harris v. Crawley, 170 Mich. 381.

¶ 371. Where the declaration and proofs in a personal injury case set forth the plaintiff's age as 13, and that he was in the exercise of due care and caution, and the proof as to age, experience and manner of driving and conduct were all before the jury, the declaration and proofs were sufficient to justify the court in instructing the jury that the degree of care and caution the boy was required to observe was such as an ordinary boy of similar age would exercise under the same circumstances, and to refuse to instruct that the plaintiff was on his own showing to be charged with the same rule of contributory negligence as an adult would be.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 372. Plaintiff's intestate, a boy of fourteen, was killed by an electric shock while taking hold of a "hanger" wire used to raise and lower the electric street light. On the question of contributory negligence, the court instructed that the jury should consider whether, from the boy's age, knowledge, and experience, and taking into account the position of the wire, the fact of warning, and the other circumstances, the boy had acted with reasonable care for his safety. Held, this instruction sufficiently covered the question of contributory negligence.—Charette v. Village of L'Anse, Mich. 304.

§ 62. ——On gross negligence of defenda

Gross negligence and last clear chance
see ante § 26.
Evidence to warrant charge of malicious
ligence, see also ante ¶ 277.
Jury questions as to gross negligence of
fendant, see ante § 53.

¶ 373. In an action for personal inju
it was error for the court to instruct
the defendant was chargeable with reck
injury even though the plaintiff may
been negligent also in being in a wrong
sition if the defendant saw the plaintiff
not aware of his danger and saw him
such a position of danger in time to pre
by ordinary care the injury, where the
laration contained no count charging
fendant with wilful, wanton, or reck
negligence, such an instruction being
tirely the issues made by the pleading
Denman v. Johnston, 85 Mich. 387.

¶ 374. In an action for personal in
caused by a collision of vehicles on a h
way, an instruction that even though
plaintiff was negligent if the defenda
conduct was wanton and wilful or reck
the plaintiff may recover, is sufficiently
ported by testimony that the defendant
proached at a rapid gait without looking
others.—Buxton v. Ainsworth, 138 Mich.

¶ 375. In an action against a city for
sonal injuries sustained in falling into an
cavation, an instruction that the plai
might recover notwithstanding contribut
negligence if the defendant was grossly
ligent is properly refused where there is
evidence of gross negligence.—Sterling
City of Detroit, 134 Mich. 22.

§ 63. Verdict and findings.

Special findings negativing duty toward
jured person, see also ante ¶ 21.
General law of damages for negligence,
Damages.
Measure of damages for negligent injurie
lands, see Damages § 103.
General law as to verdict and findings,
Verdicts.

¶ 376. A verdict in a personal injury
which shows that it was based on cont
utory negligence, necessarily implies that
jury found the defendant guilty of ne
gence.—Benedict v. City of Port Huron,
Mich. 600.

¶ 377. In actions for personal injuries
dicts cannot be based upon mere conjectu
—Dolbee v. Detroit, Y., A. A. & J. Ry.,
Mich. 656.

NEGOTIABLE INSTRUMENTS.

TREATS of the general law of bills and notes and other negotiable instruments for the payment of money and the contracts and liabilities involved in them and the negotiation and transfer of them. It excludes the general law of Contracts, which see, and the law of contracts collateral to loans and written promises to pay, e. g., Mortgages; Pledges; Chattel Mortgages; Sales; Vendors and Purchasers. The law of bona fide takers other than that which pertains to takers of negotiable paper is treated in Notice and Record of Title, I (lands), and in Sales, XI (personalty). The general law of procedure ex contractu is treated in topics Pleading; Evidence; Instructions; Trial; Verdicts; Judgments, etc., except matters distinctively pertaining to negotiable instruments. For non-negotiable instruments, see Non-negotiable Paper.

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§ 4. ——As to amount payable.
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§ 11. Maturity of instrument and time of payment.
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§ 16. Certificates of deposit as notes.
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strument.

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§ 43. Indorsement for collection.
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breach of warranty.
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or demand.
§ 51. Time to make presentment or demand and effect of dela
§ 52. ——Demand or sight paper and checks.
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[Note. The previously existing laws relating to negotiable paper have been codified and in some instances changed by the Negotiable Instrument Act and the practitioner should consult that act in connection with the cases here collected. See Comp. L. 1915, chap. 119.]

I. IN GENERAL; REQUISITES AND INDICIA OF NEGOTIABILITY.

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Authority of husband as wife's agent to execute negotiable instruments in her name, see Husband and Wife § 100.
Authority of partners to execute negotiable paper, see Partnership.
Promissory note as evidence of account stated, see Account Stated ¶¶ 21, 42, 48.
Discounts and dealings in paper by banks, see Banking, VII.
Issuance and repayment of travelers' checks, see Banking § 31.
Liability of carrier for delivering goods on order bill of lading without surrender of bill, see Carriers § 31.
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Negotiable paper as subject of gift, see Gifts § 5.
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§ 1. In general; date, signature and form.

As to date, see also post ¶ 177.
Construction of terms of instrument, see post § 10.
Accompanying mortgages, papers or agreements as part of instrument, see post § 18.
Inserting date in undated instrument, see post ¶ 62.
Certificates of deposits as notes, see post § 16.
Checks as bills of exchange, see post § 17.
Form of indorsement, see post § 42.
Form of signature of agent in execution of negotiable instruments to indicate agency, see Execution of Instruments ¶ 98.
Necessity of revenue stamp, see Execution of Instruments ¶ 20.
Definition and nature of promissory notes, see Comp. L. 1915, § 6225.
Definition and form of bill of exchange, see Comp. L. 1915, § 6167 et seq.
Definition and nature of check, see Comp. L. 1915, § 6226.
Provisions as to form of negotiable instruments, see Comp. L. 1915, § 6042 et seq.

¶ 1. No particular form of words is necessary to constitute a bill of exchange.—Hasey v. White Pigeon Beet Sugar Co., 1 D. 193.

¶ 2. The term "negotiable," as commonly applied to paper, is a term of classification, and does not necessarily imply anything more than that the paper has the negotiable quality; it includes notes drawn to order and not indorsed.—Robinson v. Wilkinson, 38 Mich. 299.

¶ 3. The omission of a date does not invalidate a check.—Gordon v. Lansing State Sav. Bank, 133 Mich. 143, per Carpenter and Grant, JJ.

¶ 3a. The entire negotiable instrument act should be construed together and its provisions harmonized if possible.—Ensign v. Fogg, 177 Mich. 317.

§ 2. Seal as affecting negotiability.

¶ 4. The addition of a seal to the signature of the maker of a promissory note destroys the note's negotiability.—Rawson v. Davidson, 49 Mich. 607.

§ 3. Certainty and absoluteness.

Place of payment of instrument, see post § 14.

¶ 5. The certainty requisite to negotiability must continue until the obligation is discharged, and any provision which before that time removes such certainty prevents the instrument's being negotiable at all.—Altman v. Rittershofer, 68 Mich. 287.

¶ 6. A proviso in a promissory note is not void unless it is illegal or nugatory; and if innocent it does not make the note illegal, though it may destroy its negotiability.—Smith v. Van Blarcom, 45 Mich. 371.

¶ 7. A note payable to order and without contingency on a day certain is not the less negotiable because purporting to be according to the condition of a mortgage, when the terms of the mortgage correspond with those expressed in the note.—Littlefield v. Hodge, 6 Mich. 326.

¶ 8. The indorsement on the back of a promissory note of a statement by the maker as to his financial responsibility does not destroy the negotiability of the note.—Hudson v. Emmons, 107 Mich. 549.

¶ 9. A note containing the following condition: "This note is given subject to the approval of Fred Soules * * * for a stock of groceries * * *, the title to the said stock of groceries to remain in said Soules until this note is fully paid." Held, the note was not a negotiable instrument.—Worden Grocer Co. v. Blanding, 161 Mich. 254.

¶ 10. An instrument otherwise in the form of a promissory note, which provides that "the conditions of this note are, if not paid when due, the property for which it is given shall be the property of" the payee, such property being named in the instrument, is not a negotiable promissory note.—Wright v. Traver, 73 Mich. 493.

§ 4. ——As to amount payable.

¶ 11. An instrument by which the maker promises to pay to the payee or bearer a certain sum by a time named, but which recites that the payee agrees to receive a certain less sum in satisfaction if paid on an earlier day named, is not a promissory note.—Fralick v. Norton, 2 Mich. 130.

¶ 12. An instrument promising to pay M. K. "or heirs the sum making $450, January 1, 1868," is a promissory note.—Knight v. Jones, 21 Mich. 161.

§ 5. ——Provision as to interest, exchange, attorneys' fees, costs or taxes.

Provision for attorney's fee as affecting surety's liability, see post § 27.

Validity of promissory note drawing no interest if paid at maturity and ten per cent interest if not so paid, see Interest ¶ 52.

¶ 13. The negotiability of a promissory note, made payable "on or before two years from date," is destroyed by a memorandum attached thereto providing that if paid within one year there shall be no interest.—Lamb v. Story, 45 Mich. 488.

¶ 14. An instrument promising to pay a stated sum, with interest, "on or before two years after date," but providing that if it be paid within one year no interest shall be paid, is not a promissory note, as it lacks certainty in time and amount.—Story v. Lamb, 52 Mich. 525.

¶ 15. An instrument promising to pay a certain sum to order, with interest at seven per cent if paid when due, and, if not, at ten per cent from date, and agreeing to pay exchange and all expenses of collection, including attorney's fee, is not a negotiable promissory note.—Cayuga County Nat. Bank v. Purdy, 56 Mich. 6.

¶ 16. A note promising to pay a certain sum with interest at seven per cent and agreeing to pay ten per cent interest from date until paid if not paid when due, is a negotiable promissory note.—Crump v. Berdan, 97 Mich. 293.

¶ 17. A note containing a promise to pay a specified amount on a given date, with interest, and "all taxes assessed against" the land described in a mortgage given to secure such note, or against the mortgagee's interest therein, until the note is paid, is not negotiable.—Walker v. Thompson, 108 Mich. 686.

¶ 18. A note made payable "with current exchange" is a negotiable promissory note.—Smith v. Kendall, 9 Mich. 241; Johnson v. Frisbie, 15 Mich. 286.

¶ 19. A provision in a promissory note for the payment of current exchange or express charges is nugatory, and does not add to vary a surety's liability, since the promi must be liable for the expense of transm ting the money to the place where the n is payable.—Bullock v. Taylor, 39 Mich. 1

¶ 20. An instrument that includes a st ulation to pay "attorney's fees," uncert as to the amount to be paid, is not a ne tiable promissory note.—Altman v. Ritte hofer, 68 Mich. 287; Altman v. Fowler, Mich. 57; Wright v. Traver, 73 Mich. 493

¶ 21. An instrument which, in addition the usual form of a promissory note, thorizes a confession of judgment for amount due thereon with costs, and the us attorney's fees, is not a promissory note Conrad Seipp Brewing Co. v. McKittrick, Mich. 191.

¶ 22. A note payable in Michigan is n dered non-negotiable by a provision ther for the payment of an attorney fee.—Stra berry Point Bank v. Lee, 117 Mich. 122.

¶ 23. A stipulation in a promissory n that the maker shall pay taxes destroys gotiability, even though at the time the n is executed no statute authorizes a mo gagee's interest to be assessed for taxes Carmody v. Crane, 110 Mich. 508.

¶ 24. A provision in the mortgage requ ing the mortgagor to pay all taxes that m be levied upon the lands "or upon this mo gage" destroys negotiability, where the terest of a mortgagee in lands was taxa as such under the law in force at the ti of the execution of the mortgage, since amount payable to or on behalf of the mo gagee is thereby rendered uncertain.—Broc v. Struthers, 110 Mich. 562.

¶ 25. Legislation subsequently passed, posing upon the mortgagee the duty of p ing a portion of the taxes will not ren a mortgage note non-negotiable which v negotiable when made, though the mortg had a covenant to pay taxes on the premi —Wilson v. Campbell, 110 Mich. 580.

¶ 26. A promissory note secured by mo gage is not rendered non-negotiable by provision in the latter requiring the mo gagor to pay all taxes and assessments up the mortgaged premises, where the sa obligation rested upon him by law at time the instruments were executed, in pendent of any such stipulation.—Wilson Campbell, 110 Mich. 580; Cox v. Cayan, Mich. 599.

§ 6. ——As to time of payment.

Promise to pay in instalments, see p ¶ 41.

Time when instrument matures and is p able, see post § 11.

Note payable on death of party, see p ¶ 63.

¶ 27. An obligation payable in money, the time of which cannot be made certain by any attainable means, is not a promissory note. It is essential to a promissory note that it be payable at a time which must certainly arrive in the future, upon the happening of some event, or the completion of some period, not depending upon the future volition of any one.—Brooks v. Hargreaves, 21 Mich. 254.

¶ 28. A promise to pay "on or before" a day named states the time for payment with sufficient certainty for the purposes of a promissory note. A note so drawn is due on the day named, and not before; the maker may pay it sooner if he chooses, but this would only be a payment in advance of his legal liability.—Mattison v. Marks, 31 Mich. 421.

¶ 29. A clause attached to a promissory note, and providing that the payee or his assigns may indefinitely extend the time of payment, destroys its negotiability and makes it a simple contract.—Smith v. Van Blarcom, 45 Mich. 371.

¶ 30. An agreement for the payment of a sum certain at a specified date, coupled with a condition that the sale or removal of the property for a part of the purchase price of which it was given shall cause the debt to mature at once, is not a negotiable promissory note.—First Nat. Bank v. Carson, 60 Mich. 432.

¶ 31. An instrument promising to pay a certain sum of money when certain work is performed by the payee is not a promissory note, and, without evidence that he has done the work, no liability is shown on the part of the makers.—Chandler v. Carey, 64 Mich. 237.

¶ 32. The negotiability of a promissory note is not destroyed by a provision therein giving the holder an option to declare the whole amount due upon default in payment of an instalment of interest, or by a provision in an accompanying mortgage giving a like option in case of non-payment of taxes by the mortgagor.—Wilson v. Campbell, 110 Mich. 580; Cox v. Cayan, 117 Mich. 599.

¶ 33. A provision in a mortgage securing a promissory note, and referred to therein, that the mortgagor's failure to pay any tax or assessment upon the mortgaged premises for 30 days after it is payable shall render the whole debt, principal and interest, immediately due at the option of the mortgagee, does not destroy the negotiability of the note.—Brooke v. Struthers, 110 Mich. 562.

¶ 7. Medium of payment; provisions for payment in currency or goods.

¶ 34. A draft payable in "current funds," in the absence of all evidence showing that anything else is current at the place of payment, must be regarded as payable only in such funds as are current by law; it is therefore negotiable.—Phœnix Ins. Co. v. Allen, 11 Mich. 501.

¶ 35. A certificate of deposit payable in "currency" means, prima facie, money current by law, or paper equivalent in value circulating in the business community at par.—Phelps v. Town, 14 Mich. 374.

¶ 36. A note made and indorsed in Michigan and payable in Canada "in Canada currency" is payable in money, and is therefore negotiable; such a phrase in a note made in Michigan means no more than that the note is payable in Canada money at the Canadian standard, as it would have been without such a phrase if made and payable in Canada.—Black v. Ward, 27 Mich. 191.

§ 8. Recitals as to consideration or terms of contract.

See also post ¶ 60.

Legality of consideration, see post § 9.

Want or failure of consideration as defense between original parties, see post § 22.

Consideration for accommodation paper, see post § 61.

Want or failure of consideration as defense against bona fide holder, see post § 87.

Issues and proof as to consideration, see post § 106.

Burden of proof and presumption as to consideration, see post §§ 109, 112.

Evidence as to consideration, see post §§ 115, 124.

Jury questions as to consideration, see post § 131.

Considerations in general, see Contracts, V.

Invalidity of contract as infecting note related thereto, see Contracts § 93.

Existing debt as sufficient consideration, see Contracts § 124.

Presumption as to consideration, see also Contracts § 139.

Want of consideration for notes given as tokens and not to be enforced, see Contracts § 135.

Provisions as to consideration, see Comp. L. 1915, § 6065 et seq.

¶ 37. An instrument unconditionally promising to pay a specified sum at a certain time to the payee or bearer is a promissory note notwithstanding the consideration upon which it was given is stated in the instrument.—Beardslee v. Horton, 3 Mich. 560.

¶ 38. The naming of the property for which a note is given does not impair the instrument's character as a promissory note.—Wright v. Traver, 73 Mich. 493.

¶ 39. The negotiability of a promissory note is not destroyed because of a writing on its face that it is given in accordance with a certain contract, although the note is one of a series which, by the terms of such contract, were to become payable, at the option of the payee, on failure to pay any of them.—Markey v. Corey, 108 Mich. 184.

¶ 40. The negotiability of an instrument in the form of a promissory note is not impaired by a recital that the consideration for it and for certain other notes is a soda fountain, described in a contract of sale of even date, that the maker, to whom the apparatus has been delivered, is to acquire no title thereto until all the notes are paid, and that the payee is to have the right, in case of nonpayment at maturity of either of the notes, to "enter and retain immediate possession of the property, * * * and remove the same."—Choate v. Stevens, 116 Mich. 28.

¶ 41. A promise, duly dated and signed, for value received, to pay to a designated railroad corporation, or bearer, a certain sum of money, "to be paid twenty per cent a month," from a date named, "towards the right of way and grading said railroad," between certain points named, is a promissory note.—Wright v. Irwin, 33 Mich. 32.

¶ 42. A memorandum attached to a promissory note and running as follows, viz.: "This note is to be valid as part pay for a piano-forte of me at retail price," leaves it at the payee's option to apply it in part payment, and contains nothing repugnant to the promise to pay in money.—Preston v. Whitney, 23 Mich. 260.

§ 9. Validity and legality.

Defenses available between original parties, see post § 20.
Illegality and invalidity as defense against bona fide holder, see post § 85.
Forgery and alteration, see post § 65.
Rights of bona fide holders of forged paper, see post § 81.
Validity of note given in settlement of a charge of embezzlement, see also post § 21.
Validity of provision for attorney's fees, see also post ¶ 126.
Absence of payee as affecting validity, see also post ¶ 177.
Issues and proof as to validity of instrument, see post § 105.
Illegality and invalidity as defense against bona fide holders, see post § 85.
Burden of proof as to validity and legality of instrument, see post § 108.
Notes for considerations obnoxious to public policy, see Contracts, IV, B.
Validity of note for price of liquor validly sold in another state, see Contracts § 41, ¶ 178.
Invalidity of notes taken for taxes or other public dues, see Contracts § 58.
Invalidity of notes by county treasurer for borrowed money for ultra vires purpose, see Counties ¶ 108.
Validity of note where maker authorizes another to sign his name to it, see Execution of Instruments ¶¶ 2-3.
Necessity of revenue stamp to make promissory note valid, see Execution of Instruments ¶ 20.
Conclusiveness of a decision of foreign co adjudicating the validity of a note, Former Adjudication ¶ 202.
Validity of paper made or transferred Sunday, see Sunday.

¶ 43. A note given in payment of a liq tax, which must be paid in money, is c trary to public policy.—Doran v. Philli 47 Mich. 228.

¶ 44. A county treasurer may lawfu advance from his own money a liquor de er's tax, taking the dealer's note for amount lent, though the tax could not paid by a note.—Hatch v. Reid, 112 Mi 430.

¶ 45. Notes given by a bankrupt to creditor for the balance of his claim o the sum at which it would be dischar by composition proceedings, which proce ings were assented to by the creditor u the agreement that such notes should given, are void as contrary to public poli —Tinker v. Hurst, 70 Mich. 159.

¶ 46. A promissory note given with consideration, and upon the payee's thr to prevent the allowance by the city cou of the maker's claim for paving a street, absolutely void in the hands of the origi payee.—French v. Talbot Paving Co., Mich. 443.

¶ 47. Where a broker received a check falsely representing that stock ordered the drawer had been purchased for him transferred on the books of a corporati and it would be delivered in a day or so, payee's title to the check was defect within the meaning of § 54 of the Negotia Instruments Act. (Act 265, Pub. Acts 1905, § 2725, How. St., 2nd Ed.)—Peopl State Bank v. Miller, 185 Mich. 565.

II. INTERPRETATION AND EFFECT TERMS; CHARACTER OF INSTRUMENTS.

§ 10. In general.

Requisites and indicia of negotiability, ante I.
Construction of indorsements, see post §
Law governing the liability of parties to gotiable instruments, see Conflict Laws, II.
Indorsement and note as separate contrac which law governs each, see Conflict Laws § 22.
Effect of customs and local usages, lo usage against general law, see Custo § 4.
Check or bill as assignment of fund, see signments § 14.
Construction, validity and effect of bon see Bonds § 2.
Construction of note as part of entire c tract of sale, see Contracts § 150.
Making note as admission of considerati

for debt thereby evidenced, see Contracts § 141.
Renewal note as making holder a creditor against unfiled chattel mortgage, see Chattel Mortgages ¶ 210.
Fee and increased interest clauses in notes as liquidated damage clauses, see Damages § 184.
Note payable on death of maker as a bequest, see Wills.
Provisions as to bills in a set, see Comp. L. 1915, § 6219 et seq.
Provisions as to interpretation of negotiable instruments, see Comp. L. 1915, § 6058 et seq.

¶ 48. The rules of the law merchant are inflexible and arbitrary, strictness being necessary.—First National Bank of Detroit v. Currie, 147 Mich. 72.

¶ 49. The law of negotiable paper cannot be changed by local custom, unless, possibly, when the paper itself is purely local.—Stringfield v. Vivian, 63 Mich. 681.

¶ 50. A note made payable to the "order of J. V. Mehling estate" was held valid, and payable to the proper representative of the estate.—Peltier v. Babillion, 45 Mich. 384.

§ 11. Maturity of instrument and time of payment.

Necessity that instrument be certain as to time of payment, see ante § 6.
Medium of payment, see ante § 7.
Payment or discharge as defense, see post §§ 24, 89.
Time to make presentment or demand, see post § 51.
Time in which to make acceptance of negotiable paper, see post § 36.
Time in which to pay accepted draft, see also post ¶ 166.
Bona fide purchasers as those taking before maturity, see post § 77.
Time to sue on instrument, see post § 91.
Agreement for extension, see also Contracts ¶ 991.
Interpretation as to time for payment of interest where promissory note stipulates interest computed on annual rate, see Interest ¶ 60.
Provisions as to maturity of instrument and time of payment, see Comp. L. 1915, § 6126 et seq.

¶ 51. A promissory note, dated July 20, was by its terms payable "One year, August 15th, after date." Held, that it was payable one year from the 15th day of August after its date.—Washington County Bank v. Jerome, 8 Mich. 490.

¶ 52. Where a note is made payable several years after date, "with annual interest," the interest falls due every year during the period for which the note is to run.—Cook v. Wiles, 42 Mich. 439.

¶ 53. A note given for the purpose of aiding in the construction of a railroad between two designated cities, via an intermediate city, and payable upon the first arrival of a regular passenger train at such city from another intermediate city, is payable when that condition is performed, although nothing has been done towards the construction of the remainder of the road, except to make a survey of the line.—Gardner v. Burch, 101 Mich. 261.

¶ 54. Where a check was drawn on a bank and payable 90 days after date, it matures at the end of 90 days under Comp. L. 1897, § 4877, "an act relating to commercial paper" and applying to checks, and there is no grace allowable, Comp. L. 1897, § 4871, providing for grace on bills of exchange, being inapplicable.—Jocque v. McRae, 142 Mich. 370.

¶ 55. Paper which is payable "on or before" a certain time is not due until that time; and if a purchaser is shown to have been holder of the securities for value before the expiration of the time, he is entitled to the same protection as if the note were made payable at that time.—Helmer v. Krolick, 36 Mich. 371.

§ 12. ——Demand or sight paper.

Certificates of deposit, see post § 16.
Time to make presentment or demand of demand or sight paper, see post § 52.

¶ 56. A note payable on demand is payable at once, and without demand. So a note payable thirty days after demand is payable after thirty days.—Palmer v. Palmer, 36 Mich. 487.

¶ 57. A promissory note payable on demand, unless indorsed in a reasonable time, is considered overdue and dishonored. What is such reasonable time is to be determined by the court on the facts in each particular case.—Carll v. Brown, 2 Mich. 401.

¶ 58. A negotiable demand note, bearing date May 25th, was sued by the bearer on the 19th of June following. Held, that the note could not be considered overdue—no prior demand being shown—before it came to the hands of the bearer.—Carll v. Brown, 2 Mich. 401.

¶ 59. As a demand note given to a bank by a depositor is due at once, it may, without actual demand, be treated as a matured debt for the purpose of set-off in proceedings between the bank and the depositor.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 60. A note payable on demand is a demand note and is considered due from the time it is given, notwithstanding a provision that the payee may sell certain stock deposited as collateral security on the maturity of the note.—Brinen v. Muskegon Sav. Bank, 174 Mich. 414.

¶ 61. A post-dated draft purporting to be payable at sight is, for all legal purposes of presentment, demand, protest and payment, a draft payable at a certain time after date.—New York Iron Mine v. Citizens' Bank, 44 Mich. 344.

¶ 62. An undated promissory note requiring the maker to pay a certain sum of money "one year after January 1, 1898, after date, with interest from date thereof," which note was executed on the date mentioned, reference being made to the fact that the note was not dated, the parties believing that the date mentioned was the date of the note, will be held to draw interest from October 16, 1896, where such note passes into the hands of a bona fide purchaser, the latter date having been inserted after execution and before the note was obtained by the bona fide holder, as it was the duty of the maker to see that the date line was so filled in that an unsuspecting bona fide purchaser would not be deceived when the note was presented to him for negotiation.—First State Sav. Bank of Breckenridge v. Webster, 121 Mich. 149.

§ 13. ——Paper payable on death of person.

¶ 63. In suit by the heirs of the payee against the maker upon this instrument: "Feb. 18, 1873. For money received I promise to pay A. $435 out of my estate if she should outlive me, but if not, to her heirs as she shall direct, without use," held, that in no event was it payable except after the maker's death and from his estate.—Kelsey v. Chamberlain, 47 Mich. 241.

§ 14. Place of payment.

Place of presentment and demand, see post § 53.

¶ 64. The presumption that a note which specifies no place of payment is to be paid at the residence of the person liable upon it is one that applies to indorsers.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

¶ 65. A note dated and signed in Michigan, and made by residents of Michigan, was presumptively delivered in Michigan, and is payable there, even though it states that the payee's residence is in another state.—Strawberry Point Bank v. Lee, 117 Mich. 122.

¶ 66. A note dated at a certain city and made payable at "The First National Bank," without designating the location thereof, is payable at the bank of that name at the city where the instrument is dated, notwithstanding the fact that the makers live elsewhere.—Finch v. Calkins, 183 Mich. 298.

§ 15. Joint or several instruments.

Liability on joint instruments, see post § 23.
Payment and discharge of joint paper, see post § 25.
Guarantor as joint maker, see post ¶¶ 138, 139.
Anomalous signers as joint makers, see post §§ 28, 29.
Subsequent indorsement as making indorser jointly liable with his principals, see post § 46.
Right of one of several payees to indorse for the others, see post ¶ 199.
Plural and singular as indication of joint and several liability, see also Bonds ¶ 10.
When instrument deemed to be joint and several, see Comp. L. 1915, § 6058.

¶ 67. A note using the first person singular signed by the individual members of a partnership and by the firm name as makers, creates a joint and several obligation.—Dow Law Bank v. Godfrey, 126 Mich. 521.

¶ 68. The fact that a note signed by two persons is in the singular number does not alter its character as a joint and several instrument, notwithstanding that the word "surety" is added to one of the signatures.—Ensign v. Dunn, 181 Mich. 456.

¶ 69. A promise in writing by several residents of certain road districts to pay to the order of a corporation, engaged in the manufacture and sale of machines for grading and repairing highways, a specified sum at a given date as the first payment for a road grader, which they have purchased of the payee "in proportion to the road tax" in said road districts on lands then owned and occupied by the promisors creates a separate, and not a joint, liability on their part.—Western Wheel Scraper Co. v. Locklin, 100 Mich. 339.

§ 16. Certificates of deposit as notes.

See also post ¶ 414.

¶ 70. A certificate of deposit payable to the depositor's order upon its return properly indorsed is a promissory note payable on demand.—Beardsley v. Webber, 104 Mich. 88.

¶ 71. A certificate of deposit payable on the return thereof properly indorsed is in legal effect a promissory note payable on demand, and is subject to all the incidents of negotiable paper.—Cate v. Patterson, 25 Mich. 191; Tripp v. Curtenius, 36 Mich. 494; Birch v. Fisher, 51 Mich. 36.

§ 17. Checks as bills of exchange.

Validity in hands of bona fide holder of check certified without sufficient funds, see post § 86.

¶ 72. All checks come within the meaning and definition of a bill of exchange, but all bills of exchange are not checks. They are commercial paper, and are governed by the same rules as to presentment and notice of nonpayment as inland bills of exchange, payable on demand.—People v. Kemp, 76 Mich. 410.

§ 18. Accompanying mortgages, papers or agreements.

Provisions in accompanying mortgage as affecting negotiability of note, see also ante § 5.

Negotiability of instrument purporting to be according to the condition of a mortgage, see ante ¶ 7.

Bona fides of purchaser as affected by notice or knowledge of collateral agreements or securities, see post § 73.

Bill of lading as incident to draft to which it is attached, see Bills of Lading § 3.

Validity of chattel mortgage to secure future payment of note or paper, see Chattel Mortgages § 13.

¶ 73. A contemporaneous agreement in writing upon a detached paper, varying the terms of a note, is not a part of it.—Smalley v. Bristol, 1 Mich. 153.

¶ 74. Where a promissory note has a clause appended giving the payee the power to extend the time of payment indefinitely, the note and the clause must be construed together.—Smith v. Van Blarcom, 45 Mich. 371.

¶ 75. The terms of a note may be modified and controlled by an accompanying mortgage.—Brooke v. Struthers, 110 Mich. 562.

¶ 76. A promissory note and a bond or agreement given at the same time by the payee in the note to the maker, the note being for the purchase price of a certain number of bushels of "Bohemian oats" at $10 per bushel, and the agreement stipulating to sell for the maker of the note a certain larger number of bushels at the same price per bushel before the note should be paid, although on separate papers, constitute one transaction.—Sutton v. Beckwith, 68 Mich. 303; McNamara v. Gargett, 68 Mich. 454; Mace v. Kennedy, 68 Mich. 389.

III. RIGHTS AND LIABILITIES OF PRIMARY PARTIES.

§ 19. In general.

Maturity of instrument and time of payment, see ante § 11.

Rights and liabilities of sureties, see post § 27.

Rights and liabilities of anomalous signers, see post § 28.

Liability upon guaranties, see post § 30.

Liability of drawee prior to acceptance, see post § 39.

Rights and liabilities of acceptors, see post § 40.

Rights and liabilities of indorsers, see post § 46.

Liability on new promises, see post § 60.

Rights and liabilities of accommodation signers, see post § 61.

Original parties as bona fide holders, see post § 67.

Rights of bona fide holders, see post § 79.

Law governing the liabilities of parties to negotiable instruments, see Conflict of Laws § 16.

Rights in deposits, payment of checks, certifications, and collections as governed by banking law, see Banking.

Liability of depositor of paper charged back to him by bank on being dishonored, see Banking § 16.

Letters of credit, rights and liabilities of parties, see Banking § 31.

Effect of acceptance by correspondent bank of draft on its depositor sent for collection, see also Banking ¶ 120.

Maker in possession for special purpose after negotiation as agent embezzling it, see Crimes ¶¶ 269, 293.

Liability of persons signing in trade or assumed name, see Comp. L. 1915, § 6058.

Provisions as to liability of parties, see Comp. L. 1915, § 6101 et seq.

Liability of parties on bills drawn in a set, see Comp. L. 1915, § 6221 et seq.

¶ 77. The mutual rights of parties to negotiable paper are determined, in common-law actions, by their respective positions on the paper at the time it is negotiated and becomes the property of a bona fide holder.—Greusel v. Hubbard, 51 Mich. 95; Brewer v. Boynton, 71 Mich. 254.

¶ 78. Equity has no different rules from those of law in respect to the rights and obligations of parties to negotiable paper; and will treat the payee of a bank draft as having the ordinary legal rights against the drawer on dishonor.—Grammel v. Carmer, 55 Mich. 201.

¶ 79. Where a person bought a judgment, partly paid for it, and gave his note for the balance on condition that if he elected to lose what he had paid and let his payee retain the judgment this note was to be void, it was held that he must give timely notice of such election to the payee before maturity, and that a mere failure to pay the note would not amount to an election, but would leave him liable.—Draper v. Fletcher, 26 Mich. 154.

¶ 80. A third person's promise to pay a note and release the makers from responsibility does not lessen the liability of the makers unless the creditor consents.—Gallery v. National Exch. Bank of Albion, 41 Mich. 169.

¶ 81. In the absence of proof that a note made for the payee's accommodation has been paid, an indorsee is entitled to recover thereon against the maker where the maker's testimony shows that the note was discounted at a bank, and that the payee received the money.—Warder, Bushnell & Glessner Co. v. Gibbs, 92 Mich. 29.

¶ 82. An indorser who pays a note on an insufficient notice of protest is, nevertheless,

entitled to recover from the maker.—Tredway v. Antisdel, 86 Mich. 82.

§ 20. Defenses available between original parties.

See also post ¶ 149.
Defenses available to indorsers, see post § 47.
Taking paper with notice of equities and defenses, see post § 69.
Defenses available against a holder in due course, see post § 79.
Pleas, affidavits and notices of defense, see post § 102.
Defenses open to garnishee, see Garnishment ¶ 326.
Set-off and recoupment in actions on negotiable paper, see also Set-off.
Provisions as to rights of holders other than those in due course, see Comp. L. 1915, § 6099.

¶ 83. In an action between the original parties to a note the circumstances of its issue are open to explanation.—Smith v. Van Blarcom, 45 Mich. 371.

¶ 84. The equities of a note given in full and final settlement of conflicting claims cannot be inquired into.—Jennison v. Stone, 30 Mich. 99.

¶ 85. Between the original parties the defense that for a discount prepayment was made without surrender of the note and a receipt given in full by plaintiff's agent is good, though if the note had been in the hands of an indorsee it might not have been available.—Haughton v. Maurer, 55 Mich. 323.

¶ 86. A note that is given to the payee's agent, and is turned over to the payee before it is due and applied by him on an indebtedness of the maker, will sustain a recovery by the payee if he has no knowledge of any arrangement between the maker and the agent whereby the latter was to keep the note in his own hands and use it in his own business.—McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426.

¶ 87. In an action on a promissory note by the joint payees thereof, held that having borrowed money which the plaintiffs jointly furnished and given her note payable to them jointly, the defendant could not be allowed to show that the money really belonged to one of the plaintiffs only as against his creditors.—Kincade v. Peck, 193 Mich. 207.

¶ 88. Purchasers of commercial paper with notice or with such knowledge as should put them upon inquiry, in an action on a note by an indorsee, take subject to the same defense that could be made against the original payee.—Carey v. Nissle, 145 Mich. 383.

¶ 89. Recovery by a joint maker of a note from his comaker of advances made by him consisting in part of money and in part property made under a compromise agr ment whereby the holder of the joint ob gation accepted less than its face value, ca not be complained of by such comake where, in an action by such maker agai his comaker, the bill of particulars charg that such joint obligation was discharged the payment of the entire amount due; sin the variance was favorable to defendant. Moffet v. Sebastian, 149 Mich. 451.

¶ 90. Where the relatives of a bank r ber gave their note to the bank in settleme of the criminal's indebtedness and the cri inal's mother conveyed to the bank a pie of land in reduction of the debt, it was i material in an action on the note that t criminal had admitted that the land h been purchased with money belonging to t bank. The fact of the conveyance was i portant, as would be that of any other pa ment, but what equitable claim the ba might have had to the conveyance did n concern the defendants on the note.—Bu v. First Nat. Bank, 27 Mich. 293.

§ 21. ——Fraud, duress or mistake.

As defense against bona fide holders, s post § 82.
Jury questions as to fraud, duress or m take, see post § 132.
General law as to duress, see Duress.
General law as to fraud, see Fraud.
General law as to mistake, see Mistake.

¶ 91. A note obtained by means of r resentations which he who makes th knows to be untrue, or does not know to true, and has no good reason to suppose th true, they being untrue in fact, is obtain by fraudulent misrepresentation, and is wi out consideration.—Wright v. Irwin, 33 Mi 32.

¶ 92. Obtaining a third party's signatu to a note under the payee's promise that su party shall not be held liable thereon, whi is not kept, is not fraud that vitiates the n as to him.—Kulenkamp v. Groff, 71 Mi 675.

¶ 93. One who, having embezzled mon from his employer, gives his promissory n in settlement and acknowledgment of t debt, cannot defend an action upon the n on the ground that his signature was o tained under duress, consisting of thre to arrest and imprison him for the crime. Beath v. Chapoton, 115 Mich. 506.

¶ 94. A note executed in settlement of charge of embezzlement is valid in the han of the payee only to the extent of the mone misappropriated.—Beath v. Chapoton, 1 Mich. 506.

¶ 95. One who accepts goods for stora and return on payment of an agreed sum, destroyed, is not liable on a check for t value given under mutual mistake in t

belief that the goods were lost where they were subsequently found and payment on the checks stopped.—State Savings Bank of Ann Arbor v. Buhl, 129 Mich. 198.

§ 22. ——Want or failure of consideration.

Recitals as to consideration, see ante § 8.
Want or failure of consideration as defense against bona fide holder, see post § 87.
Issues and proof as to consideration, see post § 106.
Burden of proof, presumptions and evidence as to consideration, see post §§ 109, 112, 115, 124.
Jury questions as to consideration, see post § 131.
General law as to consideration to support contracts, see Contracts, V.
Absence or failure of consideration as a defense, see Comp. L. 1915, § 6069.

¶ 96. As between the original parties a note must be supported by a sufficient consideration.—Kulenkamp v. Groff, 71 Mich. 675.

¶ 97. A want or failure of consideration may always be shown in defense of an action on a note. (Dictum in case of trover by the payee's administrator against the maker for conversion of the note.)—Kelley v. Guy, 116 Mich. 43.

¶ 98. A want of consideration may always be shown in defense of a promissory note upon suit between the original parties.—East Side Trust & Sav. Bank v. McGinnis, 197 Mich. 432.

¶ 99. The consideration for which a promissory note was given may always be shown unless the rights of a bona fide purchaser have intervened.—Macomb v. Wilkinson, 83 Mich. 486.

¶ 100. A note cannot be enforced that is payable by instalments in advance, and is given for the premium on an insurance policy that is to be wholly void during any period of default in payment, but revives on payment of the instalment.—Yost v. American Ins. Co., 89 Mich. 581.

¶ 101. Where a note given in aid of a railroad reads: "In consideration of the construction of a standard gauge railroad by the I. & L. M. R. Co. from S. B. to S. J., and making said S. J. the terminus of said railway, and the completion and in operation of said railway by Nov. 1, 1889, I promise to pay to ..... the sum of ..... thirty days after said road is constructed, as aforesaid, etc.," the completion and operation of the road by the date fixed must be regarded as a condition precedent to the maker's liability.—Jordan v. Newton, 116 Mich. 674.

¶ 102. Where one purchases a claim against an insolvent corporation, giving his note for the face value of the claim, he will be liable to the payee for the whole amount of the note regardless of the fact that the receiver's dividends on the claim were not sufficient to satisfy the whole debt.—Citizens' Sav. Bank v. Globe Brass Works, 155 Mich. 3.

¶ 103. Where there is a valuable consideration for a note the mere inadequacy thereof cannot defeat the paper in a claim thereon against the maker's estate.—In re King's Estate, 94 Mich. 411.

¶ 104. Defendant is not entitled to show that goods purchased by him were not worth what he promised to pay for them, in an action of a promissory note for the purchase price of such goods.—Julius Kessler & Co. v. Zacharias, 145 Mich. 698.

¶ 105. The nonperformance by the payee in a note of an agreement in consideration of which the note was given will prevent a recovery on the note by anyone not a bona fide holder of the paper for value.—Fink v. Chambers, 95 Mich. 508.

§ 23. Liability on joint or doubly signed instruments.

Construction of instrument as joint or several, see ante § 15.
Payment or discharge of joint paper, see post § 25.
Subsequent indorsement as making indorser jointly liable with his principals, see post § 46.
Joinder of parties defendant in suits on instruments, see post § 98.
Rights and liabilities on partnership paper, see Partnership.

¶ 106. Where one of two joint makers of a promissory note obtains of the payee an extension of the time of payment, and procures an additional name to the note, this will not release the other maker, though, as between the makers, the latter claims to be surety only, the payee having no notice of any such relation.—Gano v. Health, 36 Mich. 441.

¶ 106a. Where a joint maker of a promissory note writes after his signature the word "surety" he does not thereby change or limit his liability to the payee or holder, or make it the latter's duty to proceed at his request against the other maker.—Inkster v. First Nat. Bank of Marshall, 30 Mich. 143.

¶ 107. One who signs a note with an infant may be held as sole maker after discontinuance as against the infant.—Taylor v. Dansby, 42 Mich. 82.

¶ 108. A promissory note beginning "I promise," but signed by several persons, is a joint and several note, and in law may be sued against one or more of the makers.—Dederick v. Barber, 44 Mich. 19.

¶ 109. Where a married woman had signed a promissory note together with others, al-

though she may not be bound by her obligation, the note is still the joint obligation of those who were qualified to enter into it, and they alone are bound by it.—Atkinson v. Weidner, 83 Mich. 412.

¶ 110. Under a note signed in the name of a company by one who indorsed in his individual name, the company and the indorser were liable as joint makers.—McGraw v. Union Tr. Co., 136 Mich. 521.

§ 24. Payment, release or discharge.

Place of payment, see ante § 14.
Rights and liabilities of acceptors upon payment of instrument, see post § 41.
Discharge or release of payee as releasing indorsers, see post § 46.
Payment by accommodation signer, see post § 64.
Payment and discharge as defense against bona fide holders, see post § 89.
Burden of proof as to payment, see post § 111.
Evidence as to payment or discharge, see post §§ 121, 128.
Jury questions as to payment and discharge, see post § 135.
Unauthorized delivery of note by bailee to maker, see Bailments ¶ 33.
Effect of nonsurrender of originals on rediscount of renewal note, see Banking ¶ 136.
Necessity of surrender of note on discharge by conveyance of land, see also Contracts ¶ 898.
Discharge by agreement to treat note as paid and money as loan, see also Contracts ¶ 1086.
Payment of note as satisfaction of mortgage to secure indorsers thereon, see Chattel Mortgages § 104.
Discharge by bankruptcy law of foreign state, see Conflict of Laws § 7.
Diversion of corporate funds to payment of debt or to personal discharge of corporate officers, see Corporations § 173.
Provisions as to discharge of negotiable instruments, see Comp. L. 1915, § 6160 et seq.
Discharge of bills drawn in a set, see Comp. L. 1915, § 6224.
Acceptance of check as discharge of drawer, see Comp. L. 1915, § 6229.

¶ 111. Where a judgment debtor gave his promissory note for a part of the judgment, and the arrangement under which he did this was afterward abandoned for another compromise arrangement made by the judgment creditor with third persons, and inconsistent with the idea of leaving the note outstanding against the debtor to be paid in addition to the fulfilment of the compromise, it was held that the latter agreement, when perfected, would operate, in the absence of any showing of a contrary intent, to invalidate the note as between the parties to it.—Campbell v. Skinner, 30 Mich. 32.

¶ 112. The parties to a written build contract, which provides for payment c in cash, can afterwards agree orally that amount of a note made by the builder held by the other party should be p thereon by delivering up and canceling note, and thereafter, as soon as work eno is done under the contract to pay such n the note in the hands of such holder wo thereby be satisfied.—Roberts v. Wilkin 34 Mich. 129.

¶ 113. A draft that had been accepted the drawees was, on maturity, presented the bank where it was made payable, payment was refused for want of funds, the drawees' bookkeeper told the cashier the bank that the drawers should pay, that he would have to make a draft b on them to pay with. Said drawers hav orally promised the drawees to take care a sight draft, which was reported to bank, the cashier agreed to take such dr and thereupon the bank charged the amo of the matured draft to the drawees credited them with the proceeds of the si draft. It protested the sight draft w dishonored. Held, that the matured dr was paid and that the bank could not cover thereupon.—Bay City Bank v. Li say, 94 Mich. 176.

¶ 114. Casual statements made by holder of a draft, or on his behalf, to effect that it has been paid, do not es the holder from enforcing its payment the drawer is not actually misled by them Compton v. Blair, 46 Mich. 1.

¶ 115. The rule that where one of two nocent parties must suffer, the law casts burden upon him who is guilty of a want diligence or care applies in an action o note to bearer which the defendant paid a party not entitled to it, after notice its loss or theft.—Page Woven Wire Fe Co. v. Pool, 133 Mich. 323.

¶ 116. The rule, that where notice of loss or theft of an instrument has b brought home to the maker, payment the after made will not extinguish liability less the party presenting the instrument required before payment, to establish t thereto, applies in an action on a note bearer which the payor paid to one not titled to it but professing to be the payo agent and tending the note, after notice fr a bank of the loss or theft of the note Page Woven Wire Fence Co. v. Pool, Mich. 323.

¶ 116a. It is error to charge the jury t the indorser of a promissory note cannot cover from the maker thereof if the jury f that such endorser, through negligen failed to realize on stock transferred to h by the maker at the time of the execut of such note, where, in an action upon note, the defendant claimed to have tra ferred the stock in payment of the note s

ject to right of redemption within an agreed time, and that, failing to redeem, in the event of the sale of such stock, plaintiff agreed to pay defendant the excess received from such sale over the amount of the note.—Smith v. Nixon, 145 Mich. 593.

§ 25. ——Joint paper; discharge of coparty.

Construction of instrument as joint or several, see ante § 15.
Release or discharge of accommodation makers, see also post § 61.

¶ 117. When a note is paid by one of two joint promisors, who is directly liable thereon for its whole amount, the prior contract cannot be revived against his cosigners.—Stevens v. Hannan, 88 Mich. 13.

¶ 118. Where, for a consideration, it was orally agreed between the payee of a joint note and one of the three makers that such maker should pay one-third of the debt in a particular manner from a stated source, and should be released from the other two-thirds, the other two makers were released from further liability on paying their two-thirds, and the other third should be paid according to the new agreement.—Seligman v. Pinet, 78 Mich. 50.

¶ 119. Where thirteen defendants sign a joint note for $2,600, a writing given by the holder of the note to one of them, limiting his liability to $200, does not discharge the joint liability of the other defendants.—Rumsey v. Fox, 158 Mich. 248.

¶ 120. The fact that the owner of a joint note filed a claim against one of the deceased obligors thereon, which was allowed at decedent's pro rata liability thereunder, held not to bar recovery against the other joint obligors on the note as an election to enforce several liability.—McKinley v. Small, 178 Mich. 555.

¶ 121. A discontinuance as to a guarantor in a suit against all the parties to a note cannot affect the maker's liability.—Phelps v. Church, 65 Mich. 231.

§ 26. ——Renewals or reissuance after payment.

See also ante ¶ 117.

¶ 122. The receipt and acceptance of each renewal of a note, and the surrender of the former note constitutes payment of such former note.—Citizens Commercial & Sav. Bank v. Platt, 135 Mich. 267.

¶ 123. The payment, after maturity, of a note secured by mortgage, by one who has purchased the land subject to the mortgage, extinguishes the note; and if it be afterwards put in circulation no recovery can be had upon it.—Appledorn v. Streeter, 20 Mich. 9.

§ 27. Rights and liabilities of sureties.

See also ante ¶¶ 68, 106.
Extension of time to one joint maker as releasing his comaker, see § 23.
Guaranties and liabilities thereon, see post § 30.
Liability and discharge of indorsers, see post § 46.
Successive indorsers as sureties for each other, see post § 49.
Accommodation signatures and liability thereon, see post § 61.
Power of national banks to become sureties or guarantors on paper, see Banking § 90.
Rights, liabilities, and defenses of sureties as such, see Suretyship.

¶ 124. The maker of a note that has been sold to satisfy the payee will continue liable upon it, if he consents to do so; but his consent will not bind his surety.—Fuller v. Bennett, 55 Mich. 357.

¶ 125. If a bank sells, without authority to do so, a note left with it, and satisfies t the payee, the purchaser cannot afterwards collect it as against a surety of the maker. And if the purchaser has left the payee to suppose that the note was regularly taken up, the latter cannot, after the maker's death and on being made a party to a suit upon the note against the surety, be required to elect between affirming the sale or rescinding it and restore the money which he has received in payment of it, since the circumstances would prevent restoring him to his former position in respect to the note and the makers.—Fuller v. Bennett, 55 Mich. 357.

¶ 126. It has been held that a provision in a promissory note for an "attorney fee" in case of proceedings to collect it was void, being a stipulation for a penalty, and that the insertion of such a provision did not, therefore, enlarge a surety's liability.—Bullock v. Taylor, 39 Mich. 137; Myer v. Hart, 40 Mich. 517.

¶ 127. Where a corporation gave its note to secure a payment of a debt of the indorser of the note, such corporation and indorser, as between themselves, were surety and principal respectively, for the payment of such debt.—McGraw v. Union Trust Co., 136 Mich. 521.

¶ 128. Where a joint maker of a promissory note writes after his signature the word "surety" he does not thereby change or limit his liability to the payee or holder nor make it the latter's duty to proceed at his request against the other maker. Whether the rule would be different in equity, or in the case of a mere guaranty, quære. His proper course for protecting himself would be to fulfill his duty of paying the note and taking it up, and then to proceed against his principal for the amount.—Inkster v. First Nat. Bank of Marshall, 30 Mich. 143.

IV. ANOMALOUS SIGNATURES AND LIABILITY OF SIGNERS; GUARANTIES.

§ 28. In general.

Effect of signature by accommodation maker on back of note, see post ¶ 304.
Liability of indorser in blank below that of payee, see post § 44.
Accommodation signatures, see post XI.
Signer deemed indorser where it is not clear in what capacity he signed, see Comp. L. 1915, § 6058.

¶ 129. The fact that a name is signed on the back of a note will not prevent the signer being held as a joint maker, if such was the fact.—Dow Law Bank v. Godfrey, 126 Mich. 521.

§ 29. Indorsement by stranger before delivery or transfer.

Negotiation and transfer generally, see post § 31.
Liability and discharge of indorsers, see post § 46.
Discontinuance of maker as discontinuance of indorsers before negotiation joined as codefendants, see Discontinuance § 3.

¶ 130. If a stranger to a note puts his name on the back of it before it is delivered to or indorsed by the payee he is liable as joint maker and not as indorser.—Wetherwax v. Paine, 2 Mich. 555; Rothschild v. Grix, 31 Mich. 150; Herbage v. McEntee, 40 Mich. 337; Sibley v. Muskegon Nat. Bank, 41 Mich. 196; Moynahan v. Hanaford, 42 Mich. 329; Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482.

¶ 131. Where a person other than the payee indorses a note prior to the delivery thereof and before any advances are made thereon, he is liable as a joint maker to him who advances the money.—Allison v. Washtenaw Circuit Judge, 104 Mich. 141; Gumz v. Giegling, 108 Mich. 295.

¶ 132. A stranger to a note who puts his name on the back of it before it is delivered to or indorsed by the payee, is liable as a joint maker whether the note has words of negotiability or not.—Rothschild v. Grix, 31 Mich. 150; Herbage v. McEntee, 40 Mich. 337.

¶ 133. The payee of a note cannot sue, as a joint maker, one who has provisionally put his name on the back of it, if he himself has afterwards indorsed the note and put his own name before the other.—Greusel v. Hubbard, 51 Mich. 95.

¶ 134. Where a note is indorsed prior to its delivery, and the indorsers are not the payees, the contract is in form joint against the makers and indorsers.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 312.

¶ 135. One who indorses a promissory note before its delivery to the payee is an original promisor, and is liable without
test.—Tredway v. Antisdel, 86 Mich. 82

¶ 136. One who indorses a note pay
to the maker's order, at the time of its
cution and before delivery, is liable a
joint maker of the note, even though
indorsement follows that of the payee.—
insular Sav. Bank v. Hosie, 112 Mich.

¶ 137. Under the law of Minnesota
maker of a promissory note and one
indorses it before delivery are joint
several makers, and a judgment against
is not a bar to an action against the ot
—Hitchcock v. Frackelton, 116 Mich. 487.

§ 30. Guaranties and liability thereon.

Rights and liabilities of sureties, see
§ 27.
Guaranty by one to whose order the not
payable, see also post ¶ 148.
General law of guaranty, see Guaranty.
Agent as guarantor of worthless notes
cepted by him, see Guaranty § 1.
Power of national banks to become guar
tors on paper, see Banking § 90.
Sufficiency of consideration for guaranty
notes, see also Guaranty § 3.
Construction and operation of guaranties
notes, see also Guaranty § 6.
Acceptance of guaranty of note, see
Guaranty § 9.
Proceedings to fix liability of guarantors
notes, see Guaranty §§ 15, 16.
Release or discharge of guarantor of n
see Guaranty § 17.
Extension of time upon note as operating
discharge a guarantor of the note,
Guaranty § 19.
Validity of parol promise to pay anothe
note, see Frauds, Statute of § 7.
Necessity that guaranty of notes be in w
ing, see Frauds, Statute of § 12.
Warranties of indorsers and liability
breach thereof, see post § 48.
Transfer and negotiation of guaranty,
post § 34.
Joinder of guarantors as parties defenda
see post § 98.

¶ 138. A guarantor of a note is not
joint maker thereof.—Phelps v. Church,
Mich. 231.

¶ 139. One who indorses upon a ne
tiable promissory note a guaranty of p
ment contemporaneously with its executi
cannot be treated as a joint maker of
note. His undertaking is distinct and s
arate from that of the maker.—Tinker
McCauley, 3 Mich. 188, overruling Higg
v. Watson, 1 Mich. 428.

¶ 140. The guaranty of a promissory n
need not name the promisee.—Thomas
Dodge, 8 Mich. 51; Nevius v. Lansingbur
Bank, 10 Mich. 547.

¶ 141. The guarantor of the payment o
note is not released by the holder's failu

to give him notice of its nonpayment or to sue the maker; nor, though he had no such notice, is he released by the maker's becoming insolvent some time after the maturity of the note.—Roberts v. Hawkins, 70 Mich. 566.

¶ 142. A note was executed by several persons and intrusted to an agent with instructions not to deliver it until it was signed by an equal number of others equally interested in the object for which the note was given. These latter parties, however, instead of signing, indorsed a guaranty of collection and put the note in circulation. Held, that in equity the guarantors might be compelled to pay their share of the note.—Edsell v. Briggs, 20 Mich. 429.

V. NEGOTIATION AND TRANSFER GENERALLY.

§ 31. In general; necessity for delivery of instrument.

See also post ¶ 266.

Effect of indorsement by stranger before delivery or transfer, see ante § 29.

Indorsements and transfers and resulting rights and liabilities, see post § 42.

Effect of indorsement for collection to transfer title to the instrument, see post § 43.

Necessity that one claiming to be a bona fide holder take before maturity, see post § 77.

Negotiation or transfer of instrument pending action, see post § 100.

Evidence as to authority to transfer, see post § 117.

Effect of transfer to abate action pending, see Abatement § 6.

Assignability of rights in general and of rights incident to instruments for payment of money, see Assignments §§ 4-8.

Assignment of the debt as thing distinct from the note, see Assignments § 8, ¶ 34.

Negotiation and transfer of bills of lading, see Bills of Lading § 2.

Illegality of indorsement on Bohemian oats note, see also Contracts § 93.

Indorsement and transfer as consideration for goods, see Contracts ¶ 456.

Effect of indorsement of note for purpose of sale to third person, see Execution of Instruments ¶ 109.

Agreement for conditional delivery of negotiable instrument to payee, see Execution of Instruments ¶ 153.

Presumption of authority of one of two joint makers of note to deliver it, see Execution of Instruments ¶ 196.

Negotiable paper as subject of gift, see Gifts § 5.

Sufficiency of delivery for gift, see Gifts, III.

Indorsement and transfer of public bonds, see Municipal Bonds, IV.

Transfer and assignment of non-negotiable instruments, see Non-negotiable Paper § 1.

¶ 143. Semble, that to consummate the contract of indorsement there must be delivery, or what in legal contemplation amounts to it.—Kinzie v. Farmers' & Mechanics' Bank of Michigan, 2 D. 105.

§ 32. Delivery or transfer without indorsement.

Right of assignees to sue in their own name, see post § 97.

¶ 144. A promissory note payable to the "order of M. A. B. or bearer" is transferable without an indorsement by M. A. B.—Bitzer v. Wagar, 83 Mich. 223.

¶ 145. Notes indorsed in blank by the payees will pass by delivery, and in an action on them subsequent indorsements need not be proved.—Howry v. Eppinger, 34 Mich. 29.

¶ 146. Delivery without indorsement of paper payable to order does not amount to a transfer of the title thereto unless by way of equitable assignment, and as such an assignment is not, like a negotiable transfer, discharged of equities, any person in possession thereby cannot confer by delivery any better title than he owns, and is not authorized to sue on the paper in his own name.—Minor v. Bewick, 55 Mich. 491.

¶ 147. Where a note payable to A. is taken by B., A.'s agent, and is by B. indorsed in blank for collection, the subsequent turning over of the note by A. to B., on a settlement of accounts, passes title to B. without further indorsement, and enables B. to recover thereon.—Marskey v. Turner, 81 Mich. 62.

¶ 148. A guaranty of payment indorsed on a note by one to whose order it is payable is both a guaranty and an indorsement, and the note will thereafter pass by mere delivery.—Green v. Burrows, 47 Mich. 70.

§ 33. Rights and equities of transferees.

[Note. The rights and equities growing out of a transfer ordinarily depend on [a] whether it was a regular and ordinary transfer by delivery and indorsement or by delivery alone (see post VII et seq., or [b] was to one who stands as a bona fide taker as to whom equities between the original parties will not avail (see post XIII, B), or [c] was by way of mere assignment or succession (see Assignments § 16 et seq.; Estates of Decedents, IV, V). Search should be made at the places indicated according to the character of the transfer.]

Mutual rights of parties fixed as of time of negotiation, see also ante § 19.

Acceptance of check tendered in full as a satisfaction, see Accord and Satisfaction.

Deposited check as liquidated damage agreement, see Damages ¶ 695.

Surrender of note cancelled as evidence of gift, see Gifts ¶ 139.

¶ 149. Unless the subsequent purchaser of a note establishes that he is a bona fide

holder thereof, such note is open to the defenses available as between the original parties.—Harrison v. Grier, 198 Mich. 672.

¶ 150. A. gave to B. a note and mortgage to secure a smaller sum. C. took from B. the note without indorsement, and the mortgage without assignment, having knowledge of the facts. Held, that not being an innocent holder for value he could not foreclose the mortgage.—Bilderback v. McConnell, 48 Mich. 345.

§ 34. Transfer or negotiation of guaranty or of guaranteed instrument.

Guaranties and liability thereon, see ante § 30.

¶ 151. An indorsed guaranty of payment of a note without protest is negotiable.—Green v. Burrows, 47 Mich. 70.

¶ 152. A guaranty indorsed on a promissory note contemporaneously with the making of the note is not transferred therewith by negotiation of the note.—Tinker v. Webb, 3 Mich. 188, overruling Higgins v. Watson, 1 Mich. 428.

¶ 153. A guaranty of payment indorsed on a note by the payee passes with the note by negotiation since the enactment of How. St. § 1590, Comp. L. 1871, § 1564, which expressly so provides.—Green v. Burrows, 47 Mich. 70; Russell v. Klink, 53 Mich. 161.

¶ 154. A guaranty of payment or of collection indorsed on a note by the payee or other owner is negotiable and passes title to the note.—Green v. Burrows, 47 Mich. 70; Russell & Co. v. Klink, 53 Mich. 161; Phelps v. Church, 65 Mich. 231.

¶ 155. Where the party to whose order a note is payable indorses a guaranty thereon, such indorsement need not be negotiable to enable the indorsee to sue the maker.—Phelps v. Church, 65 Mich. 231.

VI. ACCEPTANCES, PROMISES TO ACCEPT AND PAYMENT BY ACCEPTOR.

§ 35. In general; necessity and sufficiency of acceptance.

Rights and liabilities of acceptors, see post § 40.
Accommodation acceptance, see post § 62.
Acceptance of non-negotiable paper by drawee, see Non-negotiable Paper § 3.
Presentment and demand, see post § 50.
Protest and notice of protest, see post §§ 57, 58.
Authority of cashier to accept bills, see Banking § 56.
Parties to certification of check, see also Banking ¶ 68.
Acceptance as separate contract, which law governs, see Conflict of Laws § 22.
Provisions as to acceptance of bills of exchange, see Comp. L. 1915, § 6173 et seq.
Provisions as to acceptance for honor, s Comp. L. 1915, § 6202 et seq.
Effect of acceptance of checks, see Comp. 1915, § 6229.

¶ 156. No acceptance is necessary of bill drawn by a corporation upon itself, t act of drawing being deemed an acceptan —Hasey v. White Pigeon Beet Sugar Co., D. 193.

¶ 157. A lumberman's order in this forn [Date and address] Pay to the order of F. the sum of $10, and charge the same Camp 8. [Signature], is, in essentials, draft, and must be accepted before it w sustain an action.—Finan v. Babcock, Mich. 301.

¶ 158. A parol acceptance of a draft bill of exchange is void under the statut —Elliott v. Miller, 8 Mich. 132; Pfaff Cummings, 67 Mich. 143.

¶ 159. A parol agreement by a tax c lector, to receive in payment of taxes a dra drawn by his creditor upon himself, is wit in Comp. L. 1857, p. 408, How. St. § 158 —Elliott v. Miller, 8 Mich. 132.

¶ 160. An oral agreement to credit a su if the promisee would procure an order a third person is invalid, since How. § 1583, forbids a person's being charged an unwritten acceptance of an order for pa ment of money.—Pfaff v. Cummings, Mich. 143.

¶ 161. Under How. St. § 1583, which r quires acceptances to be in writing, a del or's oral acceptance of an order from h creditor for the payment by him to t drawer's creditor of a certain sum of mone to be applied, when collected, upon the de due from the drawer, is void where there no novation or previous agreement to acce the order.—Upham v. Clute, 105 Mich. 350

¶ 162. Oral acceptance without novati by a debtor of an order from his credit to pay money to the drawer's creditor void under How. St. § 1583, providing th no one shall be charged as an acceptor a bill of exchange unless such acceptance in writing, etc.—Upham v. Clute, 105 Mic 350.

¶ 163. The mere writing of the drawe name across the face of an order is a su cient acceptance, and the fact that the wor "Paid on this order forty dollars" were wr ten across the face of the bill above t drawee's signature does not qualify t acceptance or limit it to that sum.—Peters v. Hubbard, 28 Mich. 197.

¶ 164. An indorsement of a partial pa ment on an order would naturally be ma by the holder, because it would be his a knowledgment that the payment had be

made, and if the indorsement was made by the party paying, it would be virtually the act of the holder as permitting it.—Peterson v. Hubbard, 28 Mich. 197.

§ 36. Time in which to accept.

Time to make presentment and demand, see post § 51.

¶ 165. Where the drawee of a bill does not refuse acceptance, but desires time to examine into the state of his accounts before deciding, he is entitled to twenty-four hours for that purpose.—Case v. Burt, 15 Mich. 82.

¶ 166. The rule that one who accepts a sight draft, has three days in which to pay it, does not give one to whom a draft is presented for acceptance, three days in which to accept it.—Town v. Jepson, 133 Mich. 673.

§ 37. Conditional acceptance.

Provisions as to conditional acceptance, see Comp. L. 1915, §§ 6182, 6183.

¶ 167. A conditional acceptance of a draft to be payable when a house was completed requires reference to the builder's contract and is not an assignment pro tanto of what is to be payable by the drawer.—Ferguson v. Davis, 65 Mich. 677.

¶ 168. In a suit upon an acceptance of a bill of exchange on condition that the amount is found due the drawer on final settlement, the plaintiff must make proof of such settlement, and of the amount found due thereon, in order to recover.—Gooding v. Underwood, 89 Mich. 187.

§ 38. Executory or collateral promise to accept or to indorse.

¶ 169. One cannot be held as indorser upon a mere promise to indorse.—Birdsell Mfg. Co. v. Brown, 96 Mich. 213.

¶ 170. Breach of promise to indorse, if the promise was upon sufficient consideration, is a cause of action.—Birdsell Mfg. Co. v. Brown, 96 Mich. 213.

§ 39. Liability of drawee prior to acceptance.

Rights and liabilities of primary parties, see ante § 19.

Liability of drawee on bills drawn in a set, see Comp. L. 1915, § 6222.

¶ 171. The drawee of an unaccepted check or draft is not liable to a suit by the payee.—Second Nat. Bank of Detroit v. Williams, 13 Mich. 282; Grammel v. Carmer, 55 Mich. 201; Brennan v. Merchants' & Manufacturers' Nat. Bank, 62 Mich. 343.

¶ 172. The payee of a banker's unaccepted sight draft has no remedy at law against the drawee for refusing to pay it, even if he has funds enough to do so, since between the payee and the drawee there is no privity of contract. And if after the draft is given the maker is found to be insolvent, the payee cannot compel the maker's assignee or receiver to pay him more than his pro rata share like other creditors.—Grammel v. Carmer, 55 Mich. 201.

§ 40. Rights and liabilities of acceptors and payers.

Certification as new contract between drawee and indorsee, see Banking § 22.

Provisions as to liability of acceptor, see Comp. L. 1915, § 6193.

Liability of acceptors of bills drawn in a set, see Comp. L. 1915, § 6223.

¶ 173. An acceptor whose liability has not been changed by subsequent dealings to his prejudice or against his rights can be sued on his acceptance, and is liable, in form, as acceptor, as every contract must be sued according to its terms.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 174. One who, accepts paper not calling for acceptance, becomes solely liable, if liable at all, and his liability depends upon the consideration for the acceptance.—Sweet v. Swift, 65 Mich. 90.

¶ 175. The death of a payee or indorser after a check has been negotiated cannot affect its negotiability further, or prevent the drawee from safely paying it.—Brennan v. Merchants' & Manufacturers' Nat. Bank, 62 Mich. 343.

¶ 176. A person who, being an agent of the drawee of demand paper which had been presented and dishonored puts his name as acceptor on the paper does not bind the drawee but becomes solely liable, and his liability depends upon the consideration upon which it was made.—Sweet v. Swift, 65 Mich. 90.

¶ 177. A paper on a printed form of bank check without date and with an ink line drawn lengthwise through the space for the name of the payee is void for want of a payee, and in view of the line cannot be regarded as one payable to bearer for want of a designated payee; and the bank paying it is liable to the drawer.—Gordon v. Lansing State Sav. Bank, 133 Mich. 143, affirming decision of lower court by equal division.

¶ 178. A custom between a depositor and his bank whereby it is the bank's duty, upon receiving for collection a draft accepted by him, to treat the transaction as though the depositor had drawn his check for the amount of the draft, and to pay the money to the drawer, does not relieve the depositor from liability upon such draft, although at the time, and a few days later, when the bank closed its doors, not having made such payment, the depositor had a balance to his credit exceeding the amount due on the draft.—Midland State Bank v. Byrne, 97 Mich. 178.

§ 41. ——Upon payment of instrument.

Liability of bank paying forged or altered paper, see Banking, VII.

¶ 179. After accepting and paying a bill the drawee cannot recover back the amount of it from the payee on the ground that he had paid it under a mistake as to the reliability of the drawer's security, which was sent forward with the bill and proved to be fictitious.—First Nat. Bank of Detroit v. Burkham, 32 Mich. 328.

¶ 180. A bank sued to recover the amount paid by it on defendant's check, which there were no funds to meet. Defendant claimed the check grew out of an intended horse trade which was not consummated, and that the bank was notified not to pay. Held, that this claim was met by the jury's finding that the check was to be paid even if the trade fell through, and that the payment was made before notice.—Frankenberg v. First Nat. Bank of Decatur, 33 Mich. 46.

¶ 181. The fact that the cashier of a bank accepts and gives credit for an accommodation note with knowledge of its character, on an overdraft of the accommodated party, will not prevent the bank recovering on the instrument.—Irwin v. Wolcott, 183 Mich. 92.

VII. INDORSEMENTS OR TRANSFERS, AND RESULTING RIGHTS, LIABILITIES AND WARRANTIES.

§ 42. In general.

Requisites and indicia of negotiability, see ante I.

Negotiation and transfer in general, see ante § 31.

Effect of indorsement by stranger before delivery or transfer, see ante § 29.

Delivery or transfer without indorsement, see ante § 32.

Effect of failure to indorse demand paper within a reasonable time, see ante ¶ 57.

Accommodation indorsers, see post § 63.

Consent of indorser to alteration of instrument, see post § 65.

Assignees of paper as bona fide holders, see post § 75.

Indorsement "without recourse" as bearing on bona fides of purchaser, see post § 75.

Persons taking under limited indorsement as bona fide purchasers, see post ¶ 382.

Guaranty of payment as indorsement, see also post ¶ 385.

Right of qualified indorsee to sue on the instrument in his own name, see post ¶ 494.

Evidence to hold indorser on original debt claimed to have been paid by transfer of note, see Accord and Satisfaction ¶ 127.

Implication as to traveling salesman's power to indorse paper, see Agency ¶ 207.

Presumption as to authority of attorney to indorse check received by attorney in payment of claim, see also Attorneys ¶ 73.

Indorsements for rediscount, see also Ba ing § 44.

Effect of maker's indorsing bond, see Bo ¶ 2.

Effect of indorsing or transferring paper Sunday, see Sunday.

Person deemed indorser where it is not cl in what capacity he intended to sign, Comp. L. 1915, § 6058.

Provisions as to indorsement and trans of negotiable paper, see Comp. L. 1 § 6071 et seq.

Kinds of indorsement, see Comp. L. 1 § 6074 et seq.

Who are indorsers, see Comp. L. 1915, § 6

¶ 182. One cannot be an indorser unl someone possesses the correlative charac of indorsee. When one holds a note un bare manual delivery by the maker, with any act or knowledge of the payee to conn the latter as a party, the character of le indorsee is not filled.—Gibson v. Miller, Mich. 355.

¶ 183. The payee of a note drawn to or becomes an indorser by signing his na on the back of it, and unless he adds words to create a different relation is chargeable otherwise. And until he indor the note no third person can become an dorser.—Smith v. Long, 40 Mich. 555.

¶ 184. Where the plaintiff has acqui the equitable title to the promissory note sues upon, prior to bringing suit, the indor ment of the same over to him by his ven is mere matter of form, and may be m at the time of the trial.—Brown v. McHu 35 Mich. 50.

¶ 185. The consideration for an indor ment and the good faith in using it may be important questions where there are original equities and the indorser is bou to make the paper good at all events. I if the maker had no right to give it c rency, no one can get any better right unl he takes the paper under circumstances t would legally exonerate him from equi that bind his assignor.—Kelly v. Freedm 56 Mich. 321.

¶ 186. Upon transferring a promiss note, the payee wrote the following upon back of the note, above his signature: hereby assign the within note" to M. and Held, that he was not thereby relieved fr liability as indorser.—Markey v. Corey, Mich. 184.

¶ 187. A promissory note made paya to a limited partnership association in name it uses, although not its full le name, is valid in the hands of an indors as if it be regarded a fictitious payee, note is payable to bearer under Comp. 1897, § 4870 and the indorsement is eit effective or unnecessary.—Shaw, Kendall Co. v. Brown, 128 Mich. 573.

¶ 188. A note to the order of J. H. S. was indorsed as by "J. H. S. & Co.," and the indorsement was shown to have been in the writing of J. H. S. Held sufficient to transfer title, and to charge J. H. S. as indorser.—Warder, Bushnell & Glessner Co. v. Gibbs, 92 Mich. 29.

¶ 189. The character of an indorsement of a bill of exchange is not affected by the use of the words "Received payment" in connection with the signature of the indorser made before acceptance.—First Nat. Bank v. Union Central Life Ins. Co., 107 Mich. 543.

¶ 190. If several persons not partners are payees or indorsees of a bill or note, it must be indorsed by all of them; either one of the joint payees may authorize the other to indorse for him, and an assignment of interest in the paper from one to the other carries with it such authority, but there is no presumption of law that one may indorse for the other.—Kaufman v. State Sav. Bank, 151 Mich. 65.

§ 43. Indorsement for collection.

Scope of collecting or financial agent's authority, see Agency § 36.
Rights of banks to which paper is indorsed for collection, see also Banking § 34.
Liability of bank for negligence or delay in collections, see Banking §§ 36-39.
Embezzlement by indorsee for collection, see Crimes § 71.
Right of agent holding paper for collection to sue it in his own name, see post § 96.

¶ 191. Indorsement for collection does not transfer title to the note and its proceeds.—Sutherland v. First Nat. Bank of Ypsilanti, 31 Mich. 230; Locke v. Leonard Silk Co., 37 Mich. 479.

¶ 192. Indorsements for collection give no title to the collecting agent as against the owner of the note, and the latter in suing on it by copy may strike them out, together with the indorsements back to him.—Reading v. Beardsley, 41 Mich. 123.

¶ 193. Indorsement of a note to a bank for collection does not preclude the payee from demanding and receiving payment.—Page Woven Wire Fence Co. v. Pool, 133 Mich. 323.

¶ 194. Where a bank sends a draft to another for collection but with a general indorsement thereon, it conveys to the second bank an apparent title; and hence where it is forwarded to a third bank for "collection and credit," such third bank has a lien on the proceeds for a general balance due it from the second bank though the first bank was in fact the owner.—Garrison v. Union Trust Co., 139 Mich. 392.

§ 44. Nature and construction of indorsements.

Effect upon negotiability of indorsement of statement as to maker's financial responsibility, see ante ¶ 8.
Interpretation and construction of negotiable instruments in general, see ante § 10.
As constituting transferee bona fide holder, see post XIII.
Liability and discharge of indorsers, see post § 46.
Admissions by indorser, see post § 48.
Form of endorsement as evidence of ownership of certificate of deposit, see Banking § 8.
Provisions as to indorsement contract, see Comp. L. 1915, § 6105 et seq.
Indorsement or transfer by corporation or infant, see Comp. L. 1915, § 6058.

¶ 195. The usual indorsement of a negotiable promissory note binds the indorser to pay it if notified at maturity that the maker will not pay it; and it may even pass a perfect title to the indorsee and enable him to recover on it in cases where the indorser could not.—Aniba v. Yeomans, 39 Mich. 171.

¶ 196. Successive indorsements of negotiable paper prima facie import, as between the several indorsers, a several and successive, and not a joint, obligation, whether the indorsements be made for accommodation or for value received though it may be shown aliunde that the undertaking of the several indorsers is in fact joint.—Harrah v. Doherty, 111 Mich. 175.

¶ 197. The indorser of a certificate of deposit in the ordinary form assumes the same liability as the indorser of a promissory note of like tenor.—Cate v. Patterson, 25 Mich. 191.

¶ 198. Under the Negotiable Instruments Act, Pub. Acts 1905, Act 265, secs. 65, 69, 70, How., 2nd Ed., §§ 2736, 2740, 2741, the liability of an indorser in blank upon the note below that of the payee is conclusively presumed to be that of a subsequent indorser and not that of a joint maker or surety.—Ensign v. Fogg, 177 Mich. 317.

§ 45. Striking out indorsements.

Striking out indorsements for collection, see also ante ¶ 192.
Provisions as to striking out indorsements, see Comp. L. 1915, § 6089.

¶ 199. The indorsement of a note subsequent to the indorsement thereof in blank by the payee named therein may, under the Negotiable Instruments Law, Pub. Acts 1905, Act 265, sec. 50, How., 2nd Ed., § 2721, be stricken out by the holder.—Ensign v. Fogg, 177 Mich. 317.

¶ 200. Where the holder of a note, striking out intermediate indorsements, declares against a remote indorser as on a contract

made directly to himself, he recovers on the contract of the defendant with his immediate indorsee.—Kinzie v. Farmers' & Mechanics' Bank of Michigan, 2 D. 105.

§ 46. Liability and discharge of indorsers.

See also ante § 44.
Rights and liabilities of primary parties, see ante III.
Effect of indorsing an assignment of the note, see ante ¶ 186.
Liability of strangers indorsing before delivery or transfer, see ante § 29.
Liability on promise to indorse, see ante § 38.
Rights of indorsers to notice of dishonor, see post § 54.
Liability on new promises, see post § 60.
Alteration of indorsement, see post § 65.
Effect of deposits made with holder after maturity upon liability of indorser, see also Banking, II, C.
Appropriation of trust fund to payment of trustee's individual note as release of indorser, see Banking § 19.
Failure to appropriate deposit as discharge of endorser on note held by bank, see also Banking ¶ 12.
Payment or certification of check as discharge of indorser, see also Banking ¶¶ 64, 66.
Rights on indorsement of bill of lading, see Bills of Lading § 2.
Implications in aid of contract by indorser with employer of maker, see also Contracts ¶ 735.
Indorsers of note secured by mortgagor as parties defendant in equity foreclosure, see Foreclosure § 67, ¶¶ 255-258.
Provisions as to liability of indorsers, see Comp. L. 1915, § 6105 et seq.
Provisions as to discharge of persons secondarily liable, see Comp. L. 1915, § 6161 et seq.
Liability of indorsers of bills drawn in a set, see Comp. L. 1915, § 6221.
Acceptance of check as discharge of indorsers, see Comp. L. 1915, § 6229.

¶ 201. Subsequent indorsement does not make the indorser jointly liable with his principals, and joint liability is not presumed when the indorsement is not dated. It is shown by independent proof of contemporaneous execution.—Freeman v. Ellison, 37 Mich. 459.

¶ 202. The payee and indorser of a note is not a joint promisor with the subsequent indorsers, and his release by the holder releases them.—Brewer v. Boynton, 71 Mich. 254.

¶ 203. When the holders of an indorsed note which they have agreed to turn in on a contract they have with the maker have informed the indorser that work enough has been done on such contract to satisfy the note they are bound by this statement, and in suing the indorser they cannot show that defendant lost nothing by relying on it. N will his having security for his indorseme from the maker of the note make any diffe ence.—Roberts v. Wilkinson, 34 Mich. 129.

¶ 203a. A transaction in the form of t payment of notes and the assignment of land contract to which they were incide if of a character that amounts to a payme will discharge an indorser of the notes r gardless of the intention of the parties.- Lange v. Muskegon Booming Co., 63 Mic 589.

¶ 204. The fact that indorsers of notes a induced by false representations to indor renewal notes does not relieve them fro liability on the originals.—Alpena Nat. Ban v. Greenbaum, 80 Mich. 1.

¶ 205. One, to whom a note, secured b chattel mortgage, has been transferred by t payee as security for his debt, he indorsi the note in blank, need not, after payment the debt, on retransferring the note, at t payee's request, to a third party, himself i dorse the instrument; and if this party pr vails upon him to indorse it representi that the indorsement is essential to pa title, his act is without consideration, a recovery cannot be had against him by su party.—Shaw v. Stein, 79 Mich. 77.

¶ 206. Where an indorsee has had a che certified by the drawee, an indorser is di charged despite that the check was pr sented for payment and refused, and th the indorser received notice.—First Nation Bank of Detroit v. Currie, 147 Mich. 72.

¶ 207. The insolvency of a certifying ban after having certified a check is entirely i material on the question of the liability the indorser where the rights of the parti have been fixed before the insolvency w known.—First National Bank of Detroit Currie, 147 Mich. 72.

¶ 208. The indorser of a check, havi been discharged through the indorsee's pre entation of the check for certification to t drawee and the check being actually cert fied, the subsequent delivery of a memora dum signed by the indorser to the indors consenting to an extension of time for t payment of the check did not renew the li bility of the indorser as a surety inasmu as it was without consideration.—First N tional Bank of Detroit v. Currie, 147 Mic 72.

¶ 209. An indorser is not discharged b failure of the holder, a bank, to appropria to payment funds in a deposit held by t bank, where the deposit stood in the nam of the maker and depositor as "trustee" since the bank was not obliged to assum that he owned it individually.—State Ban of St. Johns v. McCabe, 135 Mich. 479.

¶ 210. An ordinary indorser of a negotiable bill or note is not discharged from liability by mere delay or refusal on the part of the holder to begin suit against the maker or acceptor for any period less than that fixed by the statute of limitations where the indorser's liability had been duly fixed by demand, protest and notice although the maker may have become insolvent during the delay.—Rogers v. Detroit Sav. Bank, 146 Mich. 639.

¶ 211. Where during a delay in bringing suit the maker of the note became insolvent and an indorser's liability had been fixed the duty of the indorser is to pay the amount of the note and he may then enforce his rights against the maker.—Rogers v. Detroit Sav. Bank, 146 Mich. 639.

¶ 212. It is not necessary that the indorser of a note, prior to negotiation, who knows that it is drawn payable to the maker's order, should have knowledge also that it is to be issued without the maker's indorsement, in order that it may be valid against him when negotiated without such indorsement under How. St. § 1580, providing that notes made payable to the maker's order shall, if negotiated by him, be of the same validity as against the maker, and "all persons having knowledge of the facts," as if payable to bearer.—Peninsular Sav. Bank v. Hosie, 112 Mich. 351.

¶ 212a. The acceptance by the holder of a past-due promissory note of a new note for the amount of the old, with interest, payable "on demand after date," with interest, is not such an extension of time as will release an indorser of the old note, since the new note is due and suable immediately.—Peninsular Sav. Bank v. Hosie, 112 Mich. 351.

¶ 213. A note signed P. C. Co., "Geo. Moebs, Sec. and Treas.," and payable to and indorsed by "Geo. Moebs, Sec. and Treas.," shows a corporate note and a corporate indorsement thereon, and no individual liability on the indorsement.—Falk v. Moebs, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319.

¶ 214. The holders of a note demanded payment from the indorser, who replied that he had not expected to have it to pay, and that it was impossible to pay it at present. Held, insufficient as a promise to pay.—Cromer v. Platt, 37 Mich. 132.

§ 47. ——Defenses available to indorsers.

Defenses available as between primary parties, see ante § 20.

Waiver of notice of nonpayment or dishonor, see post § 59.

Defenses against purchaser of past due note, see also post ¶ 394.

Failure to give notice of dishonor as defense, see also post § 54.

Defenses available as against bona fide holders, see post XIII, B.

¶ 215. In an action against an indorser upon a promissory note, the fact that the maker had procured the indorsement by means of false and fraudulent representations orally made by the plaintiff to the indorser as to the maker's pecuniary responsibility is a good defense.—Lenheim v. Fay, 27 Mich. 70.

¶ 216. If one indorses a note upon the promise that the indorsement of the payee as first indorser shall be obtained before the paper is used, whoever takes and keeps it until due without said other indorsement cannot hold the conditional indorser; and indorsement by the payee after maturity and protest of the note will not fix the other's liability without his own consent. He may still show the truth as a defense.—Gibson v. Miller, 29 Mich. 355.

¶ 217. If one receives as security a note without indorsement by, or the knowledge of, the payee, but indorsed by a third person upon condition that the indorsement of the payee should be obtained before the note should be used, he accepts paper which he is bound to know will be open in his hands to any defense based upon such conditional indorsement.—Gibson v. Miller, 29 Mich. 355.

¶ 218. Where a person has, by his own act, given negotiability in appearance to an instrument drawn by another, which is an existing contract, and valid in his hands, and it gets into circulation, and it is paid by the person on whom it is drawn without notice of anything wrong, the payment will be protected.—Brennan v. Merchants' & Mnfrs. Nat. Bank, 62 Mich. 343.

¶ 219. When an indorser of a note applies to a bank to have it discounted for his own accommodation, the bank's silence as to other indebtedness of the maker of the note to the bank, and concerning the maker's assurance that he would give security if required for advances by the bank to him, is not a fraud upon the indorser.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 220. One who is induced to indorse a note, given in settlement of a charge of embezzlement, through the maker's representation that the note is for the purchase of an interest in the payee's business, is not liable to the payee if the latter knew of the means by which the indorsement was to be secured.—Beath v. Chapoton, 115 Mich. 506.

¶ 221. Where a stockholder, in indorsing his corporation's note, given for an existing indebtedness, follows an agreement with the payee that such corporation shall have the exclusive sale within the state of machinery of the payee's manufacture, any violation of the agreement, however slight, by the payee

gives to the indorser, as against such payee, the right of refusing to pay or renew such note.—J. A. Fay & Co. v. James Jenks & Co., 93 Mich. 130.

§ 48. Warranties and admissions of indorser and liability for breach of warranty.

Guaranties and liability thereon, see ante § 30.

Nature and construction of indorsement contract, see ante § 44.

Representations made in connection with indorsement or transfer of paper as constituting representations as to credit of another, see Frauds, Statute of § 80.

¶ 222. An indorser admits that previous indorsements were duly made and warrants the title and genuineness of the payer he transfers; and he is not released if it appears that a previous indorsement is invalid.—Fish v. First Nat. Bank, 42 Mich. 203.

¶ 223. One who receives negotiable paper need not look beyond the signature of the last indorser if he is satisfied that it is genuine, and has no notice of facts that should put him on inquiry.—Fish v. First Nat. Bank, 42 Mich. 203.

¶ 224. One who has bought a promissory note under an oral warranty that it is good and that the maker is financially responsible, need not exhaust his legal remedy against the maker before bringing action for a breach of the warranty.—Huntington v. Wellington, 12 Mich. 10; Clark v. Roberts, 26 Mich. 506; Taylor v. Soper, 53 Mich. 96; Knauss v. Major, 111 Mich. 239.

¶ 225. An innocent purchaser of a Bohemian oat note, from whom the holder concealed its true consideration, and to whom he warranted it to be a good note, need not collect it of the maker, though able to do so, but can recover the value of the note, or the money paid for it, from such holder.—Evans v. Stuhrberg, 78 Mich. 145.

§ 49. Rights and liabilities as between indorsers.

Rights as between accommodation indorsers, see post § 63.

Right of indorser paying old notes to be subrogated to new notes, see Subrogation ¶ 7.

Extent and measure of contribution between indorsers, see Indemnity § 15.

Applicability of doctrine of marshalling to indorsee, see Marshalling Assets ¶ 4.

Right of indorser to subrogation, see Subrogation.

¶ 226. Successive indorsers of commercial paper are not, as such, sureties for each other and liable to contribution.—McGurk v. Huggett, 56 Mich. 187.

¶ 227. A second indorser by putting his name above that of the payee, who has indorsed the note for the maker's accommo tion, makes himself a joint-maker, disqualifies himself from recourse to the indorser.—Sweet v. Woodin, 72 Mich. 39

¶ 228. An agreement by a subsequ accommodation indorser of a note with prior accommodation indorser, after mat ity of the note, to pay one-half thereof, without consideration, and of no bind effect, in the absence of a precedent agr ment changing the liability of the respect indorsers, as between themselves, from t imported by their successive indorsements Harrah v. Doherty, 111 Mich. 175.

¶ 229. A note payable to order and dorsed by the payee, with a guaranty eit of payment or of collection, may be sued the indorsee.—Green v. Burrows, 47 Mi 70; Russell & Co. v. Klink, 53 Mich. 161

¶ 230. An indorsement of guaranty n not be negotiable in order to enable the or inal and first indorsee to sue the maker. indorsement in blank is a complete act, a if made by a party holding title, passes title to the obligation.—Phelps v. Church, Mich. 231.

¶ 231. On the back of a promissory n made by R. was indorsed "I guarant which was signed by W., but not dated. He that it must be presumed to have been c temporaneous with the making of the n and a part thereof, so as to render th joint makers.—Higgins v. Watson, 1 Mi 428.

¶ 232. Under Comp. L. 1871, § 1564, Ho St. § 1590, a guaranty of collection indors on a promissory note payable to bearer m be sued by any subsequent holder in own name, subject to any equities betwe the guarantor and the person to whom t guaranty was made. Said section applies existing as well as to future contracts. Waldron v. Harring, 28 Mich. 493.

¶ 233. Under Comp. L. 1871, § 5775, Ho St. § 7344, which was passed prior to t enactment of Comp. L. 1871, § 1564, How. § 1590, an assignee of the guaranty of a no could sue thereon in his own name, and t only difference between the two sections that the latter dispenses with the necessi of setting out in the declaration those al gations concerning the assignment which a necessary in the case of non-negotiab paper.—Waldron v. Harring, 28 Mich. 49

VIII. PRESENTMENT, DEMAND AND NOTICE OF DISHONOR.

§ 50. In general; necessity for and duty to make presentment or demand.

As to checks, see also ante § 17.

Rights between primary parties upon di honor, see ante § 19.

Right of payee to demand payment after indorsing for collection, see ante ¶ 193.
Protest and notice thereof, see post § 57.
Waiver of presentment and demand, see post § 59.
Necessity of pleading demand of payment, see post § 101.
Demand or presentment as condition precedent to suit, see also post § 91.
Burden of proof as to presentment and demand, see post § 111.
Evidence as to presentment and demand, see post §§ 120, 127.
Jury questions as to presentment and demand, see post § 134.
Presentment, demand and notice of nonpayment of non-negotiable paper, see Non-negotiable Paper § 4.
Certification and acceptance of checks, see Banking, II, D.
Necessity that check be paid or accepted to constitute repayment of deposit, see Banking § 12.
Provisions as to presentment and demand, see Comp. L. 1915, § 6111 et seq.
Provisions as to presentment of bills of exchange for acceptance, see Comp. L. 1915, § 6184 et seq.

¶ 234. Where a draft is received as conditional payment the right of action upon the debt is suspended until the draft is properly presented for payment and payment refused.—Phoenix Ins. Co. v. Allen, 11 Mich. 501.

¶ 235. Where a party receives negotiable paper from his debtor, with the debtor's indorsement, as collateral security for his demand, and not as agent merely, it is his duty to present the same for payment when due, and take the proper steps to charge the debtor as indorser; and failing to do this he makes the paper his own.—Jennison v. Parker, 7 Mich. 355.

¶ 236. Where a person presenting a bill agrees to present it again no protest can be made without a new demand.—Case v. Burt, 15 Mich. 82.

¶ 237. Orders payable to bearer on demand are not subject to acceptance, and demand can only be made for payment.—Sweet v. Swift, 65 Mich. 90.

¶ 238. Institution of suit upon a certificate of deposit payable to the depositor's order upon its return properly indorsed is a sufficient demand of payment.—Beardsley v. Webber, 104 Mich. 88.

¶ 239. The rights of an indorser to presentation and notice of dishonor cannot be changed because he suffered no apparent damage by reason of failure to do so.—First National Bank of Detroit v. Currie, 147 Mich. 72.

¶ 240. An indorser of a check may always insist that the conditions requisite to make his undertaking enforceable shall be strictly complied with; namely, presentation for payment and notice of dishonor.—First National Bank of Detroit v. Currie, 147 Mich. 72.

¶ 241. Where a debtor transferred notes of a third party to his creditor in part payment, indorsing them, accompanying the transfer with a letter asking the creditor to credit him with such notes, and offering to guarantee payment of the same, and the creditor does not notify the debtor of his acceptance of the guaranty, it is the duty of the creditor to present and protest the notes when they become due, notifying the debtor, as indorser, of any default, and of his intention to hold him on the indorsement.—Brown v. Spiegel, 156 Mich. 138.

§ 51. Time to make presentment or demand and effect of delay.

See also ante ¶ 57.
Maturity of instrument and time for payment, see ante § 11.
Post-dated draft purporting to be payable at sight, see ante ¶ 61.
Time in which to accept, see ante § 36.
Time to present checks, see Comp. L. 1915, § 6227.

¶ 242. Promissory notes made after the passage of Laws 1893, Act No. 185, and falling due on Saturday, are presentable for payment and payable on the next secular day or business day succeeding said Saturday, which is Monday, unless such succeeding Monday is a legal holiday, in which case they are payable on Tuesday; and notes maturing on Sunday are payable on Monday also.—Hitchcock v. Hogan, 99 Mich. 124.

¶ 243. The holder of a promissory note who is the owner is under no obligation to an indorser to take steps to enforce payment as soon as it becomes due.—Rogers v. Detroit Sav. Bank, 146 Mich. 639.

¶ 244. Bank drafts issued for negotiable purposes are not required to be forwarded at once for acceptance and payment, and delay for a reasonable time will not discharge an indorser although longer than might be held reasonable in regard to mere private drafts not meant to circulate.—Nutting v. Burked, 48 Mich. 241.

¶ 245. A creditor's failure to present promptly a draft drawn in his favor, and accepted for accommodation only, does not release the debtor where the drawee was never supplied with funds to meet it, and the maker suffered no loss by the neglect; especially if after protest the maker recognized his continued liability for the debt.—Compton v. Blair, 46 Mich. 1.

¶ 246. Where the payee has indorsed and transferred a certificate of deposit with a special request that it be not presented until the three months have expired, and has actually received from the purchaser the in-

terest accrued at the date of the transfer, and the purchaser presented the certificate the day after the time expired, the bank having meanwhile failed, it was held that the payee, in an action against him as indorser by the purchaser, is not relieved from liability on the ground that the presentment for payment was not in due time.—Cate v. Patterson, 25 Mich. 191.

§ 52. ——Demand or sight paper and checks.

Maturity of demand or sight paper, see ante § 12.

Demand note as "due" without actual demand, see also Banking ¶ 60.

¶ 247. A demand made on a demand note over 2½ years from its date, was not made within a reasonable time to hold the indorsers, where the parties all resided in the same city so that the bank in question could have presented it at any time and notified the indorsers of nonpayment.—Home Sav. Bank v. Hosie, 119 Mich. 116.

¶ 248. Unless demand notes bearing interest are presented within a reasonable time, indorsers will not be bound.—Home Sav. Bank v. Hosie, 119 Mich. 116.

¶ 249. Demand on a note payable "on demand" must be considered to have been made at the date of an indorsement—made the day before the note would otherwise have outlawed—that the said note "shall not be outlawed."—In re King's Estate, 94 Mich. 411.

¶ 250. A draft payable at sight should be presented for payment within a reasonable time; and no delay is reasonable beyond that which is required in the ordinary course of business without special inconvenience to the holder, or by the special circumstances of the particular case.—Phoenix Ins. Co. v. Allen, 11 Mich. 501; Phoenix Ins. Co. v. Gray, 13 Mich. 191.

¶ 251. Evidence was given showing that the delay in making presentment of a draft payable at sight was for the purpose of enabling the creditor to correspond with the debtor as to the funds that should be received in payment. But as neither party could change the character of the bill, which was collectible according to its terms, it was held that the reason assigned was no excuse.—Phoenix Ins. Co. v. Gray, 13 Mich. 191.

¶ 252. The rule of diligence as to the presentation of checks for payment is not affected, so far as parties are concerned, by customs prevailing in the transaction of business through a clearing-house.—Holmes v. Roe, 62 Mich. 199.

¶ 253. Where the indorsee of a check and the banker on whom it is drawn are in different towns, the check must be forwarded for presentment on the day after it is received, at the latest.—Hamilton v. Wi Salt & Lumber Co., 95 Mich. 436.

¶ 254. The fact that there are no f in the account against which a chec drawn does not relieve the holder presentation and notice of dishonor to indorser, unless it appears that the indo knew it.—First National Bank of Detro Currie, 147 Mich. 72.

¶ 255. The indorsee of a check as betw himself and the indorser, undertakes to mand payment within the day following indorsement, and if payment is not mad give due notice of dishonor. This is sole duty, and he does anything else at peril.—First Nat. Bank of Detroit v. rie, 147 Mich. 72.

¶ 256. Verdict for plaintiff payee o check held properly directed in an ac against the drawee bank upon a check w was received by plaintiff by mail on Fri sent to their bank in another city on Sa day and presented at drawee bank in same city on Monday morning for payn which was refused though the bank open and doing business, but in the a noon of the same day closed its doors did not again resume business.—Haggert Baldwin, 131 Mich. 187.

¶ 257. The loss on account of the fai of a bank falls on the payee of a check sends it direct to the bank instead of senting it in the regular way where drawer had funds in the bank to pa when drawn.—Carson, Pirie, Scott & Co Fincher, 138 Mich. 666.

¶ 257a. The undertaking of the indorse a check is that, if not paid on presenta within a reasonable time, he will pay it, vided he is properly notified. A reason time for presentation and demand for ment must be admitted to be such w within a day following the indorsemen First Nat. Bank of Detroit v. Currie, Mich. 72.

¶ 258. Where parties living in diffe towns are present in one of them, and gives the other a check on a local bank assents to taking it home with him, he th by extends the time within which the re ent would otherwise be bound to presen for payment; but saying that he should h it certified or get a New York draft, if was going to take it home, would not be s assent.—Holmes v. Roe, 62 Mich. 199.

¶ 259. A check for a small sum was gi late in the afternoon at a lumber ca twenty miles from the place where the b was, to a merchant whose place of busi was twenty-seven miles by rail in anot direction, and who had to be there on following day, which was Saturday. Monday he left the check at the local b for collection, but the other bank failed es

that day. Held, that the delay in presenting the check for payment was not such as would release the debt for which it was given.—Freiberg v. Cody, 55 Mich. 108.

§ 53. Place and manner of presentment or demand.

Place of payment, see ante § 14.
Identification of payee presenting check, see Banking § 14.
Provisions as to place of presentment, see Comp. L. 1915, § 6114.

¶ 260. As against the maker of a promissory note payable at a particular place, the plaintiff is not required to prove presentment or demand of payment at the place specified.—Reeve v. Pack, 6 Mich. 240.

¶ 261. A note dated at a certain city and made payable at "The First National Bank," without designating the location thereof, is payable at the bank of that name at the city where the instrument is dated, and is properly presented there for payment, notwithstanding the fact that the makers live elsewhere.—Finch v. Calkins, 183 Mich. 298.

¶ 262. Forwarding a check for collection to the drawee bank by mail is not proper presentation to charge the drawer.—Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687.

¶ 263. The fact that a check is forwarded to the drawee bank itself for collection will not prevent recovery from the drawer upon its dishonor if the drawer had no funds in the bank with which to pay it.—Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687.

§ 54. Notice of nonpayment or dishonor.

Notice of protest, see post § 58.
Bona fide purchasers as those taking before dishonor, see post § 77.
Burden of proof as to dishonor, see post § 111.
Evidence as to dishonor, see post §§ 121, 127.
Jury questions as to notice of dishonor, see post § 134.
Notice to agent as affecting principal in general, see Agency, II, E.
Notification to banking corporation through manager of branch bank, see Banking ¶ 175.
Necessity of giving guarantor of note notice of its nonpayment, see Guaranty § 17.
Provisions as to notice of dishonor, see Comp. L. 1915, § 6130 et seq.
Notice of dishonor not necessary in certain cases, see Comp. L. 1915, § 6153 et seq.
Dishonor for nonpayment and rights and liabilities thereon, see Comp. L. 1915, § 85 et seq.

¶ 264. Indorsers of negotiable paper who are named as payees in it are liable on it only as indorsers, and are entitled to notice of dishonor.—Stewart v. First Nat. Bank, 40 Mich. 348.

¶ 265. The rule requiring an indorser to be promptly notified of the dishonor of a note is one not of form, but of substance; it is a legal condition of the contract that he shall be notified or discharged, unless where reasonable diligence fails to find him.—Sweet v. Woodin, 72 Mich. 393.

¶ 266. Orders which in form are bills of exchange payable to bearer on demand are not subject to acceptance, and a demand can only be made for payment. When payment is refused they ceased to be binding on the drawer as negotiable paper unless he was notified of the dishonor.—Sweet v. Swift, 65 Mich. 90.

¶ 267. An endorser of a negotiable note is entitled to notice of its nonpayment and is not liable in absence of such notice.—Barger v. Farnham, 130 Mich. 487.

¶ 268. Want of notice of the dishonor of a check on account of the failure of the bank is no defense in an action against the drawer where the drawer had notice of the bank's weakness, of his own overdraft and previous dishonor of his paper.—Carson, Pirie, Scott & Co. v. Fincher, 138 Mich. 666.

¶ 269. The liability of the indorser of a promissory note depends entirely upon compliance with the provisions of the Negotiable Instrument Act as to notice of dishonor.—First Nat. Bank of Manistee v. Star Watch Case Co., 187 Mich. 224.

¶ 270. It is not sufficient diligence to ascertain the residence of the endorser for the purpose of notifying him of dishonor to inquire of the receiving teller of the bank at which the paper is payable and to make no other inquiries since it cannot be presumed that the receiving teller would know his residence.—Sweet v. Woodin, 72 Mich. 393.

§ 55. ——Form and sufficiency.

¶ 271. Notices of dishonor of commercial paper may be given by private holders.—Burkam v. Trowbridge, 9 Mich. 209; Cromer v. Platt, 37 Mich. 132.

¶ 272. A notice of dishonor must contain words directly, or by necessary construction, showing that the note has been presented for payment and payment refused.—Platt v. Drake, 1 D. 296.

¶ 273. The object of the notice is to inform the indorser of the nonpayment of the note by the maker, and that the indorser is liable for the payment of it; and a notice which accomplishes this object is sufficient, although it misdescribes the note in some particulars.—Snow v. Perkins, 2 Mich. 238.

¶ 274. In a notice of dishonor of commercial paper no technical phrases are necessary; but it is only required that the terms used be such as fairly and naturally lead a

mind of ordinary intelligence to the idea that the paper has been presented at maturity and dishonored, and that the party notified is looked to for payment.—Burkam v. Trowbridge, 9 Mich. 209.

¶ 275. Notice of dishonor deposited in the postoffice where the person to whom it was directed received his letters was not sufficient if such person resided in the place; the notice must have been personal, or left at the place of abode or business.—Nevius v. Bank of Lansingburgh, 10 Mich. 547.

¶ 276. Service of notice of dishonor of a note by mailing was sufficient before the statute of 1867, if the person did not reside in the same place.—Nevius v. Bank of Lansingburgh, 10 Mich. 547, overruling Newberry v. Trowbridge, 4 Mich. 391.

¶ 277. A letter addressed by the holders of a note to the indorser, describing the note and stating that it was unpaid and that the holders looked to him for payment, is a sufficient notice of dishonor.—Cromer v. Platt, 37 Mich. 132.

¶ 278. One who received at New York in conditional payment a Chicago banker's draft payable to the order of Michigan debtors of his, and indorsed and mailed by them to him, and who returned it to the debtors five days after its dishonor, the protest and notices having been sent in due time, was held to have acted properly with the paper and not to be affected in his rights by the fact of the banker's failure while the dishonored draft was retained in New York.—Stringfield v. Vivian, 63 Mich. 681.

¶ 279. Where an indorser of a note does not reside or have a place of business in the place where the note is payable, but resides, as is known to the indorsee, and receives his mail more than eight miles distant therefrom, a notice of nonpayment deposited in the postoffice where the note is payable and directed to the indorser at the same place is not sufficient under How. St. § 1586, which permits mailing to the office where he resides or is reputed to reside in certain cases.—Citizens' Nat. Bank v. Cade, 73 Mich. 449.

§ 56. ——Effect of failure to give.

¶ 280. A boom company ran logs for B. under a contract. B. sold the logs, and the purchaser agreed to pay for running them, of which fact the company was informed. They drew on B., however, for part payment, and he returned the draft with directions to draw on the purchaser, which they did, making the draft of the same date and amount, and payable at the same time. The purchaser accepted the draft, which fell due and was protested without notice to B., who did not know of its nonpayment until some time afterwards when the purchaser had failed, and he was for the first time called on to pay it. Held, that the accepted draft must be regarded as having been receive conditional payment, and that the com made it their own by failing to notify its dishonor.—Blanchard v. Tittabaw Boom Co., 40 Mich. 506.

IX. PROTEST AND NOTICE THERE

§ 57. In general; nature, necessity and ficiency of protest.

Rights of party paying upon insufficient test, see also ante ¶ 82.
Agreement to make second presentmer precluding protest prior thereto, see ¶ 236.
Waiver of protest, see post § 59.
Evidence as to protest, see post § 120.
Burden of proof as to protest, see post §
Provisions as to protest, see Comp. L. § 6193 et seq.
Provisions as to acceptance and paymen honor, see Comp. L. 1915, §§ 6202-62
Protest of bill accepted for honor, see C L. 1915, § 6211.

¶ 281. A protest is a formal instru made by a notary public, alleging the presentment and dishonor of a bill, declaring that the notary protests the for nonpayment.—Platt v. Drake, 1 D. 2

¶ 282. A creditor who receives as c eral security the negotiable paper of a person, indorsed by his debtor, makes paper his own, and releases his debtor' dorsement if he neglects to protest it for payment. And this applies to drafts promissory notes alike.—Whitten v. Wi 34 Mich. 92.

§ 58. Notice of protest and service there

Notice of nonpayment or dishonor, see § 54.
Waiver of notice, see post § 59.

¶ 283. A notice of protest must stat time, place, and manner of presentment mand and dishonor, the person by v made and to whom presentment was m and if the paper is payable at a bank protest must state a demand made the Union Nat. Bank v. Williams Milling 117 Mich. 535.

¶ 284. A mistake in describing a pr sory note in a notice of protest—as v the note was for $200, but was describ the notice as for $175—does not necess vitiate the notice; the question in such being whether the indorser was misled b notice. And where the note was payab another state, under whose statutes not public were authorized to demand pay of promissory notes and to protest ther nonpayment, it was held that a simila tice was sufficient.—Snow v. Perkins, 2 238.

¶ 285. Notice to the indorser of a fo bill that the bill, describing it, has protested for nonpayment, and that

holder looks to him for payment, is a sufficient notice of dishonor; the term payment, when thus used, implying that payment had been demanded and refused.—Spies v. Newberry, 2 D. 425.

¶ 286. A notice to a party, dated on the day of the maturity of an inland bill, and stating that the bill was on that day, by the notary who signed the notice, protested for nonpayment, after due demand and refusal, and that the holder looked to the party notified for payment, is sufficient.—Burkam v. Trowbridge, 9 Mich. 209, apparently overruling Platt v. Drake, 1 D. 296, and Newberry v. Trowbridge, 4 Mich. 391.

¶ 287. It is not necessary that a copy of the protest of a bill should accompany the notice of its dishonor.—Atwater v. Streets, 1 D. 455.

¶ 288. Street letter-boxes being a legal part of the postoffice system, depositing a letter in one of them is equivalent, for the purposes of protest, to a delivery or mailing in the postoffice.—Wood v. Callaghan, 61 Mich. 402.

¶ 289. In protesting a note the notary need not take any notice of the fact that the residence of the maker is upon the note, or make inquiry as to the residence of any of the indorsers except the last.—Wood v. Callaghan, 61 Mich. 402.

¶ 290. One who gives notice of protest must use such means as are reasonably calculated to find out the indorser's residence. —Sweet v. Woodin, 72 Mich. 393.

¶ 291. A notary who, in protesting a note discounted by a bank, inquires only of the receiving teller as to the indorser's residence, is not, if such inquiries do not develop satisfactory information, sufficiently diligent to excuse further search and to charge the indorser upon notice mailed to his last named place of residence.—Sweet v. Woodin, 72 Mich. 393.

X. WAIVER OF PRESENTMENT, DEMAND, NOTICE OR PROTEST; NEW PROMISES.

§ 59. In general.

See also post ¶ 385.

Provisions as to waiver of notice of dishonor and protest, see Comp. L. 1915, § 6150 et seq.

¶ 292. An offer by the indorser of a note to pay the sum due thereon in depreciated bank-bills, without explanation, can be regarded only as an offer to compromise, and cannot operate as a waiver of notice, or as an unqualified acknowledgment of his liability on the note.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 293. Where there is no direct evidence of notice to the indorser a subsequent recognition of liability by him is presumptive evidence, in the nature of an implied admission, that notice has been given. But where the plaintiff attempts to prove due notice, and only succeeds in proving one which is defective in form or mode of service, this excludes the presumption of a proper and sufficient notice; and a part payment by the indorser afterwards will not operate as an unqualified acknowledgment of liability, unless it be shown that he knew at the time that the notice was defective.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 294. Failure to demand payment and give notice is waived by a subsequent promise by the indorser to pay the note, when he makes such promise with full knowledge of the facts.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 295. The doctrine, that an indorser of a check may waive the laches or lack of formalities on the part of the holder which are strictly necessary to charge him, cannot be invoked where the maker and indorser have been discharged by payment of the obligation upon which they were liable.—First National Bank of Detroit v. Currie, 147 Mich. 72.

¶ 296. Where an indorser agrees to pay a note after he learns the holder has not presented it at maturity for payment, he waives his defense arising from such failure.—Bessenger v. Wenzel, 161 Mich. 61.

¶ 297. Defendants, directors of a corporation, indorsed by way of accommodation a note given by the corporation. Shortly before the maturity of the note they knew the corporation had no funds to meet it, and asked the plaintiff holder for time. Held, that they thereby, under the Negotiable Instruments Act, waived presentment, protest, and notice of nonpayment.—Bessenger v. Wenzel, 161 Mich. 61.

¶ 298. In an action for the amount of a promissory note lost through the defendant's negligence, by an indorser who had to pay it, the plaintiff cannot urge that the presentment of the copy of the note was insufficient to obligate the maker because unaccompanied by tender of a bond of indemnity where in fact it was sufficient to charge him with the liability of an indorser; the question of its sufficiency to charge him was one to be determined when he was called upon to pay it, and by paying it he conclusively admitted its sufficiency.—Rogers v. Detroit Sav. Bank, 146 Mich. 639.

§ 60. New promises and liabilities thereon.

See also ante ¶¶ 294, 296.

¶ 299. Where an indorser, with full knowledge that he has been discharged from liability by the failure to duly notify him of the

dishonor of the note, states to the holder that he expects to have to pay it, but asks him to try and collect it of the maker, he recognizes his liability, and waives his defense on that ground.—Parsons v. Dickinson, 23 Mich. 56.

¶ 300. The mere fact of part payment of the note by the indorser in depreciated bank-bills will not amount to an unconditional acknowledgment of his liability to pay the whole.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 301. Where the drawer of a check has been discharged by the holder's laches, a new promise must, in order to render the drawer liable, be made, with full knowledge of all the facts and circumstances.—Hamilton v. Winona Salt & Lumber Co., 95 Mich. 436.

XI. ACCOMMODATION SIGNATURES AND LIABILITY THEREON.

§ 61. In general; accommodation makers.

Rights and liabilities of sureties, see ante § 27.

Anomalous signatures, see ante § 28.

Weight and sufficiency of evidence as to accommodation signatures, see post § 125.

Authority of cashier to make accommodations, see Banking § 56.

Consideration for accommodations, see generally Contracts, V.

Substitution of accommodation paper of buyer as breach of agreement to pay in mercantile paper, see Contracts ¶ 1033.

Disability of corporation to put out accommodation paper for others, see Corporations § 80.

Foreclosure of mortgage contingently securing accommodation party, see Foreclosure ¶ 358.

Right of bank holding accommodation paper as affected by cashier's falsehood, see also Fraud ¶ 99.

Power of mining corporation to issue and make accommodation paper, see Mines ¶ 58.

Provisions as to accommodation parties, see Comp. L. 1915, § 6070.

¶ 302. Defendant's son gave a bond to a medical company binding himself to pay for goods furnished to him, and plaintiffs went on his bond. The son defaulted. Plaintiffs went with the agent of the medical company to the defendant and asked him to settle the deficit. Defendant gave his note to the order of the agent of the medical company and plaintiffs indorsed said note as sureties. The agent then indorsed the note and turned it over to the plaintiffs. Plaintiffs borrowed money of a bank on their own note putting up said defendant's note as collateral and paid to the agent the amount of the deficit. In a suit by plaintiffs against defendant on the note, held, the defendant was merely an accommodation maker for plaintiffs' benefit and they were not entitled to recover.—Lamberson v. Love, 165 Mich. 460.

¶ 303. The owner of the assets of a solved corporation gave to a bank a cha mortgage on said assets to secure his n Later the reorganized corporation purcha the assets, and substituted its own note place of the former one, the chattel mortg being released and the former note retur to the maker. In a suit against the corpo tion on its note, the contention is made t the corporation signed the note as an commodation maker, and is therefore not ble, the act being ultra vires. Held, h ever, that inasmuch as the corporation, making the note, was enabled to take assets free from the mortgage, it was an accommodation maker.—Citizens' S Bank v. Globe Brass Works, 155 Mich. 3

¶ 304. The fact that an accommodat maker of a note has written his name ac the back instead of signing on the face the note tends, though not conclusively, indicate that he did not intend to sign joint maker, but only as surety, and enough to put the original creditor on quiry.—Moynahan v. Hanaford, 42 Mich.

¶ 305. An accommodation note given the maker with knowledge that it is to used by the accommodated party in reduc his overdraft with a bank, is based o sufficient consideration to bind the acc modation maker.—Irwin v. Wolcott, Mich. 92.

¶ 306. Where merely to accommodate payee and not at the request of the princ maker one signs a note on the payee's pr ise that he will not be held liable, ther no consideration for his undertaking.— lenkamp v. Groff, 71 Mich. 675.

¶ 307. An accommodation maker o promissory note is not liable on the not the hands of assignees of the wife of principal debtor and ostensible indo where the assignees having acted as principal's attorneys have full knowle that the consideration which satisfied bona fide holders of the note was furnis by the principal debtor, and the note tr ferred to his wife at his direction, as note must be treated as paid.—Baker Union Trust Co., 129 Mich. 581.

¶ 308. The obligation of a surety (acc modation maker) upon a note was not af ed by such surety having been informed he "took no risk" in signing as surety cause one of the makers owned property a certain value, where, in the action on note, there was no testimony showing the maker was not worth the amount so resented.—First Nat. Bank v. Johnson, Mich. 700.

¶ 309. A joint maker, signing for acc modation merely, is released by an exten granted without his knowledge or acqu cence.—Barron v. Cady, 40 Mich. 259.

¶ 310. A surety (accommodation maker) on a renewal note, who on signing the original had been informed by the cashier of plaintiff bank that he "took no risk" as one of the makers was worth a certain sum, was not released by the failure of such cashier to inform him, at the time of renewal, that such payor had, as defendant claimed, lost her property; where the notice attached to defendant's plea set forth no theory of fraud.—First Nat. Bank v. Johnson, 133 Mich. 700.

§ 62. Accommodation acceptance.

See also ante ¶ 181.

Acceptance in general, see ante § 35.

¶ 311. An accommodation acceptance stands upon its legal form if the drawee has not had notice that it is only for accommodation; but if he has had notice he cannot treat the maker as surety and the acceptor as principal except for the purpose of choosing his form of action on the acceptance. The acceptor must be treated like any other surety so far as relates to prejudicing his rights.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 312. Where the paper drawn upon a bank and accepted for accommodation has been taken up it cannot be sued as belonging to the bank, or sued at all if known to be accepted for accommodation.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

§ 63. Accommodation indorsers.

Indorsements in general, see ante § 42.

¶ 313. The liability of those who, in order to facilitate a transfer of a note which has previously been in circulation, indorse said note, is the same as if they had backed the note at its inception.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 314. One who has signed a note after it has become operative against the maker, but in order to induce others to take it, must be held as a joint debtor.—Robbins v. Brooks, 42 Mich. 62.

¶ 315. Indorsement by the payee at the time the note is signed, in order to enable the maker to negotiate it, does not enlarge the indorser's liability or create any new relation between him and third parties who may afterwards become holders.—Smith v. Long, 40 Mich. 555.

¶ 316. An accommodation indorser of a defaulting employee's notes given to his employer was discharged by employee's breach of agreement to keep employee in his service until stipulated drawback from salary should pay the notes.—Maclean v. Fitzsimons, 80 Mich. 336.

¶ 317. The second indorser who has paid the note may recover from the first, though both are accommodation indorsers.—McGurk v. Huggett, 56 Mich. 187.

¶ 318. Payment and acceptance of interest on a note for a time running beyond the maturity of it will not alone effect an extension such as will discharge an accommodation indorser.—Morse v. Blanchard, 117 Mich. 37.

§ 64. Payment by accommodation signer.

Payment and discharge of instrument in general, see ante § 24.

¶ 319. The payment of accommodation paper by the party accommodated discharges the instrument.—Lamberson v. Love, 165 Mich. 460.

¶ 320. The payor who paid an accommodation note given upon the understanding that if a land deal should be abandoned he should be reimbursed by the payee, and if not abandoned, the note should be applied in such deal, is entitled to be reimbursed upon the falling through of the land deal.—English v. Yore, 123 Mich. 701.

XII. FORGERY AND ALTERATION.

§ 65. In general.

Striking out indorsements, see ante § 45.

Insertion of date in undated instrument, see ante ¶ 62.

Forgery or alteration as defense against bona fide holders, see post § 81.

Alteration of the instrument and effect on rights, see Alteration of Instruments.

Validity of oral consent to alteration of negotiable paper, see Alteration of Instruments ¶ 29.

Signing after negotiation as alteration, see Alteration of Instruments ¶ 8.

Adding parties or changing negotiability as alteration, see Alteration of Instruments § 7.

Adding indorsements as alteration, see Alteration of Instruments ¶ 5.

Detaching portion of paper as alteration of note contained on remaining portion, see Alteration of Instruments § 9.

Notice of forgery to hold bank liable for paying forged paper, see Banking § 42.

Genuineness of instrument or signatures thereto, see Execution of Instruments § 13 et seq.

Alteration of instrument pending execution as affecting validity of the execution, see Execution of Instruments § 10.

Criminal forgeries and utterings and prosecutions for same, see Crimes, II; Indictment.

Crime of fraudulently procuring signatures, see Crimes § 87.

Appearance and condition of instrument as res gestæ on trial for forgery, see Indictment § 241.

Provisions as to forged instruments, see Comp. L. 1915, § 6064.

Effect of alteration of instrument, see Comp. L. 1915, §§ 6165, 6166.

¶ 321. An indorser's consent to the alteration of paper need not be in writing.—Stewart v. First Nat. Bank, 40 Mich. 348.

¶ 322. The act of an indorsee of negotiable paper in changing a special indorsement to himself so that it shall be in blank cannot alter the title by which he holds the paper.—Minor v. Bewick, 55 Mich. 491.

XIII. BONA FIDE HOLDERS AND LIABILITY TO THEM.

A. WHO ARE BONA FIDE HOLDERS.

§ 66. In general.

Rights of purchasers with notice, see also ante § 20.
Defenses available to bona fide holders, see post § 79.
Burden of proof as to bona fide holding, see post § 110.
Evidence as to bona fide holding, see post §§ 119, 126.
Jury questions as to bona fides of purchaser, see post § 133.
Instructions as to bona fide holding, see post § 139.
Immateriality of bona fides in taking draft where suit is for misapplying proceeds, see also Banking ¶ 58.
Pleading fraud in negotiating paper to bona fide taker, see Fraud § 90.
Who regarded as bona fide taker of municipal or public bonds, see Municipal Bonds § 13 et seq.
Provisions as to holders in due course and for value, see Comp. L. 1915, § 6093 et seq.

¶ 323. In determining whether a purchaser is entitled to be considered a bona fide holder, it is his bona fides, and not that of the payee, that is in question.—Helmer v. Krolick, 36 Mich. 371.

¶ 324. The fact that the purchaser of negotiable paper, resident in a distant part of the state, employs for its collection a person who is also agent for the payee, does not clearly indicate want of good faith in the purchase.—Helmer v. Krolick, 36 Mich. 371.

¶ 325. A purchaser of notes and a mortgage, who makes no showing beyond the recital in the assignment to him of the payment of value for them, or that they were actually transferred and delivered to him before maturity, or that they were ever indorsed to him at all, is in no position to insist upon the rights of a bona fide holder of negotiable paper.—Hull v. Swarthout, 29 Mich. 249.

¶ 326. Where a firm have received, as collateral to advances, notes indorsed in blank, from an agent having authority to sell the same, and such agent afterwards instructs them to sell, another firm, one of whom is a member of both firms, may become bona fide purchasers of the paper and entitled to protection as such; there is nothing in such a connection between two firms that would necessarily preclude a sale in good faith from one to the other, where neither had notice of anything wrong.—Howry v. Eppinger, 34 Mich. 29.

¶ 327. A bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a bona fide purchaser for value, unless such credit was drawn upon before the maturity of the note, and before notice of facts invalidating it in the hands of the payee.—Drovers' Nat. Bank v. Blue, 110 Mich. 31.

§ 67. Original parties as bona fide holders.

Rights and liabilities of primary parties, see ante § 19.

¶ 328. The payees of a note given to a certain person as their agent and by him transmitted to them cannot claim to hold it as merely bona fide purchasers.—Rickle v. Dow, 39 Mich. 91.

¶ 329. Where the cashier of a bank is one of the makers and payees of a note, the bank cannot take it as a bona fide holder without notice.—Tilden v. Barnard, 43 Mich. 376.

¶ 330. One cannot be a bona fide holder without notice of an obligation made to him directly and upon negotiations carried on with him personally.—Sweet v. Swift, 65 Mich. 90.

¶ 331. A payee of a note cannot avoid the equities in favor of the maker of the note by selling it to a bona fide purchaser and subsequently purchasing it through a third person who is in fact his agent.—Battersbee v. Calkins, 128 Mich. 569.

§ 68. Holders subsequent to bona fide purchaser.

¶ 332. The general rule that a purchaser of negotiable paper from a bona fide holder takes it with all the rights of such holder, whether he has notice of any infirmity as between the original parties or not, is subject to the exception that when the payee becomes such purchaser he takes it subject to all equities and defenses originally existing against it.—Kost v. Bender, 25 Mich. 515.

¶ 333. A transferee from a bona fide holder is entitled to recover on a promissory note given in a partnership name, even though before taking it he had notice that it was given by one of the partners, without authority, for his individual debt.—Wood v. Starling, 48 Mich. 592.

¶ 334. One who holds negotiable paper by an unimpeachable title may transfer a like

title to any other person, and the latter's knowledge of original defects or equities will not affect it in his hands.—Shaw v. Clark, 49 Mich. 384.

§ 69. Notice of equities and defenses.

See also ante ¶ 217.

Notice to agent as affecting principal in general, see Agency, II, E.

¶ 335. One who pays value is to be regarded as a rightful holder, unless shown to have had such knowledge or notice of the defects of title as to make him guilty of bad faith.—Miller v. Finley, 26 Mich. 249.

¶ 336. Purchasers of negotiable paper need not make inquiries not required by good faith as to possible defenses of which they have no notice from something appearing on the face of the paper or from facts communicated to them at the time.—Howry v. Eppinger, 34 Mich. 29.

¶ 337. The fact that the words "City Savings Bank. Collection No. 4027, Detroit, Mich.," are stamped upon the face of a draft sent by such bank to another with which it had a running account, for "collection and credit," does not give notice to the collecting bank that the savings bank was not the owner of the draft, but an agent for collection merely.—Garrison v. Union Trust Co., 139 Mich. 392.

¶ 338. In a bill to cancel notes, where complainant claimed that the notes were forwarded to the corporation defendant upon the representation that the bicycles for which they were given were completed and set apart as the property of complainant, when in fact they had not been so set apart, and that it was thereafter agreed that the notes were to be surrendered, but that within a few days a mortgage was given by the corporation upon all its property to secure its creditors, and where the notes had been purchased by a defendant through the party who was trustee in the mortgage and also was cashier of the bank which discounted the notes and also a stockholder in defendant corporation, but who had no knowledge of anything to invalidate the notes, or put him on inquiry, the bank and such purchaser were bona fide holders, notwithstanding his relationships.—World Mfg. Co. v. Hamilton-Kenwood Cycle Co., 123 Mich. 620.

§ 70. ——Regularity and completeness of instrument on its face.

See also post ¶ 392.

Signature of accommodation maker on back of note, see ante ¶ 304.

Matters on face of paper putting purchaser upon inquiry, see post § 70.

¶ 339. The want of a stamp upon a note is not such a circumstance of suspicion as to put an indorsee upon inquiry in taking the note.—Burson v. Huntington, 21 Mich. 415.

¶ 340. The words "secured by mortgage" on a promissory note form no part of it and do not limit or impair its value; nor do they notify third persons of the contents of the mortgage, or that it contains any clause inconsistent with the note, nor put them on inquiry. If it be the intent to limit the effect of the note by the terms or conditions of the mortgage securing its payment, language appropriate to express the purpose must be employed.—Howry v. Eppinger, 34 Mich. 29.

¶ 341. A promissory note in the usual form, with nothing written upon it indicating that it was taken in an illegal transaction, is "fair upon its face."—Chapman v. Remington, 80 Mich. 552.

¶ 342. A promissory note indorsed in blank by a partnership to whom it was made payable was held to be sufficient notice to the bank discounting it that it was an accommodation indorsement where the note was in the possession of the maker after the indorsement.—Mechanics' Bank of Detroit v. Barnes, 86 Mich. 632.

¶ 343. A promissory note, having nothing on its face to cast suspicion thereon, is valid in the hands of a holder for value in the absence of evidence showing mala fides on his part, and the fact that circumstances are suspicious or sufficient to put a prudent man upon inquiry does not change the rule.—Glines v. State Sav. Bank, 132 Mich. 638.

¶ 344. The rule is well settled that when there is nothing upon the face of commercial paper to cast suspicion upon its character it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith; in determining which question, the circumstances surrounding each particular transaction may be taken into consideration.—Goodrich v. McDonald, 77 Mich. 486.

¶ 345. The rule is that when there is nothing upon the face of a note to cast suspicion upon its character it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith. The circumstances surrounding each particular transaction, however, may be taken into consideration in determining this question, and frequently direct and positive proof may not be obtainable to show such bad faith.—Goodrich v. McDonald, 77 Mich. 486.

¶ 346. One of several joint-makers of a promissory note, to whom the payee has assigned it, cannot by indorsing it before maturity to a third party convey any right except to bring suit for contribution; the appearance of his name as one of the makers being sufficient notice to his indorsees.—Stevens v. Hannan, 86 Mich. 305.

§ 71. ——Extraneous suspicious circumstances.

¶ 347. Neither suspicions nor gross negligence on the part of a purchaser of a promissory note will defeat his right to recover thereon unless such suspicions amount to bad faith.—Hakes v. Thayer, 165 Mich. 476.

¶ 348. The general rule that one cannot be considered a bona fide purchaser, who had notice of facts which would put an ordinarily prudent man upon inquiry, but failed to take care of his own interests, is not applied to commercial paper.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 349. The modern rule is that circumstances which ought to excite the suspicion of a prudent, careful person are not sufficient to destroy the bona fides of the holder of commercial paper, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith.—Custard v. Hodges, 155 Mich. 361.

¶ 350. Actual mala fides must be shown to the satisfaction of the jury to deprive a holder for value of notes of the character of a bona fide holder, and negligence in not inquiring into facts which ought to have put him on inquiry, is not sufficient.—Armstrong v. Stearns, 156 Mich. 597.

¶ 351. It cannot render a purchase of negotiable paper suspicious that the payee has an interest in getting it off his hands; this fact would not necessarily be known to the purchaser, or influence in any manner his action; and in determining whether a purchaser is entitled to be considered a bona fide holder, it is his bona fides, and not that of the payee, that is in question.—Helmer v. Krolick, 36 Mich. 371.

¶ 352. Notice of facts which would be sufficient to arouse the suspicion of an ordinarily prudent man is not enough to preclude good faith in a purchase. It is a matter of mala fides.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 353. The failure of the holder of township drain orders, on exchanging them with the township treasurer for a note payable to the latter individual, to make inquiry as to how the treasurer obtained the note (which was in fact taken by the treasurer on the sale of property for taxes), is no evidence of bad faith.—Chapman v. Remington, 80 Mich. 552.

¶ 354. Mere knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities; he must have had actual notice of such equities, or, at least, knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it an act of bad faith.—New Y Iron Mine v. Citizens' Bank, 44 Mich. 34

¶ 355. Parties discounting paper drawn an agent upon his principal are bound act in the light of all facts within t knowledge bearing on his authority, cannot disregard any fact which might a prudent man to suspect that the agen acting in fraud of his principal.—New Y Iron Mine v. Citizens' Bank, 44 Mich. 34

¶ 356. Knowledge on the part of a chaser of negotiable paper that the pa thereof is engaged in the sale of liquors not put such purchaser upon inquiry to certain whether the consideration for paper was the unlawful sale of liquor.— tomley v. Goldsmith, 36 Mich. 27.

¶ 357. Where the payee obtained a c by fraud his transferee, who had knowle that the former was doing business in illegal manner, held not a bona fide ho for value within the meaning of § 54 of Negotiable Instruments Act. (Act No. Pub. Acts 1905, § 2725, How. St., 2nd —People's State Bank v. Miller, 185 M 565.

¶ 358. One who, in the usual course business, surrenders a joint promissory for an indorsed note of one of the mak is not chargeable with bad faith as aga the accommodation indorser of the last tioned note, whose signature was obta by fraud, merely because he knows that maker of such note is insolvent, and that other makers of the prior note, who amply responsible, have furnished him funds with which to pay it; nor can an toppel be predicated upon his failure to close to the indorser that others were li on the former note, or to advise him the note is a renewal note, since he has right to assume that the maker has honestly with the indorser, and obtained signature fairly, and without false repre tations, or the concealment of any which the law required him to disclo Cristy v. Campau, 107 Mich. 172.

¶ 359. Plaintiff purchased a "Bohe oat note" before maturity, and at a rea able discount. He testified that at the of the purchase he had heard that the p was dealing in Bohemian oats, but had n bought any himself; that he knew not of the scheme or plan of their sale, nor the note was given for. There was no dence that such scheme or plan of sale become public at time of such purc Held, that plaintiff was entitled to re if the jury believed his testimony.—Hel Douglass, 81 Mich. 442.

§ 72. ——Knowledge of original consider or of fraud.

Recitals as to consideration or terms of tract, see ante § 8.

Fraud, duress or mistake as defense between the primary parties, see ante § 21.
Want or failure of consideration as defense between the primary parties, see ante § 22.
Fraud, duress or mistake as defense against bona fide holders, see post § 82.
Want or failure of consideration as defense against bona fide holders, see post § 87.

¶ 360. One who has been privy to and a participant in the fraudulent procurement of an indorsement has notice of the fraud, and cannot become a bona fide purchaser of the paper indorsed so as to be entitled to recover upon the contract of indorsement.—Lenheim v. Fay, 27 Mich. 70.

¶ 361. That the purchaser of a promissory note for value before maturity had reason to believe, and did believe, that the consideration was void as against public policy, will not prevent a recovery by him, unless his carelessness in not making inquiry was so gross as to imply bad faith.—Davis v. Seeley, 71 Mich. 209.

¶ 362. A note cannot be defeated in the hands of a bona fide holder for value on the ground that he had notice that it was given for a patent right.—Miller v. Finley, 26 Mich. 249; Borden v. Clark, 26 Mich. 410; Cranson v. Smith, 37 Mich. 309.

¶ 363. The creditor of one copartner cannot occupy the position of an innocent purchaser of the firm's commercial paper, for he knows that the consideration is the individual debt of such partner, and that the firm receives no consideration for its promise.—Towle v. Dunham, 76 Mich. 251.

¶ 364. Where, in a suit upon a Bohemian oat note purchased by a firm composed of five members, only two of the partners were shown to have taken any part in such purchase, or to have known anything about it until after it was made, the presumption is that the remaining members were ignorant of the consideration of the note.—Ward v. Doane, 77 Mich. 328.

¶ 365. The plaintiff cannot recover on a promissory note given as a substitute for a note which was originally void as being fraudulent and without consideration where he is not a bona fide holder, but knew at the time he purchased the note what the note was given for.—Hunt v. Rumsey, 83 Mich. 136.

¶ 366. A substitute note given for an original is open to the same defenses as the original in the hands of parties who were aware of the original transaction.—Hunt v. Rumsey, 83 Mich. 136.

¶ 367. A failure of the consideration in whole or in part after a bona fide transfer does not affect the character of the purchaser although he had full knowledge of the original consideration for which the note was given.—Hakes v. Thayer, 165 Mich. 476.

¶ 368. It is not a good ground of defense against a bona fide holder for value of a promissory note that he was informed that the same was made in consideration of an executory contract, unless he was informed of its breach.—Hakes v. Thayer, 165 Mich. 476.

§ 73. ——Notice or knowledge of collateral agreements, claims or securities.

Effect upon instrument of accompanying mortgages, papers or agreements, see ante § 18.

¶ 369. A promissory note given for the purchase price of "Bohemian oats" and a contemporaneous agreement on separate papers binding the payee to sell for the maker a larger number of bushels at the same price per bushel before the note should be paid, constitute but one transaction and one who purchases the note before its maturity, but with knowledge of the agreement, takes the note subject to any equities in the maker's favor growing out of the contract.—Sutton v. Beckwith, 68 Mich. 303; McNamara v. Gargett, 68 Mich. 454; Mace v. Kennedy, 68 Mich. 389.

¶ 370. Where a purchaser for value and before maturity of a note valid upon its face, he having knowledge of a collateral agreement warranting the mare for which the note was given to be with foal, but being ignorant of the breach of such agreement, such purchase is a bona fide holder, against whom such breach is no defense.—Miller v Ottaway, 81 Mich. 196.

¶ 371. Where a vendor of a stallion warrants him to be a reasonably sure foal getter and agrees to substitute another horse if he proves to be otherwise, the transferee of the notes given in payment is not precluded from recovery thereon by the fact that he knew of such warranty, where there is no evidence of a breach of said warranty prior to the transfer of the notes.—Hakes v. Thayer, 165 Mich. 476.

¶ 372. The assignees of a mortgage given to indemnify and secure a surety are not bona fide purchasers as against the creditor's right of subrogation where the assignees have notice of his claim.—Albion State Bank v. Knickerbocker, 125 Mich. 311.

¶ 373. The purchaser of notes may have knowledge of a collateral agreement, but is not obliged to inquire whether the seller has performed his agreement or will be able to perform it.—Hakes v. Thayer, 165 Mich. 476.

§ 74. ——Authority or power of person executing or transferring the instrument.

Rights of bona fide taker of paper of partnership association, see post § 84.

Notice of limitations on authority or title of agent, see Agency §§ 23-25.
Receiver of insolvent corporate holder as holder subject to same equities, see Corporations § 241.

¶ 374. The bona fide transferee of negotiable paper issued by a corporation having power to issue negotiable paper may presume that it was regularly issued under authority.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 438.

¶ 375. Corporate notes, given to take up individual obligations of members of the corporation, are not given in the regular course of business, and are presumptively ultra vires; and no officer can give them without special authority to do so; and this must be expressly and affirmatively shown to entitle one who takes such notes to the protection of a bona fide holder.—McLellan v. Detroit File Works, 56 Mich. 579; Merchants' Nat. Bank of Chicago v. Detroit Knitting & Corset Works, 68 Mich. 620.

¶ 376. A purchaser of paper assets formerly owned by a corporation and indorsed by the proper officer thereof may assume that the indorsement was duly authorized, and is not bound to search the corporation books for such authority before completing his purchase.—Walker v. Detroit Transit R. Co., 47 Mich. 338.

¶ 377. Where negotiable paper purports to be secured by a mortgage to a stranger and is put into an agent's hands to sell, no buyer is bound to suppose that the seller came into possession wrongfully and has no right to sell; nor is he put on inquiry.—Howry v. Eppinger, 34 Mich. 29.

¶ 378. The fact that an agent makes negotiable paper in his principal's name, payable to himself, calls for special caution in one taking it.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

¶ 379. A debtor gave his creditor the notes of a third party, which the creditor discounted on his own indorsement, but had to take up when they fell due. The debtor then gave him other notes made by the same person, but with the name of a firm to which the maker belonged written across the back. Held, that they must be supposed to have had the previous debt in view, and that the creditor, therefore, had notice that the firm name was a mere accommodation, and could not recover on the note against another partner without whose knowledge or consent it was used.—Moynahan v. Hanaford, 42 Mich. 329.

¶ 380. Where a certified check deposited with a village as a guaranty of good faith in proceedings to secure a gas franchise is indorsed by the village clerk, the indorsee cannot be regarded as the holder in good faith, since the village clerk has no general power to transfer checks payable to the lage, but the treasurer of the village is proper custodian of its moneys and eviden of value.—Griggs v. Village of Red Jac 171 Mich. 142.

¶ 380a. Under Comp. L. 1897, § 6083, viding that debts contracted or liabilities curred by a limited partnership associat for an amount exceeding $500 must be writing, a transfer of a promissory note the indorsement of the association to the running account; no item of which ceeds $500, constitutes the indorsee a b fide purchaser even though he might not able to hold the association liable as dorser.—Shaw, Kendall & Co. v. Brown, Mich. 573.

§ 75. Taking in due and ordinary course.
Negotiation and transfer of paper, see a V, VII.
What constitutes taking municipal bonds "due course," see Municipal Bonds ¶

¶ 381. The indorsement "without course" by the vendor of a promissory n held as not tending to show that his ven was not a bona fide purchaser.—Borden Clark, 26 Mich. 410.

¶ 382. One who takes under an indo ment by the payee transferring only "right, title and interest" in the note is a bona fide holder without notice of defen —Aniba v. Yeomans, 39 Mich. 171.

¶ 383. The rule that a bona fide holder negotiable paper is not affected by p equities of which he has no notice does apply if he receives the paper from the o inal payee by assignment or sale instead indorsement; he thus obtains no title perior to that of the payee, in whose na only he can sue, and the maker is theref not precluded from asserting equities t would have been valid as against the pay —Spinning v. Sullivan, 48 Mich. 5.

¶ 384. Sections 27 and 29 of Act No. Pub. Acts 1905, changed the rule thereto prevailing in this state, and operated so to make anyone who has taken a negotia instrument as security for a pre-existing d a holder in due course to the extent of amount of the debt.—Graham v. Smith, Mich. 65.

¶ 385. A guaranty of payment of a n waiving protest, notice and demand, is equ alent to an indorsement within the meani of the law merchant, and operates as a tra fer in due course.—First Nat. Bank of rand v. Shaw, 157 Mich. 192.

¶ 386. In "ordinary or usual course business" means a transfer of a negotia instrument according to the usages and c toms of commercial transactions.—Van Sly v. Rooks, 181 Mich. 88.

§ 76. ——Pledgee as bona fide purchaser.

General law as to pledges, see Pledges.

¶ 387. One who in good faith receives a third person's unmatured promissory notes as collateral, parting with value for them, is entitled to recover upon them.—Crump v. Berdan, 97 Mich. 293.

§ 77. Taking before maturity or dishonor.

See also ante ¶ 55.

Maturity of instrument and time for payment, see ante § 11.

¶ 388. One cannot become a bona fide purchaser of a certificate of deposit unless he takes it within a reasonably short period.—Tripp v. Curtenius, 86 Mich. 494.

¶ 389. One in whose hands a debt, consisting of two notes, is subject to an equity, cannot transfer the whole debt as one demand at a time when one note is past due, except subject to this equity to the extent of the amount remaining unpaid on the matured note.—Hull v. Swarthout, 29 Mich. 249.

¶ 390. The delivery of a past-due negotiable note indorsed in blank, but delivered for a special purpose, does not estop the true owner from claiming title as against one to whom the paper has been fraudulently transferred, but the rule is different if the assignment or indorsement is made with the intention that it shall be negotiated.—Township of Washington v. First National Bank of Huntington, 147 Mich. 571.

¶ 391. A note transferred after maturity is subject to all defenses against the payee.—Brown v. Smedley, 136 Mich. 65.

¶ 392. A purchaser of a mutilated and past due note (name of a comaker cut off) is put on notice so that he cannot claim that the comaker of the note is estopped from treating its security as an existing lien.—Corbitt v. Brong, 44 Mich. 150.

¶ 393. When one buys a past-due promissory note, and there is a dispute whether his vendor had any title or right to sell it, the motives of the purchaser in buying are unimportant. Whether these are good or bad he can get no title unless his vendor had a right to sell.—Church v. Clapp, 47 Mich. 257.

¶ 394. The purchaser of past-due paper is bound by any equities which bind the original holder; and as between such purchaser and an indorser the latter can show the consideration and circumstances of the indorsement; as, e. g., that the indorser indorsed only for accommodation, and therefore was nothing more than a surety.—Simons v. Morris, 53 Mich. 155.

¶ 395. Negotiability does not cease when paper matures, but it is only subject to such equities as exist against the paper at the date when it is negotiated, and the equities which affect the indorsee are only such as attach to the note itself and do not include collateral matters.—Carpenter v. Greenop, 74 Mich. 664.

¶ 396. A due-bill payable to A. one day after date was assigned by A. to B. on the day of its date as collateral security for a loan by B. to A. not evidenced by writing, and ten days afterwards A. gave his note payable with ten per cent interest for the loan, permitting B. to keep the due-bill as security for the note. Held, that B. was not an innocent purchaser of the due-bill before maturity, and took it subject to any defenses existing between the maker and A.—City Bank of Dowagiac v. Dill, 84 Mich. 549.

¶ 397. It seems that the lapse of thirty-one days from the date of a certificate of deposit is not enough to raise the presumption that it is dishonored paper, even though such paper be due at its date.—Birch v. Fisher, 51 Mich. 86.

¶ 398. The dishonor of one of several notes secured by a mortgage puts a subsequent purchaser of the others notes upon inquiry, and he takes them subject to all the equities.—Lockwood v. Noble, 113 Mich. 418.

¶ 399. Where a plaintiff sells an automobile, takes a certificate of deposit on a bank from a purchaser in payment, and keeps control of the machine until he learns from the bank that the certificate is not good, he cannot recover against the bank on the certificate as being a purchaser for value in good faith.—American Trust & Savings Bank v. Moore, 161 Mich. 436.

§ 78. Parting with value.

Taker of municipal bonds in payment of antecedent debt as taker for value, see Municipal Bonds ¶ 70.

What constitutes value, see Comp. L. 1915, § 6066 et seq.

¶ 400. A pre-existing debt constitutes a valuable consideration, and a holder of a bill or note founded upon such consideration is unaffected with the equities between the antecedent parties of which he had no notice.—Outhwite v. Porter, 13 Mich. 533; Bostwick v. Dodge, 1 D. 413, overruling Ingerson v. Starkweather, W. 346.

¶ 401. A bank is not, as to an accommodation acceptor, a bona fide holder of a draft discounted prior to acceptance, unless, at the time the acceptance was secured, it parted with value in reliance thereon; and evidence that the proceeds were paid or credited to the drawer conditionally only is insufficient to establish that fact, in the absence of a showing that, when the acceptance was received, the drawer in fact had a credit on the books of the bank against which the amount of the draft could have been charged.

—First Nat. Bank v. Wills Creek Coal Co., 110 Mich. 447.

¶ 402. The discharge or extension of a pre-existing debt is a valid consideration so as to make the purchaser a bona fide holder of a negotiable instrument.—Thompson v. Village of Mecosta, 127 Mich. 522.

¶ 403. One who has purchased a note of an agent employed by the original parties to negotiate it is not the less a bona fide holder because of having bought the note at less than its face.—Vinton v. Peck, 14 Mich. 287.

¶ 404. The consideration paid by one who purchases a promissory note need not be in money in order to constitute a taking in due course of business; so held where a bookkeeper in a bank exchanged township drain orders for a promissory note held by the township treasurer.—Chapman v. Remington, 80 Mich. 552.

¶ 405. One who has not parted with value is not an innocent holder; so held in the case of a bank which took new notes, not as payment of, but as collateral to, a dishonored note the indorser of which had refused to sign in renewal. The bank not having parted with value on account of the new notes cannot enforce them against their indorser who was induced to sign them through the maker's fraud.—Henriques v. Ypsilanti Sav. Bank, 84 Mich. 168.

¶ 406. A bank which accepts a draft payable to its order after such draft is accepted by the drawee, and which credits the amount of the proceeds of the draft to the drawer, will not be held not to be a bona fide holder of the draft, it being given for a valuable consideration, and there being no fraud in its inception.—Texarkana Nat. Bank v. Stillwell & Co., 121 Mich. 154.

¶ 407. Although an agreement to forbear bringing suit for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration, a bank which obtained stock as collateral to a demand note for an old debt and had the same right to immediately sue the note which it had before the same was given, was not an innocent purchaser for value as against the corporation who had a prior lien against the stock by virtue of a by-law.—Bronson Electric Co. v. Rheubottom, 122 Mich. 608.

¶ 408. A bank purchasing notes and paying for them by crediting the amount to the indorser's account, the latter exhausting the amount by drawing checks against it prior to the maturity of the notes, is a bona fide purchaser though the indorser subsequently may have deposits in excess of the amount of the notes.—Fredonia Nat. Bank v. Tommei, 131 Mich. 674.

B. ADMISSIBLE DEFENSES AND EXTENT OF LIABILITY.

§ 79. In general.

Defenses available between primary parties, see ante § 20.

Defenses available to and between indorsers, see ante §§ 47, 49.

Pleas, affidavits and notices of defenses, see post § 102.

Liability of married women to bona fide holders of contracts, see Husband and Wife § 82.

Rights of bona fide takers and holders of municipal and public bonds, see Municipal Bonds § 13 et seq.

Provisions as to rights of bona fide holders, see Comp. L. 1915, § 6098.

¶ 409. Where an agent with full authority to negotiate certain paper has turned it out as collateral security for advances made to himself, and has afterwards directed the holder to sell it, a bona fide purchaser is not concerned with the state of accounts between his vendor and the agent.—Howry v. Eppinger, 34 Mich. 29.

¶ 410. A person obtaining negotiable paper in good faith for a valuable consideration and before maturity is protected, and the mortgage security in such a case is protected equally with the note.—Barnum v. Phenix, 60 Mich. 388.

¶ 411. Bona fide holders who rediscount renewed paper and who send the proceeds to the accepting bank will not be deprived of protection as such although the bank who accepts the paper for renewal does not surrender the old note or enter the new note on the books.—Davenport v. Stone, 104 Mich. 521.

¶ 412. That the payee of a note is a copartnership which has failed to comply with Pub. Acts 1907, Act No. 101, How., 2nd Ed., § 2626, requiring the filing of a certificate of membership constitutes no defense as against a holder in due course, for value and without notice.—Pontiac Savings Bank v. Reinforced Concrete Pipe Co., 178 Mich. 261.

§ 80. Want of execution or delivery.

Evidence as to execution of instrument, see post § 117.

Issues and proof as to execution and delivery of instrument, see post § 105.

¶ 413. One Hirschberg came to defendant's store to sell him certain goods. Defendant made out notes for the purchase price and laid them on the counter until Hirschberg should make out the order for defendant to sign. Defendant stopped to wait on a customer, and Hirschberg made off with the notes. Plaintiff, as transferee of the notes, asked for a directed verdict. Held, it should not be granted.—Sheffer v. Fleischer, 158 Mich. 270.

¶ 414. Certificates of deposit are negotiable paper; and where the owner of such a certificate has indorsed it, and, through his want of ordinary business caution, it has passed beyond his control, it seems that one who within a reasonable time purchases it in good faith and for value is entitled to protection.—Birch v. Fisher, 51 Mich. 36.

§ 81. Forgery or alteration.

Forgery or alteration of instrument in general, see ante § 65.

Alteration as defense against bona fide holder, see Alteration of Instruments § 10.

Alteration as defense to action by holder in due course, see Comp. L. 1915, § 6165.

¶ 415. The bona fide holding of a forged note does not enable one to recover thereon.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 416. Where, without negligence on his part, and relying upon false representations made to him at the time that the instrument in question was a mere duplicate of a contract which he had just signed, a defendant unwittingly signed an instrument in the form of a negotiable promissory note; where, also, fraudulent means were taken to prevent him from noticing the body of the pretended duplicate, and he delivered it in ignorance of its true character, believing it to be the same duplicate contract which he supposed he had signed, it was held that the instrument was to be regarded as a forgery, and could not be enforced even in the hands of a bona fide purchaser.—Gibbs v. Linabury, 22 Mich. 479.

¶ 417. One who signs a promissory note, after filling in all the blanks in a printed form except that for the rate of interest, is liable thereon to a bona fide holder without notice, though the rate of interest has been filled in after the note left his hands.—Weidman v. Symes, 120 Mich. 657.

¶ 418. The bona fide holder of a joint and several promissory note, acquired before maturity, is entitled to recover against those signers whose signatures are genuine, although a part of the names purporting to be signed thereto are forged.—First Nat. Bank of Durand v. Shaw, 149 Mich. 362.

¶ 419. One who signs a note is not relieved from liability to a holder in due course by the fact that signatures have been forged thereon subsequent to his signature.—First Nat. Bank of Durand v. Shaw, 157 Mich. 192.

¶ 420. The forgery of a portion of the signatures to a promissory note does not invalidate the instrument in the hands of a bona fide holder in due course as to those whose signatures are genuine.—Van Slyke v. Rooks, 181 Mich. 88.

Negligence affecting actions by drawee against purchaser of check or draft forged in signature or indorsement, 14 N. C. C. A. 567-581.

§ 82. Fraud, duress or mistake.

As defense between the primary parties, see ante § 21.

Purchaser's knowledge or notice of fraud as bearing on his bona fides, see ante § 72.

¶ 421. A transferee of paper given to an individual partner for partnership property, and transferred by him in satisfaction of his individual debt and in fraud of the other partner's rights, cannot be deprived of his right as bona fide holder except on evidence of his participation in the fraud or other misconduct of the partner who transferred to him.—Nichols v. Sober, 38 Mich. 678.

¶ 422. Duress is not a defense to negotiable paper in the hands of a bona fide holder who purchased it before it fell due.—Farmers' & Mechanics' Bank of Grand Rapids v. Butler, 48 Mich. 192.

¶ 423. An accommodation indorser of a promissory note cannot escape liability to a bona fide holder on the ground that his indorsement was procured by the false representations of the maker.—Cristy v. Campau, 107 Mich. 172.

¶ 424. A plaintiff bank which rediscounts renewed paper in good faith and for value is entitled to protection even though the officials of the defendant bank who negotiated the transfer but made no record upon the bank books except to credit the maker of the notes with the proceeds thereof, less a charge made by the bank, may have sought to defraud plaintiff or the stockholders of their own bank.—First Nat. Bank v. Stone, 104 Mich. 367.

¶ 425. Where there is no fraud in the inception of a note, and it is given for an actual indebtedness, but the fraud claimed to exist arose in connection with its transfer, a holder of the note without knowledge, actual or constructive, of such fraud, who gives value therefor and receives it in good faith, is a holder in due course.—Graham v. Smith, 155 Mich. 65.

¶ 426. In the absence of actual fraud in obtaining signatures to a promissory note, the makers cannot show, as against a bona fide holder for value, that they supposed they were executing a different instrument, where they were guilty of gross negligence in failing to ascertain the true nature of the instrument.—Van Slyke v. Rooks, 181 Mich. 88.

§ 83. ——In inception of instrument.

¶ 427. If it appears that the note has never been actually delivered, and that without any confidence or negligence or fault on the part of the maker, but by force or fraud, it was put in circulation, there can be no

recovery upon it, even when in the hands of an innocent holder.—Burson v. Huntington, 21 Mich. 415.

¶ 428. The maxim leaving a loss upon him who put it in the power of another to occasion it does not apply to a case where a person was deceived into signing a negotiable promissory note. The maxim supposes the action of the person upon whom it imposes the loss to have proceeded from intelligence, and not to have resulted from duress. It presumes the assent of the will of the actor. If, from any cause, this assent is wanting, the result is the same as if the act were done under duress, or by an insane man.—Gibbs v. Linabury, 22 Mich. 479.

¶ 429. Where one signs in good faith a paper that he has heard read, and that purports to be a power of attorney, deed, contract, mortgage, or the like, the rule, if any, that one who signs an instrument and puts it in circulation is bound by its terms, even though it turns out to be different from what he supposed, does not apply to hold him liable upon a negotiable note which, without any intimation to him, was embraced in the paper so signed.—Anderson v. Walter, 34 Mich. 113.

¶ 430. One who has been tricked into signing a promissory note will not be liable upon it unless his own negligence was so gross as to preclude his defending against a bona fide purchaser of the paper.—Soper v. Peck, 51 Mich. 563.

¶ 431. A bona fide purchaser, even, cannot recover on a note the signature to which was obtained by fraud and deceit without the fault of the person purporting to be the maker, since the equities of purchasers cannot be said to be any greater than those of innocent persons who have done nothing negligently or unfairly to mislead them.—First Nat. Bank of Sturgis v. Deal, 55 Mich. 592.

¶ 432. If the signature to a note is procured by trickery or by substitution, the note is void even in the hands of a bona fide holder.—Beard v. Hill, 131 Mich. 246.

¶ 433. The drawer of a check held not estopped from asserting fraud in its inception in an action thereon by a transferee, by having failed to make such claim in a previous action in which he intervened.—People's State Bank v. Miller, 185 Mich. 565.

§ 84. Want of authority or capacity to execute or transfer paper.

Effect of taking paper of partnership association issued in excess of authority, see ante § 74.

Right of holder at a discount to enforce full value against members in an illegal corporate maker, see Corporations ¶ 130.

Effect of ultra vires accommodation paper in hands of bona fide holder, see also Corporations ¶ 321.

Estoppel in favor of bona fide holder to deny authority of corporate maker's officer to execute note, see Corporations ¶ 552.

Estoppel to deny liability of partnership association to bona fide taker of paper, see also Joint Stock Companies § 10.

¶ 434. A promissory note signed by a drunken person who knows what he is doing, and is not deceived as to the identity of the paper, is not void, and a defense against it must be based on fraud and not on absolute incapacity. Such a note would be valid in the hands of an honest holder for value.—Miller v. Finley, 26 Mich. 249.

¶ 435. Accommodation notes were outstanding when the party for whose accommodation they were made died. The makers afterwards made new notes to decedent's order to be used to take up the old notes, the business of such decedent being continued, with their knowledge and approbation, by his widow in his name, and with the same manager and agent as before. Held, that where such new notes have been regularly indorsed with decedent's name by such agent as his attorney, and have passed to a bona fide purchaser for value, without notice of anything to impeach their validity, and the proceeds have been used to take up the old notes, and the makers of the new notes having full knowledge of all the facts as they occurred, they cannot resist their enforcement.—Van Etten v. Hemann, 35 Mich. 513.

¶ 436. A note and mortgage given by a corporation cannot be defeated in the hands of a good-faith purchaser before dishonor who took the same as the result of negotiations with the officers of the corporation, on the ground that the transaction out of which the securities grew was ultra vires.—Woodcock v. First Nat. Bank, 113 Mich. 236.

¶ 437. Section 6083, Comp. L. 1897, provided that the consent of at least two managers in writing should be required to contract debts over five hundred dollars except in the case of merchandising associations, where a majority in interest might authorize in writing one manager to incur such debts. One of the managers of the merchandising association in question for a period of years contracted debts above five hundred dollars, and gave notes therefor without written authority. The other managers knew of the practice, and acquiesced in it, and the notes were paid from time to time as they came due. Held, bona fide holders of such notes might enforce them against the association.—Armstrong v. Stearns, 156 Mich. 597.

¶ 438. An indorsement of negotiable paper by an insane payee is void, and the title of the indorsee may be defeated by proving the insanity, though the paper be negotiable and taken in good faith before due.—Hannahs v. Sheldon, 20 Mich. 278.

§ 85. Illegality or invalidity.

Validity and legality in general, see ante § 9.
Issues and proof as to validity of instrument, see post § 105.
Defense by indorser that note was void as a preferential transfer by insolvent maker, see Bankruptcy ¶ 41.
Estoppel of partnership association to deny validity of notes given for goods sold to it without agreement in writing, see Joint Stock Companies § 10.

¶ 439. One who buys a note made on Sunday, but dated on Monday, and has no knowledge of the time it was actually made, may recover upon it.—Vinton v. Peck, 14 Mich. 287.

¶ 440. A married woman's note given to secure husband's debt is void and is not protected, even though negotiable, in hands of bona fide holder.—Waterbury v. Andrews, 67 Mich. 281.

¶ 441. A negotiable note, though based upon a consideration that is illegal and void as against public policy, is good in the hands of a bona fide holder for value before maturity without knowledge of the transaction in which it originated, there being at the time no statute declaring such notes void.—Davis v. Seeley, 71 Mich. 209.

¶ 442. Nothing less than a statutory enactment will subject negotiable paper in the hands of a bona fide holder to the defense of illegality in its inception.—Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460.

¶ 443. A contract, though prohibited and made a crime by statute, if it takes the form of negotiable paper, is valid and enforceable in the hands of a bona fide holder for value.—Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460.

¶ 444. Comp. L. 1897, § 6108, of the general banking act, prohibiting and making a misdemeanor the certification of a check unless its amount actually stands to the credit of the drawer, was construed as intending to make such a contract void between the parties, but as not intending that if the contract took the form of negotiable paper, its validity was affected as to a bona fide holder for values.—Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460.

¶ 445. As regards the rights of a bona fide holder, a certified check is good, even though the bank has no funds of the drawer on hand and certifies it contrary to Comp. L. § 6108.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

§ 86. ——Of certification of check.

See also ante ¶ 444.

¶ 446. At common law the fact that a certified check was not covered by funds in the bank affords no defense, if the check, negotiable in form, has passed into the hands of a bona fide holder.—Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460.

¶ 447. Comp. L. 1897, § 6108, of the general banking act, prohibiting and making a misdemeanor the certification of a check unless its amount actually stands to the credit of the drawer, does not expressly declare that the check so certified shall be void in the hands of a bona fide holder for value, nor does it by necessary implication, or by implication even, make the check void in the hands of such holder.—Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460.

¶ 448. Where a drawer of checks on defendant bank in favor of plaintiff knows that the plaintiff gets the checks certified before releasing to him the securities for which they were given in payment, the drawer impliedly is an original party to the certification, and the plaintiff who procures the certification may be a bona fide holder of the checks.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

§ 87. Want or failure of consideration.

Want or failure of consideration as defense between primary parties, see ante § 22.
Issues and proof as to consideration, see post § 106.
Burden of proof and presumption as to consideration, see post §§ 109, 115.
Evidence as to consideration, see post §§ 115, 124.
Jury questions as to consideration, see post § 131.
Absence or failure of consideration as a defense, see Comp. L. 1915, § 6069.

¶ 449. Where a note is made to be discounted for the accommodation of the payee, and is discounted accordingly, the fact that the maker received no consideration therefor is no defense to the same in a suit brought thereon by the indorsee.—Thatcher v. West River Nat. Bank of Jamaica, Vermont, 19 Mich. 196.

¶ 450. Where the consideration of a transferable aid-note given to a railroad company is the benefit to be derived by the maker from the construction of its road, he cannot defend on the ground that the road was built by another company.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 451. A bank which received negotiable paper before due, as collateral security to a loan then made, without notice of any infirmity in the note, was a bona fide holder, and was protected as against the claim of want of consideration as to part of the amount, on the part of the maker.—First Nat. Bank of Niles v. Shue, 119 Mich. 560.

¶ 452. Defendant gave his note to a railroad company in consideration that the company would build its road through defend-

ant's town. The company gave its note to a trustee as a guarantee that the road would be so built, and immediately transferred defendant's note to plaintiff. The railroad failed to build the road through defendant's town, and thereafter plaintiff, who had full knowledge of the whole transaction at the time of taking the note, sued thereon. Held, he was a bona fide purchaser for value and could recover despite the failure of the consideration of the note.—Whitehead v. Purdy, 172 Mich. 31.

¶ 453. The holder of notes, the president of a corporation, which is the payee of the notes, who, at the time of the transfer of notes before maturity to him in payment of a loan had no notice or knowledge that there had been a breach of a contract which existed as a basis of the notes, is a holder in due course, and is not subject to the defense of failure of consideration.—Poss v. Meader, 189 Mich. 323.

§ 88. Misapplication of proceeds.

¶ 454. A person taking partnership paper in good faith for value before maturity and without notice that it is tainted with fraud, has good title and it is no defense to a suit on such paper that the money obtained was misapplied by the partner who issued the paper.—Stevens v. McLachlan, 120 Mich. 285.

§ 89. Payment or discharge.

Payment, release or discharge as between primary parties, see ante § 24.
Evidence as to payment or discharge, see post §§ 121, 128.
Jury questions as to payment, see post § 135.

¶ 455. The maker of a negotiable note cannot assume that it has not been transferred and make payment thereof before maturity to the original holder, thus defeating the rights of a purchaser for value before maturity.—Williams v. Keyes, 90 Mich. 290.

XIV. ACTIONS.

§ 90. In general; right to sue on instrument.

Right of pledgee to sue instrument, see also ante ¶ 387.
Parties to suits on negotiable instruments, see post § 95.
Indorsement of note to plaintiff pending trial, see ante ¶ 184.
Evidence as to ownership of instrument and right to sue, see post §§ 114, 123.
Jury questions as to ownership of instrument and right to sue, see post § 130.
Instructions as to ownership of instrument, see post § 138.
Actions on non-negotiable paper, see Non-negotiable Paper § 5.
Jurisdiction of Federal courts in suits by assignee, see Courts § 90.
Venue of actions on commercial paper, see Venue.
Enjoining actions on negotiable instruments, see Injunctions § 43.
Enforcement of contribution between several indorsers, see Indemnity and Contribution § 15.
Foreclosure upon the security as merging the note, see Former Adjudication § 41.
Recovery of judgment against maker as bar to suing indorsers and vice versa, see Former Adjudication §§ 70, 71.
Rights of successor bank to enforce paper coming from predecessor, see Banking § 47.
Actions on mortgage notes for deficiency after foreclosure and suspension of right to sue on note pending foreclosure, see Foreclosure, VI.
Right of agent indorsee to sue after death of principal, see also Agency ¶ 77.
Right of maker who is representative of payee to equitable relief to recover possession of note, see Estates of Decedents ¶ 280.
Bill, note or check as payment, and right to sue on original debt if dishonored, see Payment, I, II.
Measure of damages for conversion of commercial paper, see Damages § 116.

¶ 456. Parties must sue and be sued on negotiable paper in the order in which they have seen fit to sign it.—Sweet v. Woodin, 72 Mich. 393.

¶ 457. A tax collector's agent who took as pay for taxes a draft on the collector which the latter refused to accept, and who then paid over the amount of the tax, became a holder for value and could collect the draft.—Elliott v. Miller, 8 Mich. 132.

¶ 458. Negotiable paper may always be sued upon, by the party having the legal title, in the name of another.—Bachelder v. Brown, 47 Mich. 366.

¶ 459. Possession of a promissory note payable to bearer is prima facie evidence of ownership or right to sue.—Hovey v. Sebring, 24 Mich. 232; Brigham v. Gurney, 1 Mich. 349.

¶ 460. Possession of a promissory note indorsed in blank is sufficient evidence of the plaintiff's right to sue on it.—Battersbee v. Calkins, 128 Mich. 569.

¶ 461. One need not be the real or beneficial owner of a note payable to bearer to enable him to recover; but he cannot claim to recover as owner upon a note payable to bearer to which he did not obtain title until after he began suit.—Hovey v. Sebring, 24 Mich. 232.

¶ 462. An instrument consisting of a promise to pay and an added stipulation that the article for which payment is to be made shall remain the payee's property until the note is paid; that if there is any default in payment it shall be at his option to take possession of the article or collect the note; and that if he takes possession he shall not

be required to refund any money already paid, but that it shall be deemed to have been paid for rent of the article, is a contract sufficient to sustain an action, and on which the transferee can sue.—Soper v. Mills, 50 Mich. 75.

¶ 463. One party to a contract cannot sue upon a note placed by the other in a third person's hands as mere security for his fulfilment of the contract, so long as it is not agreed that the note shall be liquidated damages for nonperformance, and the damages therefor have not been determined in a suit on the contract.—Rumney v. Coville, 51 Mich. 186.

¶ 464. An indorsement in blank by the payee of a note payable to his order does not affect his right to sue while the note remains in his hands.—Kerrick v. Stevens, 58 Mich. 297.

¶ 465. Where a note is payable to order an indorsement in blank by the payee does not prevent his suing on the note still in his hands.—Kerrick v. Stevens, 58 Mich. 297.

¶ 466. Where an indorsement of guaranty was made by the party to whose order the note was payable the indorsement itself need not be negotiable in order to enable the first and original indorsee to sue the maker.—Phelps v. Church, 65 Mich. 231.

¶ 467. Inasmuch as indorsement of a note conveys the legal title to the indorsee, he may maintain suit on the note if his indorser could have done so, even though he may have no equitable interest therein.—Wintermute v. Torrent, 83 Mich. 555.

¶ 468. A note payable to the order of a firm and by the firm indorsed in blank may be sued by any holder.—Whitworth v. Pelton, 81 Mich. 98.

¶ 469. The right of the payee in a note payable to his order, and unindorsed by him, to recover in a suit against the maker, could not be defeated at the common law by the fact that the note was in the possession of a third person.—Hoil v. Rathbone, 98 Mich. 323.

¶ 470. A plaintiff, as assignee of the foreign administrator of the payee, may sue on a note.—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benevolent Ass'n, 166 Mich. 504.

¶ 471. A promissory note bearing annual interest providing that at the death of the payee it is to become the property of his grand-daughter, and that no part of the principal was to be paid during the lifetime of the payee if the annual interest was regularly paid, secured by a mortgage containing similar provisions, is construed to mean that the amount unpaid at the time of his death belongs to the grand-daughter, and includes interest accruing since the date of the payment of the annual interest, and no recovery can be had in a suit in behalf of the estate of the payee.—Rogers v. Osborne, 146 Mich. 618.

¶ 472. In a suit on a note where the defendant contended that the plaintiff had requested him to pay the money due to another person and had subsequently stated that the note would not be enforced, such statement would not estop the plaintiff from making claim on the note.—Barnett v. Saloman, 118 Mich. 460.

§ 91. Time to sue and conditions precedent.

Maturity of instrument and time of payment, see ante § 11.
Necessity of demand or presentment, see ante § 50.
Time to make presentment and demand, see ante § 51.
Time in which to accept bills of exchange, see ante § 36.
Exhaustion of remedies against maker before recourse to indorser, see also ante § 48.
Duty to present draft received as conditional payment before suing on the debt, see ante ¶ 234.
Bond or security upon suing on lost paper, see post § 94.
Limitations of actions on the paper and on liabilities incident thereto, see Limitations.
Time when limitation runs on antedated note payable one day after date, see Limitations ¶ 208.
Running of limitations on demand paper, see Limitations § 54.
Limitations on paper payable at death, see Limitations § 56.
New promises, acknowledgments, and indorsements to toll limitations or to revive debt, see Limitations § 81 et seq.
Giving of new note or renewal by one obligor as tolling limitations, see Limitations § 83.
Indorsement of payment as acknowledgment under statute of limitations tolling it, see Limitations § 91 et seq.
Effect of part payment by coparty or secondary party to toll limitations, see Limitations § 96 et seq.
Laches in pursuing equitable relief, see also Equity ¶ 157.
Waiver of fraud or bar of complaint by laches, see also Fraud § 82.
Right to sue for fraud without surrendering note involved therein, see Fraud § 84.
Return of notes to guarantor thereof as condition precedent to judgment against him, see Guaranty § 22.

¶ 473. An action is prematurely commenced upon a promissory note on the last day of grace.—Wiesinger v. First Nat. Bank, 106 Mich. 291.

¶ 474. An action by a bank against the indorser on a note was not prematurely

brought, where the bank claimed that demand and notice had been waived by the indorser's promise to pay if upon the allowance of the bank's claim against the maker's estate, it became apparent that the estate could not pay, and where the administrator of such estate testified that the estate was insolvent. —State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 475. Exhaustion of security is not necessary before suing a note given for the absolute payment of money.—Cole v. Shaw, 103 Mich. 505.

¶ 476. An instrument signed officially by the president and secretary of a corporation, requesting its treasurer to pay to K. or bearer a certain sum of money, is a bill of exchange drawn by the corporation upon itself. Its legal effect is the same as that of a promissory note; it imports a promise to pay on demand, and an action may be maintained upon it without proof of a demand upon the treasurer.—Hasey v. White Pigeon Beet Sugar Co., 1 D. 193.

¶ 477. Defendants executed a note to plaintiff, and also assigned to him certain other securities upon the trust that he should collect the moneys due and to become due thereon and apply the proceeds to the payment of certain drafts drawn upon a third person and in indemnifying that person against his acceptances thereof. Held, that plaintiff could recover on the note without showing that such person had been damnified by reason of his acceptances.—Smith v. Barstow, 2 D. 155; and see Wheelock v. Rice, 1 D. 267.

§ 92. Nature and form of action.

Common counts on the instruments, see Assumpsit § 26.

¶ 478. It has always been competent to sue the makers of notes, negotiable or otherwise, on the common counts.—Port Huron & S. W. R. Co. v. Potter, 55 Mich. 627.

¶ 479. A certificate of deposit may be sued upon by appending a copy thereof to the common counts.—Cate v. Patterson, 25 Mich. 191.

¶ 480. A railroad aid note, conditioned on the road's completion to a certain point, may, when it has become absolutely payable, be sued by the payee under the common counts. —Port Huron & S. W. R. Co. v. Potter, 55 Mich. 627.

¶ 481. A creditor to whom a draft has been indorsed, to be applied, if collected, on the account of a debt, need not return the draft when dishonored; the debtor cannot recall his paper without paying the debt, and the creditor can sue either on the account or on the indorsement.—Stringfield v. Vivian, 63 Mich. 681.

§ 93. Actions on lost instruments.

Proof of lost bill or note and bond to indemnify defendant against it, see Jud. Act, chap. XVII, §§ 55, 56; Comp. L. 1915, §§ 12543, 12544.

¶ 482. To give equity jurisdiction where recovery is sought of the amount of a lost note, it is not necessary that it should be lost before due.—Green v. Stone, W. 109.

¶ 483. A payee of a note which it is claimed is wrongfully in the possession of the maker without his having paid it need not sue on it as a lost instrument; he may sue in assumpsit and compel the production of the instrument by the defendant.—Page Woven Wire Fence Co. v. Pool, 129 Mich. 57.

§ 94. ——Bond or security.

Indemnity on lost note against its enforcement by stranger as provision of foreclosure decree on mortgage securing note, see Foreclosure ¶¶ 396-398.

Provisions as to indemnity bonds in actions on lost negotiable instruments, see Jud. Act, chap. XVII, § 56; Comp. L. 1915, § 12544.

¶ 484. The bond of indemnity in an action on a lost note should run to both defendants though but one was served.—Higgins v. Watson, 1 Mich. 428.

¶ 485. The filing of an indemnity bond is not required by the statute (How. St. § 7519) where suit is brought upon a lost note that is not negotiable.—Coon v. Bouchard, 74 Mich. 486.

¶ 486. The payee in a note given on the delivery by him of a deed to the maker on condition that if the maker fails to sell the land to third parties the payee's title shall be defeated and the note returned to the maker has a conditional title to the note, subject to be defeated by nonsale, and, the land not being sold, is liable in trover for the note's value if he disposes of it.—Brown v. St. Charles, 66 Mich. 71.

¶ 487. Before an indemnifying bond is required under Comp. L. 1915, § 12544, it must affirmatively appear that the note was negotiable, since § 12543, relating to suit on lost notes, is confined to negotiable instruments. —Reese v. Dyer, 199 Mich. 204.

¶ 488. Where, in case of an unindorsed note in possession of a third person plaintiff is required to furnish indemnity, and does so before the close of the case, defendant is fully protected, and it is no hardship to him to treat the note as a lost note, within the statute.—Holl v. Rathbone, 98 Mich. 323.

§ 95. Parties.

Defendants in suits on joint instruments, see also ante § 23.

Right to sue on instrument, see ante § 90.
Joinder of parties, see post § 98.
General law as to parties, see Parties.
Authority of bank officers to represent bank, see Banking §§ 54-59.
Right of holder to sue in his own name, see Comp. L. 1915, § 6092.

¶ 489. A bank holding a note as collateral security may, with the owner's assent, sue upon it in its own name.—Lobdell v. Merchants' & Manufacturers' Bank of Detroit, 33 Mich. 408.

¶ 490. A payee while retaining the possession of a note which he has indorsed in blank has the right to bring suit thereon in his own name.—Atkinson v. Weidner, 79 Mich. 575.

¶ 491. Judgment creditors of the payee in a note in whom the legal title is vested by a blank indorsement and delivery, and by his agreement to apply its proceeds when collected upon the judgment, have the right to allow him to bring suit in his own name on the note.—Atkinson v. Weidner, 79 Mich. 575.

¶ 492. A promissory note payable to the "order of M. A. B. (or bearer)" is suable in the name of any holder without an indorsement.—Bitzer v. Wagar, 83 Mich. 223.

¶ 493. Under How. St. § 6871, which provides that in all actions on promissory notes or other instruments in writing, any of the parties to which are designated by the initial letter or letters or contraction of the Christian or first name or names, it shall be sufficient in any process or declaration to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating such name or names in full, the payee in a note payable to "C. F. Shaw" may bring suit thereon in that name.—Shaw v. Fortine, 98 Mich. 254.

¶ 494. The Negotiable Instruments Law (Act No. 265, § 40, Pub. Acts 1905) provides that a qualified indorsement may be made by adding the words "without recourse" or any other words of similar character. To an indorsement was added: "Without recourse and without warrant of any character." Held, the indorsement was within the provision of the section to the effect that the use of a qualified indorsement should not impair the negotiable character of the instrument and under the indorsement in question the indorser might sue in his own name.—Schmidt v. Pegg, 172 Mich. 159.

§ 96. ——Agents and personal representatives.

Indorsements for collection, see ante § 43.
Right of agent of representative to sue in his own name on note indorsed to him for collection, see Estates of Decedents ¶ 256.

¶ 495. An agent may sue in his own name a note which he holds for collection and which is payable to bearer or indorsed in blank.—Brigham v. Gurney, 1 Mich. 349; Boyd v. Corbitt, 37 Mich. 52; Moore v. Hall, 48 Mich. 143; Coy v. Stiner, 53 Mich. 42.

¶ 496. One may sue in his own name on a note given him as agent for collection, regardless of the owner's death.—Moore v. Hall, 48 Mich. 143.

¶ 497. An agent for collection of a note indorsed in blank can sue it in his own name after paying over to his principal the amount due upon it.—Coy v. Stiner, 53 Mich. 42.

¶ 498. An agent to whom a negotiable note has been transferred for collection may sue thereon in his own name.—Watkins v. Plummer, 93 Mich. 215.

¶ 499. A bank was entitled to begin suit in its own name on a note made payable to the order of its cashier, where the cashier did not indorse the note but the evidence showed him to be plaintiff's cashier and that he acted in the transaction for plaintiff.—First Nat. Bank v. Johnson, 133 Mich. 700.

¶ 500. A foreign executor can sue in his own name on a note belonging to the estate and payable to bearer; but if the note is not negotiable, or is payable to order and not indorsed, the executor should sue in his official capacity.—Knapp v. Lee, 42 Mich. 41.

§ 97. ——Assignees.

¶ 501. Where indorsement is required for the negotiable transfer of a promissory note a mere assignee cannot sue in his own name. Sess. L. 1863, p. 102, How. St. § 7344, permitting it, does not apply to such paper.—Redmond v. Stansbury, 24 Mich. 445; Robinson v. Wilkinson, 38 Mich. 299; Spinning v. Sullivan, 48 Mich. 5; Davis v. Merrill, 51 Mich. 480; Minor v. Bewick, 55 Mich. 491.

¶ 502. A transferree of a note who incidentally stands as an assignee of the guaranty of a note can sue thereon in his own name.—Waldron v. Harring, 28 Mich. 493.

¶ 503. If the effect of the assignment of a promissory note is to make it thereafter non-negotiable, the assignee can bring suit thereon in his own name under the statute; and, if such is not the effect, the indorsement of the note in blank by the assignee and its delivery to a third party entitle him as holder to bring suit in his own name.—Stevens v. Hannan, 86 Mich. 305.

¶ 504. The payee of a note sold it to the plaintiff, writing on its back "I hereby assign my interest in this note to William H. Gale, W. R. Pelton." Section 40 of the Negotiable Instruments Law provides that a qualified indorsement constitutes the indorser a mere assignor of the title of the instrument, but does not impair its nego-

tiable character. Held, the plaintiff could not by force of this provision sue on the note in his own name under section 10054, Comp. L., giving to the assignee of a non-negotiable chose in action the right so to sue.—Gale v. Mayhew, 161 Mich. 96.

¶ 505. The payee of a note sold it to the plaintiff, writing on its back "I hereby assign my interest in this note to William H. Gale, W. R. Pelton." Held, plaintiff could not sue on the note in his own name, as the writing did not amount to a legal indorsement, nor was he enabled to do so by section 10054, Comp. L., which allows an assignee of a chose in action to sue in his own name but excepts from its operation negotiable choses in action.—Gale v. Mayhew, 161 Mich. 96.

¶ 506. A note given in payment for a threshing machine contained the provision: "If default is made in the payment of any note or the machine is levied upon or undersigned attempts to sell or remove same, said company may declare all notes due." Held, the instrument was not rendered non-negotiable by this provision so as to enable the assignee to sue in his own name by virtue of Comp. L. 1897, § 10054.—Schmidt v. Pegg, 172 Mich. 159.

§ 98. Joinder of parties.

Liability on joint instruments, see ante § 23.

¶ 507. Comp. L. 1871, § 5776, How. St. § 7345, allowing the various parties to negotiable paper to be joined in one suit, does not change the nature of each one's liability. —Sherman v. Palmer, 37 Mich. 509.

¶ 508. One who indorses on a note payable to order a guaranty of payment may be joined as a defendant in a suit on the note.—Green v. Burrows, 47 Mich. 70.

¶ 509. Whether a firm can buy paper on which one of its members is a joint maker, and join the other maker and an indorser in an action at law, quære.—Sweet v. Woodin, 72 Mich. 393.

¶ 510. When a promissory note is joint as well as several, all must be proceeded against jointly, or each severally, subject to certain exceptions, as where one is an infant, or has been discharged in bankruptcy.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 312.

¶ 511. One who indorses a promissory note for the accommodation of the principal maker and an accommodation maker can maintain an action against them jointly upon being compelled to pay the note; and this is so although the indorser is not the payee named in the note, and the indorsement was made before its negotiation. The rule as to contribution between cosureties does not apply to such a case.—Hanish v. Kennedy, 106 Mich. 455.

¶ 512. Where all the stockholders corporation, the stock of which is hel one stockholder as trustee for the benef all, indorse a note made by the trustee subsequently renew the note by the exec of eight notes respectively signed by ea eight stockholders as maker and indo the trustee indorser, upon payment of notes, is not a holder thereof such contemplated by Comp. L. 1897, §§ 1 10057, How. 2nd Ed., §§ 12705, 12707, so be entitled to sue all the makers an dorsers in one action at law.—Comsto Potter, 191 Mich. 629.

¶ 513. Severance in the case of pe purporting to be joint makers of a note who are so sued, is not contemplate Comp. L. 1871, §§ 5776-5778, How. St. §§ 7347, which authorize the suing togeth the maker, indorser, acceptor and guar of a note.—Reading v. Beardsley, 41 123.

§ 99. Intervention.

General law as to intervention, see Pa

¶ 514. The fact that the personal r sentative of the deceased payee in a issory note whose indorsement of the was obtained by undue influence, has a edy in equity, does not preclude him interceding in a suit by the indorsee ag the maker and raising defense of fra Coon v. Dennis, 111 Mich. 450.

¶ 515. In an action against the mak a negotiable promissory note brought b payee's indorsee, it is competent for the sonal representative of the payee to inte and defend for the maker, indemnifying against loss, where the indorsement was cured by undue influence, which is a sp of fraud.—Coon v. Dennis, 111 Mich. 45

§ 100. Transfer or indorsement pending a

¶ 516. The sale of negotiable paper ing suit thereon does not abate the su affect the issue.—Newberry v. Trowbridg Mich. 263; Toledo & A. A. R. Co. v. Joh 55 Mich. 456.

§ 101. Pleading; declaration.

Variance in actions on negotiable in ments, see post § 107.
General law of pleading, see Pleading.
Rules for pleading names by initials, see Pleading § 11.
Declarations in justices' courts upon neg ble instruments, see also Justices o Peace § 90.
Averments of debt on notes to support f ulent debtor proceedings, see Civil A § 29.
Service of copy of declaration, see Pr

¶ 517. In declaring on a promissory absolute on its face and in the ordinary it is not necessary to notice a contem neous agreement in writing varying

terms of the note, contained in a separate paper. Such agreement is matter of defense only.—Smalley v. Bristol, 1 Mich. 153.

¶ 518. Demand of payment of a promissory note at the time and place of payment specified therein need not, in an action against the maker, be averred or proved.—Reeve v. Pack, 6 Mich. 240.

¶ 519. A count by an indorsee upon a promissory note against copartnership makers need not specially allege the capacity of the firm to make notes, or specially set forth facts to imply it.—Carrier v. Cameron, 31 Mich. 373.

¶ 520. Where a declaration on the common counts against two defendants has a promissory note appended, purporting to be signed in a firm name, it is not demurrable for a failure to aver that defendants are partners.—Danaher v. Hitchcock, 34 Mich. 516.

¶ 521. An accommodation maker of a note, who takes it up after maturity, can sue the other joint maker as for money paid to the latter's use, and if his declaration covers the case it is immaterial that he also declares specially on the note.—McClatchie v. Durham, 44 Mich. 435.

¶ 522. A declaration in a suit joining maker and indorser as defendants must set forth a paper title accordingly.—Sweet v. Woodin, 72 Mich. 393.

¶ 523. In an action by an indorsee against the payee and indorsers of notes where the declaration fails to show title in plaintiff, the indorsements actually upon the notes not being correctly set out, plaintiff cannot recover without an amendment, which, if asked, should be allowed.—Hamilton v. Powers, 80 Mich. 313.

¶ 524. A declaration by an assignee upon a conditional note not negotiable need not aver any formal assignment, but is sufficient if it avers the plaintiff to be the owner and holder.—Draper v. Fletcher, 26 Mich. 154.

¶ 525. In an action by the indorser against the indorsee of a promissory note, a declaration alleging in the first count that defendant allowed a chattel mortgage securing the note to lapse, and in enforcing its judgment against plaintiff upon the note caused him great damage by levy upon his lands, and in the second count that defendant represented to plaintiff that the note had been paid, inducing plaintiff to give no further attention to the mortgage security, but to allow it to lapse, resulting likewise in damage from defendant's levy, sets out no cause of action based on the duty of the defendant to enforce the mortgage security for plaintiff's benefit.—Roberts v. First Nat. Bank of Yale, 149 Mich. 507.

¶ 526. The only difference between Comp. L. 1871, § 5775, How. St. § 7344, and Comp. L. 1871, § 1564, How. St. § 1590 (passed six years later), in regard to suit by an assignee of a note indorsed with a guaranty, is that the latter section dispenses with necessity of those allegations concerning the assignment which are necessary in the case of nonnegotiable paper.—Waldron v. Harring, 28 Mich. 493.

¶ 527. A pleaded breach of a warranty that a note is as good as gold, or as good as money, is not equivalent to pleading a guaranty of collection.—Taylor v. Soper, 53 Mich. 96.

§ 102. Pleas, affidavits and notices of defense.

Contemporaneous agreement in writing varying the terms of the instrument as matter of defense, see also ante § 101.

Availability of defense of nonexecution in absence of denial of execution, see also post § 103.

Omission to deny execution as dispensing with proof of execution, see post § 108.

Pleading fraud as defense, necessity of notice, see also Fraud § 98.

Denial of execution of instrument sued on in justices' court, see also Justices of the Peace § 97.

¶ 528. An affidavit by two of three defendants sued as joint makers of promissory notes executed in the name of a firm, denying "each for himself that he ever signed, executed or delivered either of said notes," is not sufficient to put plaintiff to proof of execution.—Mills v. Bunce, 29 Mich. 364.

¶ 529. Affidavits of nonexecution should not be technically construed.—McCormick v. Bay City, 23 Mich. 457; Haight v. Arnold, 48 Mich. 512.

¶ 530. Where defendant in an action on a note makes an affidavit under Circuit Court Rule 79, in which, while he admits that the signature to the note appears to be his own, he also avers that it was obtained under circumstances, fully set forth, which would relieve him of liability, the affidavit is sufficient to put plaintiff to the proof of the execution and delivery of the note.—Anderson v. Walter, 34 Mich. 113.

¶ 531. An affidavit denying only the delivery of the note sued on admits the genuineness of the signature.—Burson v. Huntington, 21 Mich. 415; McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426.

¶ 532. Where several persons are sued jointly as makers of a promissory note an affidavit by one of them that he has neither executed the note nor authorized anyone to execute it for him is sufficient to put the execution and validity of the note at issue so far as he is concerned, even though his codefendants do not join in the affidavit.—Wren v. McLaren, 48 Mich. 197.

¶ 533. An affidavit of the nonexecution of a partnership note is sufficient, when filed by one of the partners, if it shows that deponent did not sign, execute or deliver it, or expressly or impliedly authorize, direct, empower or consent to its execution, signature or delivery by any other person, and that if signed, executed or delivered by the firm, it was done by another copartner without deponent's authority, knowledge or consent, against the express agreement on which the partnership was created, for purposes outside of partnership matters, and without any authority in behalf of the partnership.—McRobert v. Crane, 49 Mich. 483.

¶ 534. The neglect of the remaining members of a firm to deny the execution of a note, signed by one partner in the firm name, admits the genuineness of such firm signature, and the authority of the partner to affix it, but does not admit that the firm received a consideration for such promise, or preclude such members from showing the fraud practiced upon them in the use made of the firm paper.—Towle v. Dunham, 76 Mich. 251.

¶ 535. Discretion of court in denying an application by defendants to file an affidavit denying execution of partnership notes sued upon is properly exercised, if the actual signing was done by a deceased partner and the affidavit could have been filed in the cause during his lifetime, and if the surviving partners have neglected to deny the signature.—Towle v. Dunham, 76 Mich. 251.

¶ 536. The failure of a railroad company to deny the execution of a note purporting to have been signed by the company by its auditor, as provided in Circuit Court Rule 79, is an admission that the note was so signed, but whether the authority of the auditor to execute the note is also admitted, quære.—Dewey v. Toledo A. B. & N. W. R. Co., 91 Mich. 351.

¶ 537. An affidavit by one of several defendants made and filed in an action on a promissory note bearing several signatures, denying the execution of such note, was sufficient notice to justify the requirement that the plaintiff, although claiming to be a bona fide holder, must show the execution of such note, before it could be offered in evidence, and to admit the defense of forgery as to some of the signatures.—First Nat. Bank of Durand v. Shaw, 149 Mich. 362.

¶ 538. In an action on a promissory note, a notice alleging fraud in the sale of stock for which a note was given and that "defendant has never received a dollar in profits out of said corporation, and has received no consideration whatever for the $2,400 invested by him in said corporation at the instigation of the plaintiff" pleads want of consideration only and cannot be construed as a notice of recoupment based on fraud; and, where uncontroverted testimony shows the company owned valuable property, a defense of want of consideration fails.—Morgan v. Nowlin, 126 Mich. 105, per Hooker, J., Moore, J., concurring and others concurring on a different ground.

§ 103. Issues, proof and variance.

General law as to issues and variance, see Pleading, IX, X.

Issues made by assumpsit with instrument annexed, see also Assumpsit § 55.

¶ 539. Omission to file an affidavit of nonexecution does not preclude any defense on the merits that does not contradict the execution of the note.—Freeman v. Ellison, 37 Mich. 459.

¶ 540. When one sues under the common counts (Comp. L. 1857, § 4425), and appends a copy of a negotiable instrument to his declaration, it is equivalent to an assertion that he is entitled to sue upon it in manner and form as set out, and when such a title can possibly be established, he may, if issue is taken, prove his title; if issue is not taken, he may assume it to be admitted, and the defendant must be held by default to have admitted any title not inconsistent with the paper as set out.—Wilcox v. Sweet, 24 Mich. 355.

¶ 541. In an action on an accepted draft the defendant may show, under the general issue, that when it was drawn he was not indebted to the drawee, that there was no consideration that the acceptance was merely for accommodation, or that it had been paid.—Colbath v. Jones, 28 Mich. 280.

¶ 542. A note given for an interest in a patent issued by the United States Patent office cannot be held to be without consideration, and evidence of the pecuniary worthlessness of the patent is not admissible under the general issue in an action on the note.—Miller v. Finley, 26 Mich. 249.

¶ 543. In an action upon a note against two joint makers it is inadmissible under the general issue to show that one maker signed as a surety, and that he was released by an agreement with the maker, without his consent, to extend the time of payment.—Rawlings v. Cole, 67 Mich. 431.

¶ 544. In an action against the maker total failure of the consideration for the notes sued upon may be shown under the general issue.—Perkins v. Brown, 115 Mich. 41.

¶ 545. Where plaintiff declares against two or more defendants as makers of a promissory note, which is signed with a collective or partnership name, omission of sworn denial admits not only the execution of the note in the abstract, but that it was executed by the parties declared against, and in the manner alleged, and saves necessity of proving partnership.—Pegg v. Bidleman, 5 Mich.

26; Lobdell v. Merchants' & Manufacturers' Bank of Detroit, 33 Mich. 408.

¶ 546. In a suit on an accepted draft the defendants may, if they see fit, waive all formal proof that the paper was filed with the justice before whom the suit originated; that the written acceptance was made by the drawees whose signatures purport to be attached, and that the parties in court as defendants compose the firm which is claimed to have accepted the draft, and whose signature purports to be attached to the acceptance; if they do waive such proof, they cannot, on the ground of its absence, claim an affirmance of the judgment granted in their favor below.—Peterson v. Hubbard, 28 Mich. 197.

§ 104. ——Evidence under the general issue.

Admissibility of evidence in general, see post § 113.

¶ 547. The defense that the one who sues a negotiable promissory note did not obtain the title or the right to sue before suit brought is admissible under the general issue.—Hovey v. Sebring, 24 Mich. 232; Reynolds v. Kent, 38 Mich. 246.

¶ 547a. In an action on a promissory note against two joint makers, one cannot show under the general issue without notice that he signed as surety only, and was released by an unauthorized extension of time to the principal debtor.—Rawlings v. Cole, 67 Mich. 431.

¶ 547b. Where the execution of a promissory note is denied on oath, the general issue in an action thereon will admit evidence tending to show that defendant made no such contract as was counted upon, and that he was fraudulently induced to sign the note when he thought he was signing something else.—Soper v. Peck, 51 Mich. 563.

¶ 548. The maker of a promissory note payable to bearer has a right to show, as against the plaintiff producing the note on trial, that the latter did not obtain the title, or the right by which he seeks to recover, until after the commencement of the suit; and this is a full defense, and may be shown under the general issue.—Hovey v. Sebring, 24 Mich. 232; Reynolds v. Kent, 38 Mich. 246.

¶ 549. Defendant gave a promissory note for two hundred dollars payable to the order of plaintiff, for certain shares of stock to be secured by plaintiff and turned over to defendant. Plaintiff indorsed this note to the bank and got the money. Later the time of payment was extended, and defendant made a new note running direct to the bank as payee, which plaintiff indorsed and had to pay, and for which he sued to recover of defendant. Defendant gave notice under the general issue that he would show that plaintiff never delivered the stock. Held, defendant was entitled under this notice to introduce evidence of the failure of consideration.—Green v. Ostrander, 160 Mich. 662.

¶ 550. In an action to recover on a promissory note, where the defendant pleaded the general issue with notice of special defense that the note was obtained by false and fraudulent representations relative to certain land which defendant was negotiating for and contracted to buy in connection with which the note was given, testimony offered by defendant after plaintiff rested to show the note was without consideration because given for a deed to the land which had not been delivered, held inadmissible under the pleadings and as showing that such defense had been litigated adversely to defendant in a former suit brought by him.—Bishop v. Dodge, 196 Mich. 231.

§ 105. ——Execution and validity of instrument.

Validity and legality of instrument in general, see ante § 9.

Want of authority to execute the paper as defense against bona fide holders, see ante § 84.

Sufficiency of pleading to put execution of instrument in issue, see also ante § 102.

Burden of proof as to execution, see post § 108.

Evidence as to execution of the instrument, see post § 117.

Necessity of sworn denial of execution to let in defense that note was ultra vires maker's power, see Corporations § 99.

Defense that notes by county treasurer are invalid for want of power without denial of execution under oath, see Counties § 56.

¶ 551. Proof of execution by a party not sued is unnecessary in suit against one of the makers of a joint and several promissory note.—Chandler v. Lawrence, 3 Mich. 261.

¶ 552. Omission to deny execution precludes defendant from showing that the note as declared on and produced was not as he executed it.—Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44.

¶ 553. C. C. Rule 79 dispensing with proof of execution of the instrument sued on unless its execution is denied on oath does not apply to an action begun in justice's court, where the declaration consisted of the common counts only, and on appeal a new declaration was filed with copy of note attached, but not served; for there is no opportunity to file the affidavit.—McMillen v. Beach, 38 Mich. 397.

¶ 554. Evidence to impeach the execution of a note is inadmissible if it has not been denied by affidavit attached to the plea.—Chicago & N. E. R. Co. v. Edson, 41 Mich. 673.

¶ 555. The omission to file an affidavit denying the execution of a note does not waive

defendant's right to show want of capacity to execute the note except for a particular consideration.—Kenton Ins. Co. v. McClellan, 43 Mich. 564.

¶ 556. Where two persons are sued on a note as partners, a denial, by one solely served, of execution by himself or by any one authorized by him, is at least an argumentative denial of execution by any partnership of which he was a member, and puts plaintiff to proof.—Haight v. Arnold, 48 Mich. 512.

¶ 557. Where several persons are sued jointly as makers of a promissory note, an affidavit by one of them that he has neither executed the note nor authorized anyone to execute it for him is sufficient to put the execution and validity of the note at issue, so far as he is concerned, even though his codefendants do not join in the affidavit.—Wren v. McLaren, 48 Mich. 197.

¶ 558. The execution of a partnership note must be proved where only one of the defendants appears, and after pleading, and in the course of the trial, files, with plaintiff's consent and the court's leave, a sufficient affidavit of its nonexecution, so far as he is concerned.—McRobert v. Crane, 49 Mich. 483.

¶ 559. Plaintiff declared in justice's court on the common counts in assumpsit and recovered a judgment, from which the defendant appealed, and on the trial at the circuit plaintiff offered a promissory note in evidence, purporting to be signed by the defendant, without offering to prove its execution. The justice's return was silent as to the note, nor did it appear that it was filed with the justice. Held, that proof of such execution was necessary.—Newton v. Principaal, 82 Mich. 271.

¶ 560. It is only in cases where the defendant has had an opportunity to deny the execution of a note under oath, and has failed to do so, that the plaintiff is not required to prove its execution.—Newton v. Principaal, 82 Mich. 271.

¶ 561. Where the payee in a note containing a power of attorney to confess judgment begins suit by declaration and annexes a copy of the note with a notice that it constitutes plaintiff's sole cause of action, the execution of the note need not be proved unless denied under oath.—Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 562. Under First Cir. Ct. Law Rule No. 79, where suit is brought upon a draft against the drawer and an indorser, and both defendants plead the general issue, without denying the execution of the indorsement, it is unnecessary for plaintiff to prove the genuineness of the indorser's signature, even as against the defendant drawer.—First Nat. Bank v. Union Cent. Life Ins. Co., 107 Mich. 543.

¶ 563. Defendant in an action to reco the purchase price of a promissory note c not claim that the note was not delive in view of the pleadings where he pleads general issue, and gives notice that he not purchase the note from plaintiff, received it for collection, and now holds as an interest in a judgment rendered in favor against the maker of the note.—Bri erhoff v. Peek, 114 Mich. 628.

¶ 564. Where the execution of a note not denied under oath, but is admitted, maker will be held to have executed it the manner and form purported by it.— sign v. Dunn, 181 Mich. 456.

§ 106. ——Consideration.

Want or failure of consideration as defe see ante §§ 22, 87.
Burden of proof and presumptions as to c sideration, see post §§ 109, 112.
Evidence as to consideration, see post §§ 124.
Jury questions as to consideration, see p § 131.

¶ 565. It seems that where the consid tion of a note is open to inquiry at all it is much in behalf of any one of the defenda as of all.—Freeman v. Ellison, 37 Mich.

¶ 566. Though no affidavit of nonexecut has been made, an indorser may show t he signed without consideration, and a the note's delivery.—Freeman v. Ellison, Mich. 459.

¶ 567. Failure of consideration may ways be shown in a suit on a contract; in an action on negotiable paper proof be made of the purpose for which it given, or that the purpose does not requ the enforcement of payment.—Maltz Fletcher, 52 Mich. 484.

¶ 568. In an action on a promissory against an indorser thereon the consid tion for the indorsement is a material q tion if plaintiff is bound by the equities isting between maker and indorser. An can hardly be immaterial if one of the p cipal questions in the case is whether h so bound or not.—Kelly v. Freedman, Mich. 321.

¶ 569. In an action on a promissory begun in a justice court, evidence that note was given as part of the purchase p of a machine which failed to work and th after the sale was rescinded and the defe ant refused to receive and retain the mach is admissible, as total failure of consid tion, under the general issue.—Keystone Co. v. Forsyth, 126 Mich. 98.

§ 107. ——Variance.

¶ 570. If it can be shown that paper s upon is not a promissory note where the laration treats it as such, and is not ada

to the case of any other special contract, the suit will fail.—Mattison v. Marks, 31 Mich. 421.

¶ 571. Where the declaration treats the paper sued upon as a promissory note, but it is shown not to be such, the variance is fatal where the declaration is not adapted to the case of any other special contract.—Mattison v. Marks, 31 Mich. 421.

¶ 572. An objection to the admission in evidence of the note sued upon for a variance from the copy appended to the declaration, in that it contained the words "secured by mortgage," which did not appear in the copy, was not well taken if accompanied by counsel's admission that he was not misled.—Howry v. Eppinger, 34 Mich. 29.

¶ 573. In assumpsit by the indorser of a draft against the makers, the plaintiff, though declaring as payee, has a right to show that as an indorser he had paid the draft after receiving notice of its dishonor.—McDonough v. Heyman, 38 Mich. 334.

¶ 574. One cannot recover under a declaration in which he claims as indorsee of a note bearing ten per cent interest, if the interest clause in the note sued on is invalid, for the note sued on would be different from the one indorsed to him.—Nelson v. Dutton, 51 Mich. 416.

¶ 575. In a suit against indorsers whose defense is fraud practiced in securing their indorsement, testimony which recognizes their liability and seeks to establish a discharge by matters ex post facto is inadmissible.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 576. Where a variance between the declaration and the proof as to the middle initial of the maker of a draft could not have prejudiced anyone, it will not be noticed.—McDonough v. Heyman, 38 Mich. 334.

¶ 577. "Trobridge" for "Trowbridge" is not a material variance in naming a defendant in a declaration on a promissory note.—Buhl v. Trowbridge, 42 Mich. 44.

§ 108. Burden of proof.

Instructions as to burden of proof, see post § 140.

Burden of proof on bank in establishing existence of fictitious payee, see Banking § 18.

Burden of proof in actions on negotiable instruments against estates, see Estates of Decedents ¶¶ 609-610.

General law as to burden of proof, see Evidence, II.

¶ 578. The omission of the maker of a note when sued thereon to deny its execution does not dispense with the necessity of plaintiff's proving his title through an alleged indorsement or assignment.—Spicer v. Smith, 23 Mich. 96; Hinkley v. Weatherwax, 35 Mich. 510.

¶ 579. While the unexplained possession of a note, indorsed in blank, is presumptive evidence of ownership and sufficient to warrant a recovery in a suit by the holder thereon, the introduction of evidence tending to show that the note belongs to an insurance company of which the holder is the secretary and treasurer, and ex officio the proper custodian of the note if it belongs to the company, will destroy such presumption and cast the burden upon the holder to show his ownership.—Barnes v. Peet, 77 Mich. 391.

¶ 580. An affidavit of nonexecution filed with the plea leaves the plaintiff the burden of showing that the paper was signed by the defendant as alleged in the declaration.—Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

¶ 581. Where defendant in an action on a bill of exchange, drawn by his agent, pleads the general issue, and files with it an affidavit denying the execution of the bill, the plaintiff has the burden of proving that it was drawn with competent authority.—New York Iron Mine v. Citizens' Bank, 44 Mich. 344.

¶ 582. Where plaintiff claims title to a promissory note through its alleged indorsement by the payees by third persons as their agents and attorneys, the burden of proof is upon him to prove their authority to make such indorsement.—Newton v. Principaal, 82 Mich. 271.

¶ 583. In an action against a partnership upon partnership paper, the burden of proof is upon defendant to show any fraud, lack of authority for its issue, or that the paper was not given for partnership purposes.—Stevens v. McLachlan, 120 Mich. 285.

¶ 584. A note imports consideration, and its execution being admitted, the burden is upon the defendant to show its invalidity.—Young v. Shepard's Estate, 124 Mich. 552.

¶ 585. The burden is on defendant to show that a promissory note given in settlement of an alleged embezzlement and other claims is not for the proper amount, and that he gave the note for that amount to avoid a charge of embezzlement of which he was guiltless.—Beach v. Chapoton, 124 Mich. 508.

¶ 586. The payee in a draft, who has received it on the credit of written authority given to the drawer to make drafts upon the drawee in amounts sufficient to enable the former to meet advances on grain or other produce consigned to the drawee need not show that the funds raised by it were used for making advances on grain, or other produce, to be consigned to the persons giving the authority.—Bissell v. Lewis, 4 Mich. 450.

§ 109. ——As to consideration.

Want or failure of consideration as a defense, see ante §§ 22, 87.

Evidence as to consideration, see post §§ 115, 124.

Jury questions as to consideration, see post § 131.

¶ 587. In a suit upon a promissory note made by the defendant in consideration of the plaintiff's forbearance to seize certain property on attachment against his debtor, the onus of proving that the debtor had at the time no interest in the property, and that therefore the note was without consideration, is upon the defendant.—Rood v. Jones, 1 D. 188.

¶ 588. When indorsed commercial paper is sued by indorsee as holder, proof of signatures of maker and indorser raises the presumption that the note is supported by a good consideration and that it was indorsed at its date, or at least before maturity and before delivery to the holder. But when evidence is introduced which shows a want of consideration, or that the indorsement was not made until after delivery to the holder, then the presumption is rebutted, and the burden of proof is still on plaintiff to show a consideration and indorsement before delivery.—Manistee National Bank v. Seymour, 64 Mich. 59.

¶ 589. In an action on a promissory note signed by a wife and endorsed by her husband, the introduction of the note makes a prima facie case, and plaintiff is not bound to prove such consideration as would bind the wife, the burden resting upon defendant to prove facts which would relieve her from liability.—National Lumberman's Bank v. Miller, 131 Mich. 564.

¶ 590. The burden of proof is on the defendant in the first instance to show want of consideration for a promissory note and the plaintiff is only required to prove consideration after evidence of want of consideration has been introduced.—Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 591. Where a promissory note has not been negotiated the promisor may show want of consideration and on doing so the burden of proving consideration would fall upon the promisee.—Cawthorpe v. Clark, 173 Mich. 267.

¶ 592. The defendant must show want of consideration for an instrument which imports consideration.—Hinckley v. McLaughlin, 182 Mich. 707.

§ 110. ——As to bona fide holding.

Evidence as to bona fide holding, see post §§ 119, 126.

Jury questions as to bona fides of purchaser, see post § 133.

Instructions as to bona fide holding, see post § 139.

General rules as to bona fide purchasers, ante, XIII.

Provisions as to burden of proof of bona f holding, see Comp. L. 1915, § 6100.

¶ 593. Whenever the consideration of gotiable paper is illegal between the origi parties, especially if in violation of a posit prohibition of statute, proof of such illeg ity throws upon the holder the burden proving that he got it bona fide, and g value for it.—Paton v. Coit, 5 Mich. 505.

¶ 594. Evidence which showed that consideration of a promissory note was sale of liquors in violation of the prohibit liquor law threw upon the plaintiff the b den of showing that he bought the note good faith, and before it fell due.—Paton Coit, 5 Mich. 505; Bottomley v. Goldsmi 36 Mich. 27.

¶ 595. Proof of execution and indorsem makes a prima facie case; but defe ant may then show the invalidity of the n in the hands of the payee without first pr ing that the holder had notice of the defec and the burden of proving that it was ceived from the indorser in good faith, value, and before maturity, then rests the plaintiff.—Conley v. Winsor, 41 Mi 253.

¶ 596. Evidence that a note was gi for another's debt is not enough to place the holder the burden of proving that paid value for it.—Chicago & N. E. R. v. Edson, 41 Mich. 673.

¶ 597. When evidence is introduced t shows a want of consideration, or that indorsement was not made until after del ery to the holder, then the presumptions to consideration and indorsement at or fore maturity and delivery to the holder rebutted; and the burden is on the hol to show that such were the facts.—Manis National Bank v. Seymour, 64 Mich. 59.

¶ 598. Where the fraudulent inception a note has been shown in an indorsee's tion against the maker, the burden is thro upon plaintiff to show that he or his vend was a bona fide purchaser for value.—M v. Kennedy, 68 Mich. 389.

¶ 599. Where in an action on a due which has been assigned by the payee plaintiff as collateral security, the mak gives evidence that it was without consider tion and that he did not know of its be assigned, plaintiff has the burden of sho ing that it was purchased before matur and without notice of facts which wou constitute a defense to it in the paye hands.—City Bank of Dowagiac v. Dill Mich. 549.

¶ 600. After proof by the maker that promissory note sued upon by an alleged nocent holder was fraudulently obtained

the payee by a prior transferee, the burden of proof is upon plaintiff to show that he is a bona fide holder for value.—Horrigan v. Wyman, 90 Mich. 121.

¶ 601. Where, in a suit by an indorsee upon a promissory note, the plaintiff produces the note with proof of protest, a defense that it was paid while in the hands of a prior indorsee is inadmissible, unless accompanied by evidence that plaintiff is not a bona fide holder of the paper, and upon this issue defendant has the burden of proof. —Little v. Mills, 98 Mich. 423.

¶ 602. Where, in a suit by an indorsee, it conclusively appears that the note sued upon was given without consideration, and that the transaction upon which it was based was contrary to public policy, the burden of proof is upon plaintiff to show that he is a bona fide holder, and that he purchased the note without knowledge of the illegal character of the transaction.—French v. Talbot Paving Co., 100 Mich. 443.

¶ 603. Where bonds sued upon are shown by defendant to have been illegal or void in the payee's hands, the burden is upon plaintiff to show that they were purchased in good faith before maturity, for a valuable consideration, and without notice of their original invalidity.—Grant Township v. Reno Township, 114 Mich. 41.

¶ 604. In an action upon partnership paper after fraud has been shown as a defense, the burden of proof is upon plaintiff to show that he took the paper in good faith and for a valuable consideration.—Stevens v. McLachlan, 120 Mich. 285.

¶ 605. The burden of proof is upon plaintiff to show that it was a bona fide holder, in an action against the receiver of an insolvent bank on a fraudulently certified check.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 606. In an action by the assignee of accepted drafts where it is shown that the drafts were obtained from the drawer by the original drawee through fraud, the burden of proof is upon the plaintiff to show that he was a bona fide holder.—Stouffer v. Fletcher, 146 Mich. 341.

¶ 607. Where there is strong evidence that a note was obtained from the maker through the fraud of the payee, a plaintiff holder, to be entitled to recover on same, has the burden of showing that either himself or a prior indorser was a bona fide purchaser of the same.—Merchants' Nat. Bank v. Wadsworth, 166 Mich. 528.

¶ 608. Evidence that a check was fraudulently obtained by the payee casts upon a subsequent holder the burden of affirmatively showing that, as a holder in due course under the conditions enumerated in § 54 of the Negotiable Instruments Act (Act 265, Pub. Acts of 1905, § 2725, How. St., 2nd Ed.), he acquired the instrument in good faith and for value.—People's State Bank v. Miller, 185 Mich. 565.

§ 111. ——As to presentment, demand, payment, protest and dishonor.

As to payment and discharge as defense, see ante §§ 24, 89.
Presentment, demand, dishonor, and protest generally, see ante VIII, IX, X.
Evidence as to, see post §§ 120, 127.
Jury questions as to, see post § 134.

¶ 609. The burden of proof in an action by the holder of a promissory note against an indorser rests upon such holder to show a compliance with the provisions of the Negotiable Instruments Act as to notice of dishonor, as the liability of the indorser rests solely upon compliance with such provisions. —First Nat. Bank of Manistee v. Star Watch Case Co., 187 Mich. 224.

¶ 610. Although the payee of a note who claims that demand and notice was waived by a subsequent promise of the indorser to pay the note, has the burden of proving that such promise was made with full knowledge of the facts, positive or direct evidence of knowledge is not necessary.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 611. In an action against an estate on promissory notes the burden of proof is on the estate to show payments made.—Taylor v. Taylor's Estate, 138 Mich. 658.

§ 112. Presumptions.

Presumption as to place of payment where no place of payment specified, see ante ¶ 64.
Presumption as to place of delivery of instrument, see ante ¶ 65.
Presumption as to right of one of several payees to indorse for the others, see ante ¶ 199.
Presumption as to joint liability of indorser and his principals, see ante ¶ 201.
Presumption of notice of protest, see also ante § 59.
Lapse of time as raising presumption that paper is dishonored, see also ante ¶ 397.
Possession of instrument as evidence of ownership and right to sue, see also ante ¶ 459.
General law as to presumptions, see Evidence, II.
Presumptive authority of attorney to collect note in his possession, see Attorneys § 24.
Presumptions and evidence as to alteration, see Alteration of Instruments §§ 12, 13.
Presumption as to consideration, see also Contracts § 139.
Presumption against party failing to testify or produce available evidence or witnesses, see Evidence §§ 63-65.
Presumption that paper issued by partner is partnership paper, see Partnership.

Presumption as to consideration, see Comp. L. 1915, § 6065.
Presumptions as to bona fide holding, see Comp. L. 1915, § 6100.

¶ 612. A charge for native wine or beer, sold in lawful quantities (Comp. L. 1871, § 2152), was not unlawful so as to taint a note given for it; and in a suit on a note given for liquor, if no facts were found to show that the liquor for which it was given belonged to the forbidden class, it could not be presumed that it did.—Brown v. McHugh, 36 Mich. 433.

¶ 613. A note was given by a debtor to an execution creditor to obtain a release from a levy, and was indorsed in the name of a firm by one of the partners. There was no showing that the firm received any consideration, or that one of the partners consented to the indorsement. Held, that it must be presumed that it was purely an accommodation indorsement, and that the creditor, who of course was not a bona fide holder, was privy to all the facts.—Heffron v. Hanaford, 40 Mich. 305.

¶ 614. A negotiable promissory note presumes consideration even though "for value received" is not contained in the instrument.—Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 615. The presumption of consideration for a promissory note when rebutted disappears as evidence in the case, unless upon consideration of the whole testimony on both sides the weight of evidence is equally balanced; then the presumption arising from the usual course of business in regard to commercial paper entitles plaintiff to recover.—Manistee National Bank v. Seymour, 64 Mich. 59.

¶ 616. The presumption arising from the existence of a promissory note, unless in the hands of a bona fide holder, may be overcome by credible testimony. Thus, a mortgage and a note were adjudged to be fabricated, and the bill to foreclose dismissed, on proof that the mortgagee was a grasping money-lender, unlikely to run risks, but the mortgage was for a large sum, on property of little value, contained no release of dower, and had been assigned, without any apparent consideration, to a nonresident brother of the mortgagee, in whose name the foreclosure suit was brought. Matteson v. Morris, 40 Mich. 52.

¶ 617. In the absence of anything to the contrary a note is presumed to have been made at the place where it bears date.—Finch v. Calkins, 183 Mich. 298.

¶ 618. An indorsee suing the indorser in justice's court is presumed to be the owner of the paper on which the suit is brought.—Wilson Sewing Machine Co. v. Spears, 50 Mich. 534.

¶ 619. The indorsement and delivery o negotiable instrument to another is presu tive evidence of his ownership, but this p sumption is not conclusive; it may be butted by showing that the title is still the original maker.—Reed v. McCready, Mich. 532.

¶ 620. Neglect to protest a note and g notice to an indorser is conclusively p sumed to injure him, and the contrary can be shown.—Whitten v. Wright, 34 Mich. Smith v. Long, 40 Mich. 555.

¶ 621. The presumption which exists favor of written instruments cannot be ov come except upon evidence from which an ference of duress, deception, misrepresen tion, substitution, or artifice is clearly ducible.—Mishawaka Woolen Mfg. Co. Stanton, 188 Mich. 237.

§ 113. Admissibility of evidence.

Evidence under the general issue, see a § 104.
Weight and sufficiency of evidence, see p § 122.
General law of evidence, see Evidence.
Evidence in actions on contracts genera see Contracts, X, B.
Judicial notice of Bohemian oats swin see Evidence ¶ 34.
Authority of party to make admissions bi ing on coparty, see Evidence § 406.
Incompetency of original party's declarati to charge bona fide holder as admissio see Evidence § 406.
Bank stamp on paper as evidence, see E dence § 502.
Evidence as to alteration, see Alteration Instruments §§ 12, 13.
Evidence as to part payment or new prom to toll limitations, see Limitations § 1
Evidence to impeach or corroborate w nesses, see Witnesses.

¶ 622. The indorser of a note for wh benefit it was discounted does not, in co quence of that fact, incur any other liabil than that of his indorsement; and proof that fact is, therefore, irrelevant in a s against him.—Newberry v. Trowbridge, Mich. 263.

¶ 623. Proof is irrelevant that a note renewal of which the one in suit was gi was purchased of the maker thereof by indorser for less than its face; as no s evidence could change the nature of indorser's contract, or excuse a failure take the necessary steps to charge him u it.—Newberry v. Trowbridge, 13 Mich. 26

¶ 624. In an action upon a promiss note it was held error to refuse to admit evidence a certain contract, and certain sp fied facts in connection with it, if there w anything in them to materially change nature of the obligation created by the n and the effect of the other evidence, or wh

would constitute a defense to the action or any part of it.—Preston v. Whitney, 23 Mich. 260.

¶ 625. When the defense of fraudulent alteration of a promissory note as to rate of interest is set up for the first time on a second trial, it is competent to read the affidavit of the defendant upon which a former default was opened, and the plea then introduced, as tending to show that the new defense was an afterthought and fictitious.—Tupper v. Kilduff, 26 Mich. 394.

¶ 626. In an action upon a negotiable note evidence cannot be received to show that the maker, at an interview with the payee, when interest on the note was arranged, but before the note fell due, made no objection to the payment of the note; nor can any inference against the good faith of the defense be drawn from the mere fact of payment of interest before the principal matured.—Buck v. First Nat. Bank, 27 Mich. 293.

¶ 627. H. made a note to R. and W. indorsed it. H. made a contract with R., and what he earned on it was to be turned in on the note. When he had done enough to pay the note, but before he had finished the job, he failed, stopped work and went into bankruptcy. R. thereupon sued W. on the note. Held, that the bankruptcy proceedings were immaterial to the suit.—Roberts v. Wilkinson, 34 Mich. 129.

¶ 628. An accommodation acceptor of paper may properly seek information from the agent or manager of a bank to which the paper is to be paid as to the condition of the person whom both understand to be really responsible on it. And in a suit by the drawee against the acceptor the latter may show his condition and the agent's statements or admissions.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 629. The agent of a manufacturing corporation was one of a firm organized for selling its goods. The firm owed money, and the agent furnished it from funds of the corporation, taking as security the note of one of the partners, on which the maker's father was surety. The note was payable to the corporation and was afterwards taken up and another given. In a suit on the last note defendants claimed that it had never been intended that it should be delivered to the payee. Held proper to refuse to allow defendants to show that certain members of the firm had, with others, projected a partnership for selling the plaintiff's goods some time before the note was given; or to show what funds were in the firm's hands and that the agent had charge of and used them; or what the surety's intention was, when he signed the first note, as to its delivery; or what property belonging to the firm the corporation had taken possession of on finding that their agent was short in his accounts.—McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426.

¶ 630. Proceedings taken to establish a lien upon partnership property to satisfy a debt evidenced by their note are immaterial in an action on the note if the lien has not been enforced or anything realized from it.—Kerrick v. Stevens, 58 Mich. 297.

¶ 631. In an action upon a note given during infancy the question whether the maker was or was not emancipated by his father at the time of the note's execution cannot affect his liability, and it is irrelevant.—Tyler v. Gallop's Estate, 68 Mich. 185.

¶ 632. In suit upon an order drawn on defendant in plaintiff's favor it is not error to allow plaintiff to testify that he never looked to the drawer for pay after presenting the order to defendant.—Mitts v. McMorran, 85 Mich. 94.

¶ 633. A will whereby testatrix left a legacy of $2,000 to her mother is inadmissible in an action on notes alleged to have been given for the purchase of her mother's notes, since such will throws no light on the question.—Crampton v. Newton's Estate, 132 Mich. 149.

¶ 634. In an action by a bank against the indorser of a note, based on an alleged new promise to pay, it was competent for the officers of the bank who made an arrangement with such indorser for the filing of its claim against the maker's estate, to testify that they relied upon the indorser's promise to pay and in reliance thereon, presented the claim against the estate.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 634a. Where suit is brought in assumpsit with notice that a certain note made by defendant corporation will be introduced in evidence and defendant omits under oath to deny the execution of the note, it is admissible in evidence, and establishes a prima facie case.—Barnes v. Spencer & Barnes Co., 162 Mich. 509.

¶ 635. In an action on a promissory note where plaintiff claimed that an agreement was made for the exchange of such note for two smaller notes, and that such agreement was invalid because made on Sunday, and that he returned such smaller notes to the defendants, and defendants claimed that the agreement was made after midnight, and denied that such smaller notes were returned, but claimed that they were subsequently paid, held that the wife of one of the defendants was properly permitted to testify where the money came from that was used to pay such notes, as bearing upon the probabilities.—Prussia v. Bailey, 193 Mich. 77.

¶ 636. In an action on a promissory note where plaintiff claimed that an agreement

was made for the exchange of such note for two smaller notes, and that such agreement was invalid because made on Sunday, and that he returned such smaller notes to the defendants, and defendants claimed that the agreement was made after midnight, and denied that such smaller notes were returned, but claimed that they were subsequently paid, held that evidence as to where plaintiff was on the Monday following the Sunday on which plaintiff claimed the agreement was made was properly excluded as immaterial.—Prussia v. Bailey, 193 Mich. 77.

¶ 637. In an action on a promissory note it was held competent to call defendant to rebut one of his own witnesses by producing his account book, and identifying as in his own handwriting an entry showing the date of a certain note payable to the same person to be earlier than that of the note in suit, the purpose being to show that the latter was not the note concerning which the witness had testified.—Blackwood v. Brown, 32 Mich. 104.

¶ 638. Where indorsers, being sued by a bank, alleged that their indorsements were secured by the fraudulent representations of plaintiff's president as to the solvency of the maker of the notes indorsed by them, evidence that but for this communication defendants would have taken steps to collect the debt from the maker's other property was irrelevant and prejudicial.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

§ 114. ——As to ownership of instrument and right to sue.

Possession of instrument as evidence of plaintiff's right to sue on it, see also ante § 90.
Cancelled check in payment as evidence of title to transferred note, see Evidence ¶ 548.
Admissibility of payee's declarations in derogation of title to bill or note, see also Evidence ¶ 1988.
Evidence of transfer of note by way of gift, see also Gifts §§ 31-33.

¶ 639. The joint ownership by plaintiffs of a negotiable promissory note indorsed in blank and put in evidence without objection may be shown by testimony that they bought it from the payee.—Cilley v. Van Patten, 68 Mich. 80.

¶ 640. In a suit on a note by an indorsee it is irrelevant that the plaintiff had put in a claim against the estate of the indorser.—Hillman v. Schwenk, 68 Mich. 293.

§ 115. ——As to consideration.

Jury questions as to consideration, see post § 131.
Parol evidence as to true consideration, see Evidence § 161.
Issues and proof as to consideration, see ante § 106.
Weight and sufficiency of evidence as to consideration, see post § 124.

¶ 641. In an action on a negotiable promissory note evidence of what the person of whom the plaintiff bought the note paid for it, he being a bona fide holder before maturity, is inadmissible.—Hunter v. Parsons, 22 Mich. 96.

¶ 642. Where the evidence is direct, clear and uncontradicted that the plaintiff is a bona fide purchaser of a note sued upon, the court, trying the case without a jury, may refuse to permit the defendant to inquire into or contest the consideration.—Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44.

¶ 643. In an action upon a promissory note given in satisfaction of a judgment upon an original subscription to the capital stock of a corporation, and defended for want of consideration, evidence as to the misfortunes or bad management of the corporation is irrelevant.—Gould v. Vaughan, 30 Mich. 376.

¶ 644. Where plaintiff is presumptively a bona fide holder, and before any evidence has been introduced to impeach his position as such, it is not error to exclude evidence that the note sued upon was obtained without consideration and by false inducements and fraudulent representations.—Wright v. Irwin, 33 Mich. 32.

¶ 645. Parol evidence is admissible as to the consideration of an indorsement, or to show that it was obtained by fraud or merely to facilitate collection, or had been fraudulently perverted.—Ortmann v. Canadian Bank of Commerce, 39 Mich. 518.

¶ 646. Parol evidence is inadmissible to vary a note so as to show a different consideration from that expressed on its face.—Johnson v. Sutherland, 39 Mich. 579.

¶ 647. Where the execution of a corporate note is admitted, evidence in defense to show that it was given to satisfy a claim against another is inadmissible to show want of consideration; it would only show that the consideration was another's liability, and defendant's right to assume the liability cannot be questioned if execution has been admitted.—Chicago & N. E. R. Co. v. Edson, 41 Mich. 678.

¶ 648. Where a written agreement is shown as consideration for a note, but not referring to it or indicating what the entire dealings were, evidence of additional consideration is admissible.—Taylor v. Dansby, 42 Mich. 82.

¶ 649. B. and F. were litigating in equity the ownership of certain logs, and B. filed a separate bill to restrain F. from interfering

with them. In this latter proceeding a receiver was appointed by consent of the parties, and he, being authorized to sell the logs, delivered them to F. and took his notes therefor, upon which he afterwards brought suit. The bill in the last-mentioned suit was dismissed, and the receiver thus became a mere bailee for the party actually entitled to the logs. Held, that in the suit by the receiver on the notes F. had a right to show that it was understood when they were given that they were to be paid only if the logs should be adjudged not to belong to him, and that as the logs were in fact his, the notes were without consideration.—Maltz v. Fletcher, 52 Mich. 484.

¶ 650. Where a deed had been given in settlement of a debt, and notes were also given for an alleged balance, the makers resisted suit on the notes on the ground that as the deed covered the debt they were without consideration. Held, that they could put the deed in evidence as an element bearing on the consideration.—Duflo v. Juif, 63 Mich. 513.

¶ 651. In an action on a note, where the sole defense is an entire failure of consideration, evidence of false representations in sales to other parties similar to those upon which the note in suit was obtained are inadmissible to establish a defense that the goods were not as represented and the other promises were false.—Altman v. Fowler, 70 Mich. 57.

¶ 652. Notwithstanding the evidence is very strong on the issue, it is competent for plaintiff to testify whether an alleged settlement with defendant was final for which the note in suit was given, that point being one on which defendant has raised a dispute and has testified.—Eastman v. Cleaver, 72 Mich. 167.

¶ 653. In a suit upon a note the defendant may introduce in evidence the bond received by him as a part of the transaction in which the note was given, the two papers being construed together as showing the true nature of the contract.—Goodrich v. McDonald, 77 Mich. 486.

¶ 654. The contract containing a guaranty of a stallion and evidence of the breach thereof, in a suit upon certain notes given in payment for such animal, is rightly admitted, where there is evidence to show that the plaintiffs, indorsees of such notes, were not bona fide purchasers.—Carey v. Nissle, 145 Mich. 383.

¶ 655. In an action on a promissory note evidence as to the existence of a contemporaneous indebtedness of the maker to the payee, for which the note might have been given and probably was given, is admissible.—Stretch v. Stretch, 191 Mich. 416.

§ 116. ——As to fraud, duress or mistake.

Jury questions as to fraud, duress and mistake, see post § 132.

Cross-examination as to notice or fraud, see Examination of Witnesses § 53.

¶ 656. In an action against copartners upon a promissory note signed with the firm name, the plaintiff simply showed the existence of the firm and who composed it; the making of the note by one of the firm in the firm name; the indorsement by the payee over to the plaintiff, the ownership by the plaintiff and the amounts due on it. Held, that it could not be assumed that this conclusively established the plaintiff's cause of action to the exclusion of evidence tending to show that the note was fraudulent in its inception as against the copartnership, and that the payee not only knew this, but was a party to the fraud.—Carrier v. Cameron, 31 Mich. 373.

¶ 657. Plaintiff having been shown not to be a bona fide holder, it was error to exclude evidence that the only inducement for giving the note sued on was an untrue statement of fact.—Wright v. Irwin, 33 Mich. 32.

¶ 658. Where, in an action upon a note, the defense of fraud is raised, and evidence is introduced showing that other notes were obtained by the same parties by a similar fraud, and that early in 1886 the fraud was talked of in the community, and that plaintiff, who bought the note of the payee, must have known of it, plaintiff can show by one who bought similar notes that the fraud was not known until the summer of 1886.—Mace v. Kennedy, 68 Mich. 389.

¶ 659. In an action upon a note given for "Bohemian oats" defendant set up the defenses of fraud and failure of consideration. Held, that evidence tending to show that defendant, after giving the note, had taken steps to join a fraudulent association similar to that to which the payee of the note belonged, was immaterial and inadmissible.—Sutton v. Beckwith, 68 Mich. 303.

¶ 660. Where, in an action upon a promissory note given by the grantee in a quit-claim deed in part consideration therefor, the defense interposed is want of consideration in that the grantor had no title to convey, but that an attorney represented to defendant that there was an outstanding title, evidence by such attorney that no representation was made as to the nature of the title at the time the deed was given is admissible to show that the grantor practiced no deceit.—Walton v. Mason, 109 Mich. 486.

¶ 661. Where, in an action upon a promissory note brought by a transferee thereof, there is proof of fraud in the inception of the instrument, the burden of showing a bona fide purchase is upon plaintiff; but if plaintiff, at the outset, makes a prima facie

case of bona fide holding, it is not error to exclude evidence of such fraud until such prima facie case has been attacked by evidence raising a question of fact in relation thereto.—Drovers' Nat. Bank v. Blue, 110 Mich. 31.

¶ 662. In an action on a promissory note brought by an indorsee, it is within the court's discretion to exclude evidence of fraud until the plaintiff's prima facie proof of bona fide ownership is contradicted by sufficient testimony to raise a question for the jury.—Shaw, Kendall & Co. v. Brown, 128 Mich. 573.

¶ 663. In an action on promissory notes where defendants gave notice of fraud in the inception of the notes, and plaintiff gave evidence of bona fides, it was incumbent upon defendant to show some evidence of mala fides before introducing evidence of the fraud.—Fredonia Nat. Bank v. Tommel, 131 Mich. 674.

¶ 664. It is improper to receive in evidence in an action on a promissory note, testimony of other alleged fraudulent dealings of plaintiff not connected with the transaction in issue.—Smith v. Nixon, 145 Mich. 593.

¶ 665. Parol evidence that defendant's signature to the note in suit was obtained after the note's execution and delivery by the payee's request and on his promise that defendant should not be held thereon, and that his signature was only desired to aid in securing prompt payment by the real maker, who knew nothing of this transaction, is not admissible to show fraud, or that the note was delivered conditionally or for a specific purpose. But in an action by the original payee it is admissible to show that there was no consideration for the undertaking.—Kulenkamp v. Groff, 71 Mich. 675.

§ 117. ——As to execution of instrument and authority to make or transfer.

Evidence of making of contract of which notes are part, see also Contracts § 312.
Secondary evidence of note sued on without notice to produce, see Evidence § 146.
Evidence to rebut existence of note claimed to have been last in possession of decedent, see Evidence ¶ 439.

¶ 666. In an action on a note given in consideration of an agreement to secure the respondent in bastardy proceedings from damages arising from the complaint, proof that the injured woman agreed to be satisfied with the arrangement made was no more than proof of its execution, and was held admissible.—Taylor v. Dansby, 42 Mich. 82.

¶ 667. In an action under Comp. L. 1897, §§ 10183, 10184, How. St., 2nd Ed., §§ 12828, 12829, for money loaned evidenced by a promissory note which had been lost, evidence was properly admitted to show t transaction on which the note was based tending to prove that the note had be given.—Sick v. Schug, 179 Mich. 578.

¶ 668. A corporation, sued on renew notes given to take up individual obligatio can show that it formally repudiated t notes when they came to its knowledge. McLellan v. Detroit File Works, 56 Mic 579.

§ 118. ——Admissibility of instrument a evidence to explain or vary.

Admissibility of altered note in evidence, s Evidence § 495.
Admissibility of bill or note in action common counts, see Assumpsit § 61.
Foundation proofs of genuineness and exec tion to admit paper in evidence, see E dence § 515 et seq.
Admissibility of note where prima facie ou lawed, see also Limitations ¶ 415.
Admissibility of bills and notes in prosec tions for crime relating to them, see I dictment § 283.
Parol evidence to vary, contract or expla paper, see Evidence, V.
Indorsement as excluding evidence of pri parol agreements, see Evidence, V.
Parol evidence that note or bill in uncon tional terms was conditionally operati see Evidence § 157.
Parol to explain or contradict indorsemer of payment, see Evidence § 190.
Parol evidence to show rights and relatio of parties among themselves, see E dence § 201.
Parol to show real nature of contract ma by irregular indorsement, see Eviden § 181.
Parol evidence as to character, capacity a relations of parties on commercial pap see also Evidence §§ 181, 182.
Evidence in rebuttal of evidence as to re tionship of person signing under make name, see also Evidence ¶ 441.
Evidence as to agreement changing order indorsers' liability, see Comp. L. 19 § 6109.

¶ 669. Under Circuit Court Rule 79, promissory note, a copy of which was tached to and served with the declaratio may be read in evidence under the comm counts, without proof of the signature, whe its execution is not denied on oath.—Hoa v. Little, 7 Mich. 468.

¶ 670. Where a draft declared upon justice's court has not been filed, and proof of the signature has been given, it error to admit it in evidence against obj tion.—Colbath v. Jones, 28 Mich. 280.

¶ 671. A promissory note made payable C. T. Allen, cashier, or order, indicates th it was made to him not as an individual, b as a bank officer, and that it was a contra with the bank; and in a suit upon it by t

bank no indorsement by such cashier is necessary to the admission of the note in evidence.—Garton v. Union City Nat. Bank, 34 Mich. 279.

¶ 672. When payees made defendant have indorsed in blank, and have failed to deny execution, objection to introduction of note in evidence because indorsements are not proved will not avail; payee's indorsement is thereby admitted, and subsequent indorsements need not be proved.—Howry v. Eppinger, 34 Mich. 29.

¶ 673. A note is admissible in evidence under the money counts, under Comp. L. 1871, § 5777, How. St. § 7346, when a copy is filed and served with the declaration, although the action on the note, on its face, appears to be barred by the statute of limitations.—Michael v. Tuttle, 37 Mich. 502.

¶ 674. As between the original parties to a note, parol evidence is admissible to show that the maker, who is signing the note added "Agt." to his name, executed the note in a representative capacity, and that the payee so understood.—Keidan v. Winegar, 95 Mich. 430.

¶ 675. The maker of a promissory note, upon its delivery to him for a temporary purpose, cannot, by marking it "Paid" and retaining it upon the claim that he is entitled to a credit equivalent to the balance due thereon, destroy the character of the note as an existing obligation or as evidence of the indebtedness, but the same will be admissible upon explanation being made of its condition.—Liesemer v. Burg, 106 Mich. 124.

¶ 676. Parol evidence is admissible to show that indorsers whose indorsements are successive were accommodation indorsers, and were, by agreement among themselves, cosureties, and so liable to contribution.—Farwell v. Ensign, 66 Mich. 600.

¶ 677. A joint maker of a note cannot show a parol agreement limiting his liability to that of a mere indorser entitled to notice of nonpayment.—Aultman & Taylor Co. v. Gorham, 87 Mich. 233.

¶ 678. Whether a written contract of sale, executed some days before, in accordance with the terms of which the notes in suit were given, could properly be examined by the court for the purpose of determining the character of the transaction as bearing upon the negotiability of the notes in case the recitals in the notes had left the matter in doubt, quære.—Choate v. Stevens, 116 Mich. 28.

¶ 679. The real payees of a negotiable note have the right to transfer by indorsement; and if the name of another person who never had any interest in the note appears thereon as a payee, evidence aliunde is admissible to show that he was not a payee, and thus the indorsee's title will be supported.—Pease v. Dwight, 6 How. (U. S.) 190, 12 L. ed. 399.

§ 119. ——As to bona fide holding.

What constitutes bona fide holding, see ante XIII, A.
Materiality of motives of purchaser, see also ante ¶ 393.
Burden of proof as to bona fide holding, see ante § 110.
Weight and sufficiency of evidence as to bona fide holding, see post § 126.
Jury questions as to bona fides of purchaser, see post § 133.
Instructions as to bona fide holding, see post § 139.
Res gestæ showing knowledge or notice, see also Evidence § 451.
Evidence and proof of good faith and value in transfer of bonds, see also Municipal Bonds § 16.
Cross-examination as to notice, see Examination of Witnesses § 53.

¶ 680. Where it appears that one who claimed to be the bona fide holder of promissory notes had, before buying them, consulted an attorney on the street as to being able to collect them, evidence of the value of such advice is inadmissible, as being too remote to support an inference that the purchaser of the notes had contemplated litigation.—Tupper v. Kilduff, 26 Mich. 394.

¶ 681. In an action by an indorsee if the defendant alleges the note to have been fraudulent and that the plaintiff knew it, and shows that other notes were fraudulently obtained and sold to third parties before maturity. The plaintiff cannot show, on cross-examination, that such purchasers were reputable citizens.—Mace v. Kennedy, 68 Mich. 389.

¶ 682. Where indorsers defend on the ground that their indorsements were secured by the fraudulent representations of the president of plaintiff bank, evidence that another banker told such president that the maker of the notes was in bad condition and would soon fail is inadmissible to show notice to him when not shown to have occurred before defendants took the last of the notes in suit.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 683. In an action on a note given by one partner payable to himself and transferred after maturity and a few days prior to the dissolution of the partnership to the plaintiff, where the bona fide character of the plaintiff's purchase of the note is challenged by the other partner, who attacks it as without consideration and as fraudulent it is competent to inquire of plaintiff on cross-examination as bearing upon the question of whether he in fact held the note at

the time he had paid the other partner certain sums of money in excess of the amount due on the note, and upon the further question of whether it was a bona fide note and believed by him to be such, his conduct toward the other partner being inconsistent with his holding a long past due note against him.—Carpenter v. Greenop, 84 Mich. 49.

¶ 684. Circumstances of suspicion, or even gross negligence, are merely admissible as evidence tending to show mala fides on the part of the purchaser of a promissory note, but do not of themselves preclude him from recovery.—Hakes v. Thayer, 165 Mich. 476.

¶ 685. It was competent to show the knowledge of plaintiff's officers as to the pecuniary standing, methods, and dealings of a bank and its executive officer, which issued a fraudulently certified check, in an action against the receiver of such bank, upon such check, and to show the volume of similar business done, the terms upon which it was done, whether transactions were ordinary or usual in their character, and to show that the business done with such executive officer was not communicated to or known by plaintiff's directors; where the crucial question in such action was whether such check was purchased upon an honest belief of the validity of the certification, since such testimony naturally raised doubt of such belief.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 686. Evidence tending to show that printed official statements of the bank which fraudulently certified a check were brought to the knowledge of plaintiff's officers, that such statements contained an item of only $10,000 of certified checks, and that plaintiff's officers must have known that it held a much greater amount of such checks at the time, was admissible, where in an action upon such fraudulently certified check, the question of plaintiff's good faith in purchasing such check was at issue.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 687. Where a bank in seeking to show that it gave value for a check which had been fraudulently obtained by the payee, in order to show the latter's indebtedness to it, introduced drafts and other checks which had been "kited" by the payee, the drawer may show that such paper represents illegal transactions.—People's State Bank v. Miller, 185 Mich. 565.

§ 120. ——As to presentment, demand, protest and dishonor.

Weight and sufficiency of evidence, see post § 127.

Jury questions as to presentment, demand, protest and notice of dishonor, see post § 134.

Conclusion of notary as witness that note was dishonored, see Evidence ¶ 1273.

¶ 688. Where an indorser sued on a n or bill does not annex to his plea an affids denying receipt of notice of nonpayment notary's certificate under seal is evidence such notice.—Fish v. First Nat. Bank Detroit, 42 Mich. 203; First Nat. Bank Negaunee v. Freeman, 47 Mich. 408.

¶ 689. Evidence of a notary who made a certificate of protest of a pron sory note, that, while he does not recol mailing notice of dishonor to the indor he has no doubt, from the fact that it his habit to mail such notice upon protest a note, that he did so upon the occasion question, as recited in his certificate, is c petent as tending to show notice of dishor —Martin v. Smith, 108 Mich. 278.

¶ 690. A certificate of protest made dated more than six months after the sentment is nevertheless prima facie dence of the facts therein stated.—Un Nat. Bank v. Williams Milling Co., 117 M 535.

¶ 691. Testimony as to the nonreceipt notice of dishonor of a promissory note an indorser is immaterial in an action such note against such indorser where properly executed certificate of the not showing such mailing is introduced in dence.—First Nat. Bank of Manistee v. S Watch Case Co., 187 Mich. 224.

¶ 691a. Where a disinterested witness notary public, testifies in an action aga an indorser upon a promissory note notice of dishonor was properly mailed, timony of the nonreceipt of such notic immaterial.—First Nat. Bank of Maniste Star Watch Case Co., 187 Mich. 224.

§ 121. ——As to payment or discharge.

Weight and sufficiency of evidence as payment and discharge, see post §

Jury questions as to payment and discha see post § 135.

Parol evidence as to time, manner or det of payment, see Evidence §§ 176, 177.

¶ 692. In a suit upon a promissory which the plaintiff in interest had purcha at a receiver's sale, plaintiff being enti to whatever is due on it, evidence on part of defendant to show what was st at the time of the sale to be due on the is not admissible when not offered in nection with proof of some payment m to the receiver, and for the purpose of sh ing such payment.—Newberry v. Tr bridge, 13 Mich. 263.

¶ 693. In an action on a promissory the mere fact that T. has sent his check A. for the difference between the amo due to himself as paid on A.'s note, and own indebtedness to A., does not show ei payment or settlement of such amount, it cannot be shown by A.—Tredway v. tisdel, 86 Mich. 82.

¶ 694. In an action upon a promissory note defended by an accommodation maker on the ground that the note had been altered, it is error to allow plaintiff, the payee, to be cross-examined by defendant as to his knowledge about the maker's becoming insolvent after the note was given, and about the maker's conveying property to him; where there was no issue of payment.—Weidman v. Symes, 116 Mich. 619.

¶ 695. In an action against several joint obligors on a note, proceedings before commissioners on the allowance of a claim against the estate of a deceased obligor for his pro rata liability under the note, is admissible to show what portion of the joint obligation had been paid by decedent's estate.—McKinley v. Small, 178 Mich. 555.

¶ 696. One seeking to enforce notes growing out of several successive transactions in one of which the defendants claim that some of the notes in suit were satisfied should be allowed to cross-examine the defendants fully pertaining to the details of the alleged settlement.—Port Huron Engine & Thresher Co. v. Bloom, 183 Mich. 180.

¶ 697. Where indorsers, being sued by a bank, alleged that their indorsements were secured by the fraudulent representations of plaintiff's president as to the solvency of the maker of the notes indorsed by them, evidence to show payment, that the president, after mortgages had been executed to him by the maker in trust to pay the maker's debts, told defendants that the mortgages covered enough property to pay all the debts, and that defendants need not fear about their liability was irrelevant and extremely prejudicial.—Alpena National Bank v. Greenbaum, 80 Mich. 1.

§ 122. Weight and sufficiency of evidence.

Sufficiency of evidence of fraud in procuring execution of notes, see Fraud § 50.

¶ 698. Proof of any one or more of the legal conditions necessary to charge an indorser has no tendency whatever to prove a compliance with the rest.—Cicotte v. Morse, 8 Mich. 424.

¶ 699. A mere inference that a note sued on is identical with a note referred to by a witness cannot support a judgment.—Nelson v. Dutton, 51 Mich. 416.

¶ 700. In an action by a bank against indorsers on a note, a prima facie case was made by proving execution and indorsement of the note in suit, and thereupon the burden was upon the indorsers to show that the first note was not protested, and that they were discharged as indorsers thereof, and failing to do so, the assumption was that when the first renewal note was given, they were still liable on the first note.—Citizens Commercial & Sav. Bank v. Platt, 135 Mich. 267.

¶ 701. Where the evidence of a justice, before whom an action on a note was tried, warrants the conclusion that the note was produced, and filed, and canceled by the judgment on the return day, it is sufficient to support a judgment without other proof of execution, and whether complainant appeared or not, where it is not shown that any plea was filed nor any denial of the execution of the note under oath.—O'Donnell v. Wade, 151 Mich. 103.

¶ 702. In an action upon a promissory note, made according to the laws of Ontario and payable in such province, a husband who was then residing in the province being the maker and his wife the indorser, a prima facie case against the wife is established by proof of the note and her signature, there being no disability by coverture in such province.—Millar v. Hilton, 189 Mich. 635.

¶ 703. In an action against the drawer of a check dishonored on account of failure of the bank, evidence that the drawer knew the bank was not strong is not sufficient to raise an inference or warrant an instruction implying positive fraud on the part of the drawer so as to enable the plaintiff to recover, notwithstanding improper presentation and lack of notice of dishonor.—Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687.

¶ 704. In an action upon a promissory note for $100 to the defense that it was void under the prohibitory liquor law is not sustained as matter of law by proof that the payee was a grocer and four dollars of it was for liquor got at his store.—Brown v. McHugh, 36 Mich. 433.

¶ 705. The defense that a note was void under the prohibitory liquor law was not made out by a finding merely that part of its consideration was intoxicating liquors.—Brown v. McHugh, 36 Mich. 433.

¶ 706. Where a copy of a promissory note and its indorsement is served with the declaration, and the note and indorsement are read in evidence without objection, and no evidence is given tending to disprove the indorsement, any further proof of the indorsement is unnecessary.—Thatcher v. West River Nat. Bank of Jamaica, Vermont, 19 Mich. 196.

¶ 707. An admission by a subsequent indorser of a note that he signed under an agreement to become liable as cosurety is not established by evidence merely that he told the holder, after maturity, that he would see the prior indorser, and arrange so that the latter and himself would pay the note.—Harrah v. Doherty, 111 Mich. 175.

¶ 708. In assumpsit by money counts with notice of a promissory note to a corporation, where the declaration does not set out an indorsement to the plaintiff and plea is of general issue and on trial the plaintiff intro-

duces the note with the indorsement of the original payee, by one as receiver, without proof of the receiver's authority to indorse, the judgment should be for the defendant.—St. Johns Table Co. v. Brown, 126 Mich. 592.

¶ 709. Recognition of a debt does not establish a right of action upon an unauthorized note, though it might strengthen evidence otherwise given of ratification.—Carleton v. Jenness, 42 Mich. 110.

¶ 710. The addition of the word "surety" to the signature of one of the makers of a joint and several note is some evidence of the relations of the makers to each other.—Ensign v. Dunn, 181 Mich. 456.

§ 123. ——As to ownership of instrument and right to sue upon it.

Admissibility of evidence as to ownership of instrument and right to sue, see ante § 114.

Right to sue negotiable paper generally, see ante § 90.

Jury questions as to ownership of instrument and right to sue, see post § 130.

Possession of promissory note by payee as prima facie evidence of delivery, see Execution of Instruments ¶ 211.

¶ 711. Where, upon the trial, the plaintiff produces the promissory note sued on, it would ordinarily raise the presumption that the state of facts authorizing him to sue on it in his own name existed when the suit began; but the defendant may rebut the presumption by evidence to the contrary, and defeat the action.—Hovey v. Sebring, 24 Mich. 232.

¶ 712. Where suit is brought upon assigned paper the testimony of one of the plaintiffs that they owned the paper sued upon, when considered in connection with his further statement that such ownership was derived from the original party thereto, through its attorney, the person whose name was signed to the aforesaid assignment, is construed as no more than the inference of the witness as to the effect of the written form of assignment, and as adding nothing to the proof of ownership afforded by that writing.—Hinkley v. Weatherwax, 35 Mich. 510.

¶ 713. Title to a promissory note by equitable assignment is sufficiently made out in an action thereon in justice's court against the maker, if it appears that plaintiffs are the successors to the firm to which it was made payable; and proof of indorsement is needless.—Gray v. Wilcox, 56 Mich. 58.

¶ 714. Ownership of a note in plaintiff is not fully established in assumpsit, where the note was made payable "to the F. N. Bank of B., Idaho, in favor of" plaintiff or order, and was indorsed with plaintiff's name, followed by an indorsement to the order of C. E. Bank "for collection, for account of F. N. Bank," and signed "John Huntoon, Cashier," and where a line is drawn through the words between the indorsed name of plaintiff and that of "John Huntoon"; and where there was no direct evidence to establish that "John Huntoon" was the cashier of either bank.—Pinkham v. Cockell, 77 Mich. 265.

¶ 715. Possession of a promissory note sued on, by a plaintiff, and its production by him upon the trial, are presumptive evidence of the plaintiff's title or his right to sue, and that such right existed when the suit was commenced, and the plaintiff need not be the real or beneficial owner, to entitle him to recovery. The maker of a note has the right to rebut such presumption and show that the plaintiff has no title, or that he did not acquire title until after the commencement of the suit, and thus defeat recovery thereon in such action. Accordingly a plaintiff who produces acceptances which belong to a bank and which were duly indorsed by an authorized agent of the bank, at a trial, establishes the fact of ownership.—Hogan v. Dreifus, 121 Mich. 453.

¶ 716. An indorsement on a note by defendant maker of payments of interest by plaintiff holder, coupled with testimony of defendant that said indorsements were entered as the payments were made, establishes a prima facie case of ownership by plaintiff, entitling him to recover under Act No. 265, Pub. Acts 1905, §§ 18, 53, 61.—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benevolent Ass'n, 166 Mich. 504.

¶ 717. In a suit on a note, plaintiff put in evidence a deposition of a Canadian advocate setting out the Canadian law and stating that thereunder one Ruiter, as universal legatee, was entitled to administer and had authority to indorse and deliver said note to plaintiff. Held, the proof was sufficient that Ruiter owned the note.—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benevolent Ass'n, 166 Mich. 504.

§ 124. ——As to consideration.

Burden of proof and presumptions as to consideration, see ante §§ 109, 112.

Admissibility of evidence as to consideration, see ante § 115.

Jury questions as to consideration, see post § 131.

¶ 718. Defendants were large brewers, and had a contract with an ice company to supply them with ice during the season of 1880 at $1.75 a ton, or $2 if the crop was short. The contract was made in November, 1879. The following winter was so mild that the ice crop was a failure. In May defendants were notified by the ice company that no more ice would be furnished them under

the contract. Defendants had then on hand a considerable amount of beer that would be spoiled without ice, and under stress of the circumstances they made a new arrangement with the ice company, and agreed to pay $3.50 per ton for the ice. At this rate ice was received and paid for afterwards. A note given for ice at this rate in October being sued, held, that the note was not without consideration, and that the refusal of the ice company to perform its contract, and the exaction of a higher price, was not legal duress.—Goebel v. Linn, 47 Mich. 489.

¶ 719. In an action between maker and payee upon a promissory note, if the whole evidence, upon both sides, leaves it doubtful whether there was a good consideration for the note, plaintiff fails to establish case and defendant is entitled to a verdict.—Manistee National Bank v. Seymour, 64 Mich. 59.

¶ 720. The admission of value received in a note containing power of attorney to confess judgment is prima facie sufficient to show that the promise contained in the note is supported by an adequate consideration.—Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 721. A note reciting that it is for value received imports upon its face that it was given for a valuable consideration; but no recovery can be had upon it by the payee unless all the evidence satisfies the jury by a preponderance of proof that value was in fact received.—In re King's Estate, 94 Mich. 411.

¶ 722. Want of consideration for a note executed by defendant to decedent in her lifetime is established where it is shown that the note was executed merely as a memorandum of a previous transaction, whereby decedent paid to defendant the amount of the note in consideration of his agreeing to use the same in the construction of a house where she might make her home and receive maintenance and support, which agreement was carried out to the satisfaction of decedent.—Kelley v. Guy, 116 Mich. 43.

¶ 723. Where uncontradicted testimony shows that deceased, a married woman, purchased her mother's notes and gave her own notes therefor, the jury should not be permitted to find that her notes were without consideration.—Crampton v. Newton's Estate, 132 Mich. 149.

¶ 724. In a suit upon a note which is introduced in evidence, the duty of introducing evidence to show want of consideration is upon defendant but he is not required to prove by a preponderance of testimony that there was no consideration.—Farnsworth v. Fraser, 137 Mich. 296.

¶ 725. Recovery on a promissory note cannot be defeated by showing a contemporaneous parol agreement that the note was not to be enforced in a certain contingency, though such agreement was offered to show partial or total failure of consideration.—Central Sav. Bank v. O'Connor, 139 Mich. 82.

§ 125. ——As to accommodation signatures.

Accommodation signatures and liability thereon, see ante XI.

Sufficiency of evidence to show liability of estate for notes made for accommodation of decedent though in form indorsed to him, see Estates of Decedents ¶ 630.

¶ 726. Testimony held to show that one maker of a note against whose estate the note was presented as a claim by the other maker was only an accommodation maker.—Devereaux v. Phillips' Estate, 97 Mich. 104.

¶ 727. Testimony that one of the two signers of a note, since deceased, stated that the other wanted some money "and I signed his note to M. for $500" and "helped" him, also that at the time "I hadn't sold my wheat and hadn't the money on hand; but I will try and take care of that note so that it shan't trouble him," and also that he referred to it as "his" (the other maker's note), shows that it was signed by decedent as an accommodation maker.—Devereaux v. Phillips' Estate, 97 Mich. 104.

¶ 728. That a note was for accommodation was supported by a letter in evidence from the since deceased maker transmitting the note to the payee and stating that it was for the latter's accommodation and the testimony of the payee to the same fact.—Baker v. Union Trust Co., 129 Mich. 581.

¶ 729. Campbell shipped lumber on vessels owned by Graham, who had a partnership interest with him. Coumbe was Campbell's agent, and was to receive half the profits of the lumber business. It was arranged that Coumbe should settle freight bills with Graham by accepting Graham's drafts on the Canadian Bank of Commerce, and that the drafts were to be taken up by Campbell out of the proceeds of sales. In an action by the bank against Coumbe upon these acceptances it was held (1) that defendant's testimony that he told Graham and Campbell that he would accept the drafts if they would not hold him responsible, and that he was not himself a partner, and was neither expected nor bound to provide for freight, would justify the jury in finding that the acceptances were accommodation acceptances; (2) that in order to prove the relations of the parties and the consideration for the acceptances defendant might properly show the details of the shipments, including bills of lading and accounts of the several transactions; (3) that the jury might consider plaintiff's course in discounting the drafts before acceptance and in treating the maker as the primary debtor.—

Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

§ 126. ——As to bona fide holding.

What constitutes bona fide holding, see ante XIII, A.

Burden of proof as to bona fide holding, see ante § 110.

Admissibility of evidence as to bona fide holding, see ante § 119.

Jury questions as to bona fides of purchaser, see post § 133.

Instructions as to bona fide holding, see post § 139.

¶ 730. Where, in a suit on a note that is shown to be fraudulent in its inception as between the original parties, the only proof explaining the character of the plaintiff's holding of it is that he is "owner" of it, and that the payee indorsed it over to him before maturity, the inference would be that he gave no value and was not a bona fide holder, as it must be intended, in that state of things, that the original party, not being able to sue upon the instrument himself, turned it over to another to sue on it for his benefit.—Carrier v. Cameron, 31 Mich. 373.

¶ 731. Evidence that plaintiff, in purchasing the note in suit and before delivering the alleged consideration therefor, was told it was given in a wheat deal and admitted having made no further inquiry, together with the almost common and universal knowledge that wheat and oat deals were being fraudulently made, tended to show that he was not a bona fide holder without notice.—Goodrich v. McDonald, 77 Mich. 486.

¶ 732. Evidence held insufficient to support a finding of the court that plaintiff was not a bona fide purchaser of the note sued upon; there being no competent testimony to support the further necessary finding that plaintiff's alleged agent had possession of plaintiff's stock at the time of the sale of certain other stock to defendant, or during the negotiations which led up to its sale, and the giving of the note in payment for the same.—Henneberger v. Matter, 88 Mich. 396.

¶ 733. An admission by counsel, at the hearing of a suit to enforce contribution to the payment of a judgment upon township bonds which were illegal in the payee's hands, that the judgment-plaintiff became the owner of the bonds through one who had "purchased" them from a specified person, is not equivalent to a showing that they were at some time held by one who had purchased them in good faith before maturity, for a valuable consideration, and without notice of their invalidity.—Grant Township v. Township of Reno, 114 Mich. 41.

¶ 734. The fact that a fraud was perpetrated upon defendant maker in procuring from him the note sued upon does not te to contradict positive testimony of pla tiff indorsee's cashier that the note w bought before maturity for a certain su and that plaintiff had no notice that t maker had any defense or that there h been any fraud.—Drovers' Nat. Bank v. P vin, 116 Mich. 474.

¶ 735. The fact that the particular offi of a bank who acted for it in buying pa before the maturity thereof had no kno edge that such paper was fraudulently p cured from the maker, is sufficient pri facie without calling all the other officers show want of notice.—Drovers' Nat. Ba v. Potvin, 116 Mich. 474.

¶ 736. In an action by a bank upon promissory note taken by it before matur but originally obtained from the mal through a fraud perpetrated upon him the payee's agent, the fact that before note was made plaintiff recommended payee as responsible and reliable does connect it with the fraud or tend to sh it was not a bona fide purchaser; there ing no evidence to show that plaintiff or officers knew the payee was engaged in fraudulent business.—Drovers' Nat. Bank Potvin, 116 Mich. 474.

¶ 737. In an action against a partners upon partnership paper, the defense be that it was given in fraud of the other pa ners, proof of circumstances which wo put a prudent man upon inquiry is insu cient to defeat recovery, evidence being quired to show mala fides on the part the holder.—Stevens v. McLachlan, Mich. 285.

¶ 738. In an action by an alleged bona f indorsee of a check given for a gambl debt under the laws of Maine, which ma such a check void except in the hands o bona fide purchaser, testimony that agent of the holder had known of and h a prior draft on the defendant upon wh payment was stopped because given for gambling debt, that subsequently the pay of the check indorsed the check to him st ing that matters had been fixed up with defendant, and that the agent knew that parties were engaged in making bets a pools is sufficient to show that the plain is not a bona fide holder.—Maine Mile-Tra Ass'n v. Hammond, 127 Mich. 690.

¶ 739. A plaintiff bank received a certif check by a defendant bank for an amou in excess of the funds of the drawer hand. Defendant introduced in evidence scrap book of the plaintiff bank, which corded that the defendant bank had only small amount of outstanding certified chec Held, the scrap book was not evidence sho ing that plaintiff had knowledge of the il gal certification.—First Nat. Bank v. Uni Trust Co., 158 Mich. 94.

§ 127. ——As to presentment, demand and notice of dishonor.

¶ 740. A witness called to prove the dishonor of a note, who only testifies that he went to find the maker's last place of residence, and that the note was not paid, and that he then protested it, but does not testify concerning his knowledge of the residence, nor whether, if no personal demand was made, there was any valid reason for the omission, does not sufficiently show the dishonor.—Nevius v. Bank of Lansingburgh, 10 Mich. 547.

¶ 741. A promissory note payable at the I. bank was left with the C. bank for demand and protest. In an action upon the note, the testimony tended to show that it was the custom among the banks of the city to send messengers with commercial paper once a day to one of the banks for the purpose of clearing and adjusting their accounts; that it was the duty of each messenger, on receiving paper against the bank represented by him, to take the same to such bank, to be passed on by the cashier; that, on the day the note in suit matured, it was delivered to the messenger of the I. bank. It further appeared from the clearance books of both banks that, on the day in question, there was a balance of a certain amount in favor of the C. bank, but that an item corresponding with the amount of the note in suit was rejected by the I. bank, and the account adjusted by the giving of a check to the C. bank for the difference between the two amounts. A certificate of protest was made on the same day by the cashier of the C. bank, as notary public. Held, that the evidence was sufficient to warrant a finding of circumstances equivalent to timely presentment, demand, and nonpayment.—Martin v. Smith, 108 Mich. 278.

§ 128. ——As to payment or discharge.

Payment and discharge as defense, see ante §§ 24, 89.
Burden of proof as to payment, see ante § 111.
Admissibility of evidence as to payment and discharge, see ante § 121.
Jury questions as to payment and discharge, see post § 135.

¶ 742. A general receipt of payment, indorsed on the back of a draft by the payee before acceptance and before notice of dishonor, raises no presumption of payment by either drawer or drawee.—First Nat. Bank v. Union Cent. Life Ins. Co., 107 Mich. 543.

¶ 743. Where the makers of a note admit that they have not paid it, possession of the note by an indorser who produces it in court is prima facie evidence that he has paid it in full at maturity according to his obligation.—Alderton v. Williams, 130 Mich. 626.

¶ 744. Proof of an indorsement of a part payment in the handwriting of the maker on a note is proof from which an actual payment may be inferred.—Stretch v. Stretch, 191 Mich. 416.

¶ 744a. On an issue of payment of a note so as to discharge the maker's liability to the indorser, the claim being that it was paid from partnership funds and that the indorser and maker were partners, evidence, that the indorser raised money by a mortgage on his individual property and deposited it in an account carried in the firm name and that the note was then paid by a check on that account, has no tendency to prove payment by the firm, where the note did not on its face appear to be a firm note and the account was one in which both firm and individual deposits were carried, both in the firm name.—Tredway v. Antisdel, 86 Mich. 82.

§ 129. Questions of law and fact.

What constitutes reasonable time in which to indorse demand paper, see ante ¶ 57.
General law as to jury questions, see Trial, VI.
Jury questions and instructions as to alterations, see Alteration of Instruments § 14.
Court and jury questions, see also Contracts, X, C.

¶ 745. What is a reasonable time after which a note payable on demand becomes overdue is a question for the court.—Carll v. Brown, 2 Mich. 401.

¶ 746. If the genuineness of the signature is admitted the note may be read in evidence, though defendant claims it has been altered. In thus submitting the note to the jury the court does not pass upon its genuineness, which is the jury's province.—Hunter v. Parsons, 22 Mich. 96; Willett v. Shepard, 34 Mich. 106.

¶ 747. Where, in an action on a promissory note, the evidence tends to show on one side that defendant deliberately signed and delivered the note at the same time that he executed an agency contract in duplicate, and, on the other, that only the two other papers were executed, or mentioned, or read to him, and that there was no talk of a note, and no note shown or signed, there is no room for leaving any question of defendant's negligence to the jury.—Anderson v. Walter, 34 Mich. 113.

¶ 748. The identity of words in a written instrument is for the jury, who may be aided by parol evidence of facts connected with the giving of the paper. So held, where a note which purported in the margin to be for $50 was so written in the body that it was uncertain whether it was for fifty or sixty dollars.—Paine v. Ringold, 43 Mich. 341.

¶ 749. Whether original notes renewed by those in suit were given by defendant's hus-

band, defendant signing them as surety only, and not to benefit her individual estate, is a question for the jury.—Holland v. Maus, 69 Mich. 180.

¶ 750. Testimony by the daughter of the maker of a promissory note regarding a conversation "at Christmas time in 1892 or 1893" in which the plaintiff's intestate stated that the note was not to be collected during the life time of the maker raises no issue for the jury where it is not shown to be subsequent to an indorsement dated August 2, 1893, reading "for a valuable consideration, I hereby agree to pay the said note in two years from date" and signed by the maker. —Walbridge v. Tuller, 125 Mich. 218.

¶ 751. In an action on a promissory note, which plaintiff claimed was for services, and which defendant claimed was given for plaintiff's accommodation, it appearing that defendant had given plaintiff two notes for personal services, and that plaintiff owned a third note of plaintiff's which he claimed he bought from another, who was the payee, and which defendant claimed was given for the accommodation of the plaintiff, and it further appearing that plaintiff had reduced two notes for services to judgment against plaintiff of the amount sued upon, held that it was a question for the jury whether the note sued upon was, or was not an accommodation note.—Alpert v. Plotkin, 189 Mich. 232.

¶ 752. In a suit on a promissory note copies of the same were introduced as secondary evidence upon proper proof of loss of the original. Plaintiff testified that he had seen the original and knew defendant's signature, and that defendant had indorsed said original. Defendant's evidence was contradictory and denied indorsement of the note by defendant. Held, the question of said indorsement was one of fact for the jury.—Gelder v. Welsh, 169 Mich. 490.

¶ 753. In an action by a bona fide purchaser on a promissory note dated June 29th, 1895, testimony by the defendant that the only note signed by him was one dated April 2nd, 1895, for a like amount and sent to him in a letter on March 23rd, which letter is introduced in corroboration, raises a question of alteration or identity as a fact for the jury.—First Nat. Bank of Detroit v. Bowen, 125 Mich. 281.

§ 130. ——Ownership of instrument and right to sue upon it.

Evidence as to ownership of instrument and right to sue on it, see ante §§ 114, 123.

¶ 753a. Where a partner's testimony explicitly disclaims any interest in the note sued on, it is error to submit the question of ownership to the jury.—Weaver v. Bromley, 65 Mich. 212.

¶ 754. Where the authority of a holder of a promissory note to bring suit thereon in his own name is shown by the uncontradicted evidence in the case, it is error to submit that question to the jury.—Horrigan v. Wyman, 90 Mich. 121.

¶ 755. The question of the ownership of a note sued on is properly for the jury where there is testimony that plaintiff had sold it before maturity and also that he had redeemed it after it had gone to protest.—Big Rapids National Bank v. Peters, 120 Mich. 518.

¶ 756. Where the testimony as to the ownership of a note indorsed in blank is in conflict, it is proper to submit the question to the jury.—Molby v. Murray, 173 Mich. 143.

§ 131. ——Consideration.

Burden of proof and presumptions as to consideration, see ante §§ 109, 112.
Evidence as to consideration, see ante §§ 115, 124.

¶ 757. Whether a note in suit arose from the indebtedness of a firm or of an individual partner is a question for the jury in a suit thereon.—Roberts v. Pepple, 55 Mich. 367.

¶ 758. The presumption of consideration for decedent's post obit note arising from the recital therein that it was for value received, supplemented by testimony that she was the payee's mother, and that, a number of years before the note was given, personal property was furnished her and her husband by the payee under such circumstances that she recognized her obligation to make some compensation therefor, is sufficient evidence that it was given for a moral obligation to warrant its submission to the jury.—Van Buskirk v. Hoy, 114 Mich. 425.

§ 132. ——Fraud, duress or mistake.

Evidence as to fraud, duress and mistake, see ante § 116.

¶ 759. In an action against the drawer of a check dishonored on account of the failure of the bank, testimony that the bank books showed a balance for the defendant but that when the check was drawn he had accepted a draft and drawn other checks for practically the entire amount, contradicted by testimony of the defendant that the bank had sufficient funds to pay the check when it was received, raised an issue of fact for the jury, whether it was drawn and sent in fraud.—Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687.

¶ 760. Where the defense to a promissory note was that it was obtained by fraudulent misrepresentations on a sale, and the evidence showed that the property for which it was given had been tendered back before suit was brought, and that the damage aris-

ing from the alleged deceit greatly exceeded the amount of the note, it was not error to refuse a peremptory charge that the plaintiff was entitled to recover the amount of the note; such evidence raised questions proper for the jury.—Browne v. Moore, 32 Mich. 254.

§ 133. ——Bona fides of purchaser or holder.

What constitutes bona fide holding, see ante XIII, A.

Burden of proof as to bona fide holding, see ante § 110.

Evidence as to bona fide holding, see ante §§ 119, 126.

Instructions as to bona fide holding, see post § 139.

¶ 761. The question of whether, upon conflicting evidence, a person is a bona fide holder of a note, is one for the jury.—Neyens v. Worthington, 150 Mich. 580.

¶ 762. It is for the jury to determine upon conflicting evidence whether the purchaser of a certificate of deposit took it in good faith.—Birch v. Fisher, 51 Mich. 36.

¶ 763. Evidence that the indorsee, grandmother of one of the payees of fraud-infected notes given for an agency for a patent fence, took the note in suit and other like ones at $100 for a face of $120, that in another trial indorsee testified that she knew there was "a fence contract behind the note" and that her grandson said he would protect her, and that about this time the other payee, her grand-daughter-in-law, lived at her house and that the business out of which the notes grew was prosecuted from her house, though she denied knowledge of the business, its nature, or the responsibility of the makers,—is sufficient to go to the jury on the question of the bona fides of plaintiff in purchasing such notes.—Fink v. Chambers, 95 Mich. 508.

¶ 764. Plaintiff's prima facie case of good faith in acquiring a fraudulently certified check is sufficiently disputed to make a case for the jury, where in an action against the receiver of an insolvent bank upon such check, there is testimony that the claimant had received from time to time many certified checks aggregating large sums of money, of such bank, some of which were withheld for a day or two from the clearing house at the request of the vice-president of such bank, and for a high rate of interest, that such vice-president during the same time was overdrawing his account largely with claimant in favor of such insolvent bank, and it was known by claimant's cashier that such vice-president was speculating in stocks during this time.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 765. In a suit upon a promissory note, the evidence showed that defendant's indorsement had been materially altered, that plaintiff's agent had examined the notes and noticed the erasure and the writing over it before he consummated the purchase of the note, and that he made no inquiries. Held, that this is sufficient to take the question of good faith to the jury, and to shift the burden of proving good faith to plaintiff.—Custard v. Hodges, 155 Mich. 361.

¶ 766. Gross carelessness on the part of the holder of notes is not conclusive of notice, though it is perfectly competent evidence to go to the jury on the question of bad faith.—Armstrong v. Stearns, 156 Mich. 597.

¶ 767. The cashier of plaintiff bank took a check from one Andrews, drawn on the City Savings Bank. The City Bank illegally certified the same when it had on hand no funds of Andrews. Plaintiff's officers testified that they took the check in good faith. Defendant receiver of the City Bank offered evidence to show that the president of the plaintiff bank was accustomed to examine the statements of other banks, and that the City Bank's statement as to its certified checks outstanding was palpably false; that a subordinate officer of plaintiff bank warned his superiors that their method of dealing with Andrews was bad banking; and that plaintiff at Andrews' request withheld the presentation of the check, and charged Andrews a high rate of interest. Held, that this evidence was admissible and, with other circumstances, warranted the court in submitting to the jury the question of the good faith of the plaintiff in taking the check.—Detroit Nat. Bank v. Union Trust Co., 158 Mich. 557.

¶ 768. Defendant, a stockholder in a corporation, gave his promissory note payable to the corporation, and turned over to it certain shares of his stock to be used as collateral, to enable it to secure a loan from plaintiff bank. Many other shareholders did the same thing. In a suit on the note, held, it was a question for the jury whether the plaintiff knew the note was given on condition that all other shareholders should do the same.—People's Bank v. McMahon, 160 Mich. 46.

¶ 769. Whether plaintiff, suing on a note, was a bona fide holder thereof, held, upon the facts in evidence, to have been a question for the jury.—Harrison v. Grier, 198 Mich. 672.

§ 134. ——Presentment, demand, protest and notice of dishonor.

Presentment, demand, protest and dishonor in general, see ante VIII, IX, X.

Burden of proof as to presentment, etc., see ante § 111.

Evidence as to presentment, etc., see ante §§ 120, 127.

¶ 770. A draft drawn at Cincinnati, May 2, 1861, on persons in Chicago, payable at

sight, was received in Detroit May 4, but not transmitted for presentment until the 25th of that month. There was a daily mail between Detroit and Chicago, occupying from twelve to fourteen hours in its passage. No evidence was given to explain or excuse the delay in presentment; and it was held that, without any evidence bearing upon the point, it was error to submit to the jury the question whether the draft was presented for payment in a reasonable time.—Phoenix Ins. Co. v. Allen, 11 Mich. 501.

¶ 771. One who gives a check may expressly or by implication extend the time during which he will remain liable for the amount thereof before its presentment for payment. And the question whether he has consented to such extension is for a jury if the evidence conflicts.—Holmes v. Roe, 62 Mich. 199.

¶ 772. In an action against the drawer of a check which has been dishonored on account of the failure of the bank, evidence that the drawer had notice that the bank was weak, that his checks had been dishonored and that he overdrew his account without intimation to the plaintiff of the dangerous situation, tends to show that the check was drawn without expectation of payment and is sufficient to go to the jury on the question of whether or not notice of dishonor was necessary.—Carson, Pirie, Scott & Co. v. Fincher, 138 Mich. 666.

¶ 773. The sufficiency, in itself, of a written notice of dishonor is to be determined by the court as matter of law.—Platt v. Drake, 1 D. 296.

¶ 774. The question as to whether notice of dishonor of a promissory note was actually mailed to an indorser, defendant in an action by a bank upon such note, held properly submitted to the jury when the notary who claimed to have mailed the notice was an officer of the bank and an interested witness, and an officer of the maker stated that he saw the note without any writing thereon three days after the date the notary claimed to have marked the note as protested for nonpayment.—First Nat. Bank of Manistee v. Star Watch Case Co., 187 Mich. 224.

¶ 775. Defendant, secretary and manager of a corporation, personally indorsed a promissory note given by said corporation. Same being presented when due, defendant informed plaintiff that the corporation could not pay the same immediately but hoped to do so soon, and asked for time. Plaintiff did not protest the note. Held, the evidence was sufficient to submit the question to the jury as to whether defendant waived such protest.—Gelder v. Welsh, 169 Mich. 490.

§ 135. ——Payment or discharge.

Burden of proof as to payment, see ante § 111.

Evidence as to payment and discharge, see ante §§ 121, 128.

¶ 776. Where a note not enforceable in the payee's hands because of fraud and want of consideration is received by a subsequent taker in payment of a precedent debt, it must appear, to render such taker a holder for value, that the debt was extinguished by the note's transfer; which is a question for the jury.—Burroughs v. Ploof, 73 Mich. 607.

¶ 777. Whether a note sued upon has been paid, and whether an accommodation maker has been discharged by extension of time of payment, should, if depending upon conflicting testimony, be submitted to the jury.—McInerney v. Lindsay, 97 Mich. 238.

¶ 778. In an action on a promissory note, the questions of payment and of the existence of a subsequent agreement for the application of certain funds to the note are for the jury.—Dow Law Bank v. Godfrey, 126 Mich. 521.

¶ 779. In an action on a promissory note where plaintiff claimed that an agreement was made for the exchange of such note for two smaller notes, and that such agreement was invalid because made on Sunday, and that he returned such smaller notes to the defendants, and defendants claimed that the agreement was made after midnight, and denied that such smaller notes were returned, but claimed that they were subsequently paid, held that it was a question for the jury whether the note sued on had been paid.—Prussia v. Bailey, 193 Mich. 77.

§ 136. ——Directing verdict.

See also ante ¶ 413.

Instructions, see post § 137.

General law as to directing verdict, see Directing Verdict.

¶ 780. Where, in suit on a note, it appears that plaintiff has taken goods in another state on attachment for the same demand, the value of such goods should be ascertained and applied in reduction of plaintiff's demand, and it is error to direct verdict for the note's full amount.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 304.

¶ 781. Verdict may be directed for the indorsee suing on a note where the only issue made is on the question of bona fides and there is no dispute in the evidence showing it.—Drovers' National Bank v. Potvin, 116 Mich. 474.

¶ 782. A bank deposited checks in defendant bank in due course of business and drew checks against such deposits. The depositing bank became insolvent and one of its depositors brought suit against defendant for the amount of certain checks which he had deposited in the insolvent bank. Defendant had no notice of the insolvency and

took the checks in good faith, as cash, and paid out the proceeds on checks of the insolvent bank. Held that verdict should be directed for defendant.—Glines v. State Sav. Bank, 132 Mich. 638.

¶ 783. A directed verdict for plaintiff for part of the amount claimed in an action by a bank on a note was error, where the important question involved was one of fact as to whether the defendant gave the note in consideration of wood purchased from the bank and not all delivered, or whether the wood was owned by a third party and the note was given directly to the bank and such owner credited with its amount.—First Nat. Bank v. Stringer, 133 Mich. 630.

¶ 784. In a suit by the transferee of a promissory note, defendant set up that the note was given for liquors sold by the payee to defendant, and that such sale was illegal for lack of a license in the payee. Plaintiff contended that the sale was made in bulk and was justifiable. Held, the court properly refused to direct a verdict for the defendant on the ground that the sale by the payee was illegal, especially in view of the fact that defendant failed to request the court to submit this disputed question of fact to the jury.—Rothschild v. Schneider, 167 Mich. 501.

¶ 785. Defendant gave a promissory note for two hundred dollars payable to the order of plaintiff for certain shares of stock to be secured by plaintiff and turned over to defendant. Plaintiff indorsed this note to the bank and got the money. Later the time of payment was extended and defendant made a new note running direct to the bank as payee, which plaintiff indorsed and had to pay, and for which he sued to recover of defendant. Defendant gave notice under the general issue that he would show that plaintiff never delivered the stock. Held, it was error to direct a verdict for the plaintiff where the evidence showed that the bank knew of the whole transaction and took the note with notice of equities.—Green v. Ostrander, 160 Mich. 662.

¶ 786. Where plaintiff and defendant, owners of interests in a corporation, indorsed a corporate note, with plaintiff's name appearing first, and there was evidence of an agreement that, in consideration of such indorsement, defendant promised to personally pay the note; that the note was twice renewed, but indorsed in the reverse order from the indorsement on the first note; that plaintiff did not see the renewals after their indorsement by defendant and had no knowledge of the change in the order of indorsement until after the last renewal fell due, and, in fact, did not know that the order of indorsement affected the liability of the indorsers as between themselves, it was error to direct a verdict for defendant in an action by plaintiff against defendant to recover the net amounts of a judgment on the note in favor of the payee, since the evidence afforded by the order of indorsement is only prima facie under Pub. Acts 1905, No. 265, § 70, How. St., 2nd Ed., § 2741, providing that as "respects one another, indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise," it being unnecessary, in order to overcome the prima facie effect of the later order of indorsement, that there should be evidence of new agreements at the time of the second and third indorsements.—Goldman v. Goldberger, 208 Fed. 877.

§ 137. Instructions.

Directing verdict, see ante § 136.
General law as to instructions, see Instructions.
Sufficiency of instructions to be ascertained by construing them as a whole, see also Instructions § 19.
Instruction erroneous as assuming facts in question, see also Instructions ¶ 438.
Refusal of instruction giving undue emphasis or prominence to evidence, see also Instructions ¶ 487.
Instructions as to alterations, see Alteration of Instruments § 14.
Instructions as to authority of wife to execute promissory note for illiterate husband, see Execution of Instruments ¶ 90.

¶ 787. An instruction on notice to a bank by reason of facts coming to an officer and challenging his inquiry is erroneous, if the bank purchased the paper through another officer and the tendency is to mislead the jury into believing that such knowledge by any officer would be imputed to the bank on a purchase of the paper by any other of its officers without such knowledge; it should be limited to that officer through whom the purchase of the paper was made.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 788. An instruction from which the jury would be likely to infer that, if the notes sued on were obtained through threats to prosecute, they were necessarily void unless a bona fide holding should be established, is erroneous as ignoring the possibility of a legal consideration.—Wolf v. Estate of Troxell, 94 Mich. 573.

¶ 789. Where, in response to a request to charge that the plaintiff was not entitled to recover upon an instrument against the defendant as indorser because the same was not in law a negotiable promissory note, the court charged that the instrument was a promissory note, and that the defendant was liable as indorser upon the same, the charge was construed to mean only that defendant was liable as an indorser in the same manner and to the same extent as if the instrument had been a promissory note in the or-

dinary form, indorsed by him, and was not open to the objection that it took the evidence entirely from the jury.—Cate v. Patterson, 25 Mich. 191.

¶ 790. In an action upon a non-negotiable note given for a lightning-rod, it is error to instruct the jury that in case of a recovery it must be for the full amount claimed by the plaintiff, when there is proof of a much smaller consideration.—Closs v. Thiefels, 79 Mich. 589.

¶ 791. In an action on a forged promissory note given as collateral security to a title note given for the purchase price of a horse which died before trial and before defendants denied the forgery, an instruction that it was the duty of the defendants, as soon as either of them learned that the plaintiff had a note against them, to notify plaintiff of the forgery, and that if they received such notice and delayed notifying plaintiff for three months, such delay was unreasonable, if unexcused, and that if plaintiff, by reason of the conduct of defendants, suffered damages, he was entitled to recover the full amount of the note, held sufficient.—Kole v. Lampen, 191 Mich. 156.

¶ 792. In an action by the administrator of an estate against a son of decedent on a lost promissory note, which defendant claimed was barred by the statute of limitations, an instruction that if the jury found that such a note was given as plaintiff claimed and the indorsements were made thereon by defendant as claimed, then the burden of showing payment was upon the defendant, that payment was a matter of defense and must be shown, and that if the note was in court and the indorsements were on the back of it as claimed the plaintiff might make out a prima facie case by proof of the note and indorsements, held not prejudicially misleading as tending to confuse the jury on the question of payment, where none was claimed, it appearing that it was given in relation to a request made by counsel for defendant regarding a settlement of the estate by the heirs before proceedings were taken in the probate court.—Stretch v. Stretch, 191 Mich. 416.

¶ 793. Where, in an action on a promissory note, defendant denied having signed it, or having received any consideration therefor, and further testified that, while being taught to write by plaintiff, he signed his name to several pieces of paper, which he left on plaintiff's desk, it was held that it was error to refuse to charge the jury, as requested, that if defendant signed the note without receiving any consideration therefor, or without understanding it to be a promissory note, or if he signed his name to a blank piece of paper, and the body of the note was filled in without his knowledge or consent, defendant was not liable, and to charge merely that, if defendant signed the note, plaintiff could recover.—Trombly v. Trombly, 106 Mich. 227.

¶ 794. In an action on a note where it is alleged that a part payment of the amount due for which the note was given was made before the note was executed, but such payment was not taken into consideration, an instruction that if the alleged payment was made that fact alone would not authorize a denial of relief to plaintiff, but if such payment was made and the amount was inadvertently included in the note the jury might allow defendant such payment and render verdict for the balance due is proper.—Baird v. Salnave, 174 Mich. 409.

¶ 795. Where a defendant sued on a note has testified that as a compromise to avoid litigation he offered to pay the note if plaintiff would discount it, it is proper to instruct the jury that if they find that such offer was made under circumstances that constituted it an admission of liability, they may consider it as bearing upon the question whether defendant ever became originally liable or not; but if they find the offer was not a recognition of liability, then they should not consider it at all.—Steers v. Holmes, 79 Mich. 430.

§ 138. ——As to ownership of instrument.

Evidence as to ownership of instrument, see ante §§ 114, 123.

Jury questions as to ownership of instrument, see ante § 130.

¶ 796. In an action on a note there was no error in charging that it was the plaintiff's property at the beginning of the suit, if the fact was fully proved and there was no contrary evidence.—Toledo & Ann Arbor R. Co. v. Johnson, 55 Mich. 456.

¶ 797. Where, in a suit upon a note delivered to the secretary of an insurance company as security for a loan made by him, the question of fact to be determined by the jury is whether the money loaned belonged to the secretary or to the company, they can determine such issue without any special instructions as to the law of ownership, or as to what would constitute an ownership of the note either in the secretary or in the insurance company.—Barnes v. Peet, 77 Mich. 391.

§ 139. ——As to bona fide holding.

What constitutes bona fide holding, see ante XIII, A.

Burden of proof as to bona fide holding, see ante § 110.

Evidence as to bona fide holding, see ante §§ 119, 126.

Jury questions as to bona fide holding see ante § 133.

¶ 798. Where the question before the jury related solely to the genuineness of a certain negotiable promissory note, and on that

point they had been instructed that any material alteration would vitiate it, it was held unobjectionable to charge that the law would sustain the claim of an innocent or bona fide holder of such a note, purchased before due, however viciously other parties might have acted, or whatever objections to the consideration might arise.—Hunter v. Parsons, 22 Mich. 96.

¶ 799. Where the purchaser of a Bohemian oat note testified that he had read of this Bohemian oat note scheme, and knew that some farmers were getting into it, in the absence of a denial on his part that said scheme was a fraudulent one, the jury and court have a right to presume that it was the same fraud with which the whole state is now familiar, and in such a case the jury should be instructed that if they found that the plaintiff knew that the note was given for Bohemian oats, or was so informed before its purchase, he could not recover.—Ward v. Doane, 77 Mich. 328.

¶ 800. An instruction, in an action on a promissory note by an indorsee, that if such indorsee knew that the note was given for Bohemian oats, and was a fraud, at the time he purchased it, or if he had such notice of it as would put an ordinarily prudent man on inquiry as to its illegality, and he neglected to make such inquiry, it would show bad faith, and he could not recover, was more favorable than the defendant was entitled to under the law.—Helms v. Douglass, 81 Mich. 442.

¶ 801. In an action on a note where the question in issue was whether plaintiff bought the note in good faith, a charge that he bought the note was a conceded fact, no matter whether he paid more or less is error, if thereby the court meant to say that it was a conceded fact that plaintiff bought the note in the sense of being a good faith purchaser without any knowledge of or participation in any fraud that may have been perpetrated upon the defendant, that fact not being conceded, and it was only in that sense that it was material to speak of the plaintiff having bought the note at all.—Carpenter v. Greenop, 84 Mich. 49.

¶ 802. Where a defendant sued upon promissory notes claims they were procured by fraud, there being, however, no evidence tending to show that plaintiff was guilty of any fraud in their purchase, or to contradict his statement that he bought the notes in the usual course of business, paying value therefor, defendant is not prejudiced by an instruction which, standing alone, might leave the jury with the impression that the burden of proof was upon him to show want of good faith on the part of the plaintiff in the purchase of the notes, it appearing that the correct rule as to the necessity of plaintiff's showing good faith, and want of notice of any imperfection in the paper, after defendant had shown fraud in its inception, was clearly given to the jury.—Rice v. Rankans, 101 Mich. 378.

¶ 803. An instruction as to whether a holder of a check took bona fide is correct and sufficient which states that a person in taking paper is not bound to make inquiry; but if he has knowledge of facts and circumstances making it dishonest for him to take the check with intent to hold the bank, he is not a bona fide holder.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

¶ 804. A plaintiff bank received a check certified by a defendant bank for an amount in excess of the funds of the drawer on hand. Defendant introduced in evidence a scrap book of the plaintiff bank, which recorded that the defendant bank had only a small amount of outstanding certified checks. Held, in the absence of evidence that the officers taking the certified check had knowledge of the contents of the scrap book, that it was proper for the court to refuse to single out evidence and state its effect by instructing that the scrap book was evidence that plaintiff had knowledge of the illegal certification.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

¶ 805. Defendant signed a contract and gave certain promissory notes to a company in payment for a cash register. The plaintiff became a purchaser of the notes. Held, an instruction was correct which stated that the plaintiff, if he had no knowledge of the contract behind the notes, could recover on them even though the company had not fulfilled its warranty under the contract.—People's Building & Loan Ass'n Co. v. Rutz, 158 Mich. 440.

¶ 806. In a suit by the transferee of promissory notes, it is error for the court to charge that if plaintiff from circumstances brought to this knowledge, as an ordinarily prudent man, had reason to believe that some defense might be made to the notes, he is not a bona fide purchaser.—Hakes v. Thayer, 165 Mich. 476.

¶ 807. It is the court's duty to charge the jury that one is a bona fide holder of a promissory note for value and not to leave such question to the jury, where the evidence as to the plaintiff's bona fides is undisputed, and shows that the instrument was acquired for value in the usual course of business under circumstances not suggesting any bad faith.—Van Slyke v. Rooks, 181 Mich. 88.

§ 140. ——As to burden of proof.

Burden of proof in general, see ante § 108.

¶ 808. Charging that execution of the note being admitted makes a prima facie case unless defendant proves want of consideration, and that the burden is on him to show

it, is not error though the maker testified that he gave the note to escape a charge of embezzlement, where he also admitted that a settlement was made on the claim of embezzlement and of other matters and the amount was agreed on but did not testify wherein or how it was excessive or give any evidence as to the exact amount, some being concededly due, and where the remainder of the charge fairly left the question of the consideration to the jury.—Beath v. Chapoton, 124 Mich. 508.

¶ 809. Fraud by the maker on the indorser being admitted or proved, it was not error to charge that if the holder knew of it and had directed the maker to practice it for the purpose of procuring the indorsement he was not a bona fide holder, and to charge that the burden of proving fraud was on the defendants.—Beath v. Chapoton, 124 Mich. 508.

¶ 810. When in a suit upon a promissory note by an alleged innocent holder defendant gives evidence, which is not disputed, that the note was given in an illegal transaction, void as between the original parties on the ground of public policy, it is not error for the court to instruct the jury that the evidence shows a fraudulent transaction as to the original consideration, and that the burden of proof is upon plaintiff to show by a preponderance of evidence that he is a purchaser in good faith.—Goodrich v. McDonald, 77 Mich. 486.

§ 141. Verdict and findings.

Weight and sufficiency of evidence, see ante § 122.

¶ 811. A defense that a promissory note was signed by the maker as surety, as a result of fraudulent representations by a comaker, is effectually disposed of, in a suit brought by the holder of the note who had acquired it before maturity, in payment of a balance due, by a verdict in favor of the plaintiff which operates as a finding either that there were no fraudulent representations, or that the plaintiff had no notice thereof.—First Nat. Bank of Paw Paw v. Houseknecht, 121 Mich. 313.

¶ 812. In an action by a maker of a joint note against his comaker to recover his proportion of the amount paid thereon, plaintiff having made payments at different times, the defendant is not injured by the trial court requiring the jury to state in their verdict the several sums allowed plaintiff and their dates and amounts.—Moffet v. Sebastian, 149 Mich. 451.

¶ 813. A finding that the plaintiff purchased a certain promissory note "before it was due, and without the knowledge of any special matter of defense connected with the making of it," is not equivalent to finding that he acquired it without any notice of the matters impairing its validity; or that he became the holder upon such consideration as the law deems requisite to invest one with the character of a bona fide holder.—Peabody v. McAvoy, 23 Mich. 526.

¶ 814. A finding that a note was transferred before maturity for a valuable consideration, and that at the time the transferee had no knowledge of the details of its origin, cannot be regarded as equivalent to a finding that he was a bona fide holder for value.—Tilden v. Barnard, 43 Mich. 376.

¶ 815. In a suit on a promissory note, the court in its finding stated that the note had not been canceled or destroyed; that its execution had not been denied under oath by defendant; that it was offered in evidence, and its execution proved; that no legal defense was offered thereto; and that plaintiff was entitled to recover the full amount thereof and interest. Held, said finding was sufficient to support a judgment in plaintiff's favor.—Thurber v. Aldrich, 167 Mich. 656.

§ 142. Judgment.

Assessment of damages on default, see Defaults, V.

¶ 816. In an action against the maker and indorser of a promissory note, where several pleas are filed and issue joined as to both defendants, plaintiff cannot sever, but must proceed to trial against all, though he may move for judgment against one defendant only. But proper severance was presumed on error, and the judgment sustained, where the record showed no objection taken to the trial of the separate issue.—Maynard v. Penniman, 10 Mich. 153.

¶ 817. The contracts of the maker of a note and of the indorser are several, and do not authorize a joint judgment upon lawful service on only one of them.—Church v. Edson, 39 Mich. 113.

¶ 818. Where several persons are sued as copartners upon a note signed in the name of a company, Comp. L. 1871, § 5778, How. St. § 7347, does not allow judgment against those only who are shown to be members of the company.—Anderson v. White, 39 Mich. 130.

¶ 819. Comp. L. 1871, § 5778, How. St. § 7347, authorizing judgment to be taken against one or more of the defendants, does not apply to a case where a note is signed in the name of a company, and the defendants, being sued as copartners doing business under that name, deny its execution and the partnership, and no evidence is given that some of them are connected with the company.—Anderson v. White, 39 Mich. 130.

¶ 820. One who signs a note with an infant may be held as sole maker after dis

continuance against the infant.—Taylor v. Densby, 42 Mich. 82.

¶ 821. When the maker and indorser of a promissory note are jointly sued under the statute, and one is defaulted, and issue is joined as to the other, plaintiff may have the damages assessed against the defaulted defendant by the jury sworn to try the issue against the other, and upon verdict and assessment may take a joint judgment against both.—Storey v. Bird, 8 Mich. 316; People ex rel. Ellison v. Marquette Circuit Judge, 41 Mich. 222.

¶ 822. A separate verdict against one will not authorize a judgment against another as to whom there has been no assessment.—People ex rel. Ellison v. Marquette Circuit Judge, 41 Mich. 222.

¶ 823. The statute (Comp. L. 1871, §§ 5776-5778; How. St. §§ 7345-7347) authorizing the maker, indorser, acceptor and guarantor of a note to be sued together, and judgment against any one or more of them, does not contemplate a severance in the case of persons purporting to be joint makers and sued as such.—Reading v. Beardsley, 41 Mich. 123.

¶ 824. In an action upon a promissory note plaintiff need not include all the parties in one judgment, but may have judgment against any of the parties against whom he could have proceeded separately (How. St. § 7355).—Phelps v. Church, 65 Mich. 231.

¶ 825. In an action under the common counts upon a note, against joint indorsers, notice of dishonor was shown only as to one indorser. Held, that a judgment against that indorser was error. There must be a joint judgment or none.—Seligman v. Gray, 66 Mich. 341.

¶ 826. In an action on a promissory note against the maker, and against indorsers who—not being the payees, and having indorsed before delivery—are also joint makers, a discontinuance against him is a discontinuance against them.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 312.

¶ 827. A discontinuance as to one of four makers of a note because she, being a married woman, could not be held liable, will not prevent the rendition of a valid judgment against the remaining defendants.—Atkinson v. Weidner, 83 Mich. 412.

¶ 828. A joint judgment against makers and indorsers of a note who resided in different counties upon service on former in different county from that in which suit was begun and indorsers served is not authorized.—First National Bank v. Dwight, 85 Mich. 509.

¶ 829. A joint and several note entitles the holder to proceed against either of the makers in a several action, or to join the two; and, under How. St. § 7355, the holder has the right to take judgment against one before the other.—Beals v. Clinton Circuit Judge, 91 Mich. 146.

¶ 830. A cognovit filed by one of two makers of a joint and several promissory note, in a suit brought against both, may properly be treated as a default as to the defendant filing it, under How. St. § 7355, which provides that, if a default is obtained against part of the defendants in a suit on a promissory note, the plaintiff may proceed to the hearing or trial against the remaining defendants in the same manner as if the suit had been commenced against them only, and that the action shall thereby be severed.—Beals v. Clinton Circuit Judge, 91 Mich. 146.

¶ 831. Judgment on cognovit against one of two makers of a joint and several note, in suit against both, does not preclude plaintiff from thereafter prosecuting the suit against the other defendant.—Beals v. Clinton Circuit Judge, 91 Mich. 146.

¶ 832. It does not follow that because notes are joint and several the judgment taken on such notes is the same.—Rohrabacher v. Walsh, 170 Mich. 59.

NEGOTIATIONS to NEW PROMISE.

Cross-References.

Negotiations—
- Merger in completed contract, see Contracts § 265 et seq.; Evidence, V.
- Exclusion of evidence as to prior negotiations culminating in contract, see Evidence, V.
- By broker to earn commissions, see Brokers.

Negroes—
- Discrimination against by reason of color, see Civil Rights.

Nephew—
- As heir or next of kin, see Descent.
- As legatee or devisee, see Wills, VI.
- Disqualifying relationship, see Judges § 11; Jury, III.

Nervous Derangement—
- Adequacy and excessiveness of awards for injuries, see Damages § 238.

Net Profits—
- Compensation or shares according to net profits, see Master and Servant, II; Partnership; Joint Adventures; Accounting suits.

Nets—
- Regulations of use in fishing, see Fish § 5.

Neutralizing Presumptions—
- See Evidence § 32.

New—
- As an adjective alone it is improper to

attempt to collate references. See those which follow and others which form themselves as occasion for search arises.

New Actions—
For purpose of limitations, see Limitations §§ 76, 101.

New Contracts—
See Contracts, VIII; Novation.

New Matter—
Of amendments in equity, see Equity, VII, E.
Of amendments in law, see Pleading, VI.

New Parties—
See Parties; and see especially topics treating of chancery practice, e. g., Equity, VII, § 129, and specific equity topics.

New Partners—
See Partnership.

New Promise—
See Bankruptcy § 24; Limitations, VI, A; Novation; Accord and Satisfaction; Negotiable Instruments § 58.

NEW TRIAL.

TREATS of retrial of actions at law by order or direction of the trial court, including the power, right, propriety, and grounds of granting or denying new trials, and the motion or application for them, but excluding the propriety of reversing on error for a new trial (see Appeal, XIII; Harmless Error) and excluding the determination whether a given ruling, act, or omission was erroneous or not (see specific topics treating of trial procedure).

Analysis.

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§ 3. Power and discretion of court.
§ 4. ——To grant or deny new trial after remand of cause.
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§ 6. Existence and materiality of grounds and probability of different result.
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§ 9. Of parties or their witnesses.
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§ 11. In general.
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F. IRREGULARITIES IN VERDICT OR FINDINGS.

§ 25. In general.

G. SURPRISE, ACCIDENT OR MISTAKE.

§ 26. In general.
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§ 35. Willingness to change testimony.
§ 36. Diligence in procuring evidence.
§ 37. ——Evidence known or obtainable at time of trial.
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§ 41. Presenting question and obtaining ruling preparatory to moving.
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§ 50. In general.
§ 51. Rights waived or barred on first trial.

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§ 1. In general.

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Ground for new trial, see post II.
New trials in justices courts, see Justices of the Peace § 130.
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Right to new trial after reference, see Reference, VI.
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Presumption on error as to propriety of new trial, see Appeal § 389.
Impropriety of new trial on case made or submitted controversy, see Appeal §§ 517, 518.
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Arrest of judgment, see Judgments § 41.
Vacating or setting aside judgment on motion, see Judgments, V.
Bills in equity to set aside judgments, see Judgments, VI.
Grant by legislature as encroachment on judiciary, see Constitutional Law § 38.
Grant of new trial as part of judgment on certiorari, see Certiorari § 62.

¶ 1. A new trial should be granted whenever it becomes necessary for the protection of a party in his just rights, where such party clearly has merits, and has not legally waived his rights or lost them by some improper or unjustifiable laches.—Loree v. Reeves, 2 Mich. 133.

§ 2. Waiver or bar of right.

Effect of rights waived or barred on first trial, see post § 51.
Waiver of remedies generally, see Election and Waiver.

¶ 2. A party has a right to waive the right to move for a new trial, and will be bound by such waiver unless it is invalid for some cause relating to him; no one else can set it aside.—Hackley v. Muskegon Circuit Judge, 58 Mich. 454.

§ 3. Power and discretion of court.

To grant or deny new trial after remand of cause, see post § 4.
Discretion of court to extend time for making motion, see post ¶ 122.
Granting of new trial as matter of judicial discretion, see also post ¶¶ 75, 80.
Discretion of court to refuse new trial where the newly discovered evidence is merely cumulative, see post ¶¶ 91, 93.
Necessity that court state reasons for denial or granting of motion, see post § 48.
Review of discretion to grant or deny, see Appeal § 413.

¶ 3. The circuit court has discretion to grant or refuse a new trial; and this discretion is not, usually, reviewable.—Dibble v. Rogers, 2 Mich. 404; Bourke v. James, 4 Mich. 336; Cuddy v. Major, 12 Mich. 368; Sleight v. Henning, 12 Mich. 371; Pennsylvania Min. Co. v. Brady, 14 Mich. 260; People ex rel. Shimer v. Branch Circuit Judge, 17 Mich. 67; Final v. Backus, 18 Mich. 218; People ex rel. Ætna Live Stock Fire & Tornado Ins. Co. v. Wayne Circuit Judge, 20 Mich. 220; Johr v. People, 26 Mich. 427; Jones v. Hobson, 37 Mich. 36; People ex rel. Stork v. Detroit Superior Court Judge, 41 Mich. 5; People ex rel. Alderman v. Montcalm Circuit Judge, 41 Mich. 550; Mahoney v. People, 43 Mich. 39; Toulman v. Swain, 47 Mich. 82; Hake v. Buell, 50 Mich. 89; People v. Francis, 52 Mich. 575; Nelson v. Lumbermen's Min. Co., 65 Mich. 288; Graham v. Myers, 67 Mich. 277.

¶ 4. Courts of record are vested with general discretionary power on the subject of granting new trials; which power is judicial, and not arbitrary.—Loree v. Reeves, 2 Mich. 133.

¶ 5. In a clear case the trial court has discretionary power in an action for a personal injury to set aside the verdict rendered, and order a new trial, of its own motion, if it deems the award insufficient.—Fort Wayne & B. I. R. Co. v. Wayne Circuit Judge, 110 Mich. 173.

¶ 6. The fact that a judgment is obtained for or against a party who moves for a new trial has no bearing upon the question whether the judge has abused his discretion in granting or denying the motion.—Detroit Tug & Wrecking Co. v. Wayne Circuit Judge, 75 Mich. 360.

¶ 7. The circuit court has authority to set aside judgments and grant new trials after the expiration of the term at which they were entered.—Manufacturers' Mutual Fire Ins. Co. v. Gratiot Circuit Judge, 79 Mich. 241.

¶ 8. After an order has been made giving plaintiff until the first day of the next term to move for a new trial, if the county is placed in a new circuit, the judge thereof has jurisdiction to grant a new trial.—Manufacturers' Mutual Fire Ins. Co. v. Gratiot Circuit Judge, 79 Mich. 241.

§ 4. ——To grant or deny new trial after remand of cause.

Power to grant new trial after remand, see Appeal § 565.

¶ 9. A circuit judge may hear and grant a motion for a new trial on the merits even though the supreme court may have affirmed the former judgment.—Parkey v. Galloway, 147 Mich. 693.

¶ 10. Where a case brought by writ of error to the supreme court, and there affirmed, is remitted without direction as to the final disposition thereof, the trial court has power, in the absence of laches, to grant a new trial, if, in its opinion, justice requires it.—Reynolds v. Newaygo Circuit Judge, 109 Mich. 403.

§ 5. Effect of death of trial judge.

¶ 11. The death of a trial judge without acting upon a bill of exceptions duly submitted to him entitles the party applying for it to a new trial.—People ex rel. Wright v. Superior Court Judge, 41 Mich. 726.

¶ 12. Laws 1879, Act No. 8, authorizing exceptions to be settled on the stenographer's minutes in case of the trial judge's death, did not take away the right to a new trial which had been asserted and had vested before the statute was passed.—People ex rel. Campau v. Superior Court Judge, 40 Mich. 630; Stebbins v. Field, 41 Mich. 373.

II. GROUNDS FOR.

A. IN GENERAL; DEFECTS IN THE ACTION.

[Note. In a great many cases language is found to the effect that a given thing was error and constitutes ground for a new trial. Very often this means only that error was committed, the statement as to new trial being gratuitous. These cases have been classified, so far as it was possible to segregate them, into the procedural topics Trial; Instructions; Argument of Counsel; Evidence; and the like. New Trial is not designed to treat of the law of practice and of judicial errors therein, but of the rules by which such errors may or may not afford ground for a retrial.]

§ 6. Existence and materiality of grounds and probability of different result.

Defects in pleading or form of action, see post § 7.
Bias or interest of trial judge, see post § 8.
Misconduct of parties, counsel or witnesses as ground, see post II, B.
Rulings and instructions on trial, see post II, C.
Misconduct of or irregularities affecting jury, see post II, D.
Verdict or findings contrary to law or evidence or unsupported by evidence, see post II, E.
Irregularities in verdict or findings, see post II, F.
Surprise, accident or mistake, see post, II, G.
Newly discovered evidence, see post II, H.
Nature and right in general, see ante I.
Motion, procedure and order or ruling, see post III.
Necessity for stating ground for new trial on making of motion, see post ¶ 119.
Probability of different result based on newly discovered evidence, see post §§ 30-34.
Grounds for awarding new trial on error, see Appeal, XIII, B.
Final judgment without remand where there is no jurisdiction or cause of action, or where new trial would be hopeless, see Appeal §§ 508-511.
Propriety and occasion for remanding for new trial or for entering final judgment on error, see Appeal, XIII, B.
Grounds for new trial in quo warranto, see Quo Warranto, IV.
Necessity that ground relied on for new trial be made basis of objection in trial court, see Saving Questions.
Judicial errors regarded as harmless in themselves or as cured or neutralized by other incidents, rulings, or event of trial, see Harmless Error.
Judicial powers generally, see Courts, V.

¶ 13. New trial on reversal of a judgment for plaintiff is not ordered where it is not probable a different case could be made thereon.—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

¶ 14. A new trial will not be ordered for an error that did not tend in any degree to prejudice the rights of appellants.—Finan v. Babcock, 58 Mich. 301.

¶ 14a. A new trial may be granted after a trial on quo warranto upon the same grounds and on the same showing as in civil cases generally.—People ex rel. Dickinson v. Sackett, 14 Mich. 243.

§ 7. Defects in pleading or form of action.

General law of pleading, see Pleading.
Waiver of variance by failure to object in motion for new trial, see also Pleading § 179.

¶ 15. The joining of several demands for different torts is permissible, and the fact that some demands for which plaintiff was not entitled to recover were so joined with one upon which he did recover could not have prejudiced the jury and refusal of new trial was not error.—Dickinson v. Pere Marquette R. Co., 148 Mich. 461.

§ 8. Bias or interest of trial judge.

Disqualification of judge for interest or bias generally, see Judges § 10.

¶ 16. An order by a trial judge vacating a judgment and ordering a new trial on the ground that he had, as he supposed, discovered that he had a personal interest in the case, is proper, and will not be reviewed.—People ex rel. Alderman v. Montcalm Circuit Judge, 41 Mich. 550.

B. MISCONDUCT OF PARTIES, COUNSEL OR WITNESSES.

§ 9. Of parties or their witnesses.

Misconduct of or affecting jury as ground, see post II, D.

What amounts to erroneous misconduct or distraction during trial, see Trial, II.

¶ 17. A new trial in an action for damages for assault and battery upon the ground of alleged misconduct of the wife and daughter of plaintiff, witnesses in the case, in weeping when plaintiff's counsel, in his closing argument, referred to the fact that plaintiff would always be affected in his hearing, held properly denied.—Matthews v. Lamberton, 198 Mich. 746.

¶ 18. There was no abuse of the discretion of the trial court, in an action by a husband for damages for expenses incurred and loss of services due to injuries received by the wife, in refusing to pronounce a mistrial after the wife of plaintiff fainted, upon being called to the witness stand, and was taken to a hospital, where the verdict was clearly not excessive.—Jolman v. Alberts, 192 Mich. 385.

§ 10. Of adverse counsel.

Association and conversation between counsel and juror as misconduct warranting new trial, see also post ¶¶ 43-46.

What constitutes improper opening statement or argument, see Argument of Counsel.

¶ 19. New trial will not be granted for remarks of counsel regarding the poverty of the plaintiff, when they are based on the evidence and no ruling had thereon, though excepted to.—Druck v. Antrim Lime Co., 177 Mich. 364.

¶ 20. A motion for a new trial based upon the claim that the argument of counsel was improper and prejudicial, is properly denied where counsel's argument was justified by the testimony except that part of it based upon testimony which had been stricken out, and the court at once informed counsel that such testimony had been stricken out, and counsel made no further allusion to it.—Scheer v. Detroit United Ry., 155 Mich. 561.

¶ 21. Language employed with regard to defendant in the closing argument of counsel, is no ground for a new trial where the point raised is merely one of good taste.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 22. Where it is testified to that a certain lost paper was subsequently found in the shoe of a child five years of age, it is no ground for a new trial that, in his argument to the jury, counsel produced a child's shoe which he asserted would be the size of a shoe ordinarily worn by a child of that age, and argued to the jury the improbability of a paper such as the one in question having been lost in such a place, although the shoe had not been offered and put in evidence.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 23. Where counsel for plaintiff employs considerable latitude in his argument to the jury, in a way calculated strongly to move them, the defendant will not be granted a new trial where the argument was based on the evidence, and the reasonableness of the verdict indicates that the jury were not unduly prejudiced by it.—Shepard v. Platt, 158 Mich. 181.

¶ 24. Where, in a suit on a written contract for a correspondence course, the execution of said contract by defendant is the only point in issue, a verdict for defendant will be set aside where by imputing questions and accusing answers on immaterial matters the jury are apparently led to believe that defendant was inveigled into the signing of said contract by glowing promises of plaintiff's agent that the course would open to defendant the royal road to learning.—International Text-Book Co. v. Roberts, 168 Mich. 501.

C. RULINGS AND INSTRUCTIONS ON TRIAL.

§ 11. In general.

Instructions or directing of verdict, see post § 12.

Rulings on admission, exclusion or striking of evidence, see post § 13.

Powers of court generally, see Courts, V.

¶ 25. Where the trial court, in refusing to postpone a suit for commissions on account of the failure of a subpoenaed witness to appear for plaintiff, acts within his sound discretion, his ruling cannot be held to have grown into reversible error by reason of his refusal to grant a new trial on such ground.—Roney v. Healy, 170 Mich. 46.

§ 12. Instructions or directing of verdict.

Propriety of instructions, see Instructions; and see also sections in specific topics treating of instructions.

New trial for inapplicable charges on damages, see also Damages ¶ 1427.

¶ 26. An instruction given to a jury after retirement when such jury requested further instructions, which correctly stated the law, is not ground for a new trial where counsel made no objection to the delivery of the instruction by the clerk of the court, at the time.—Barnett v. Saloman, 118 Mich. 460.

¶ 27. Where, in action to recover for the value of automobiles and supplies sold, an ambiguous opening statement is made by the counsel for plaintiff and there is testimony supporting such statement, but also

testimony supporting the declarations, and the verdict is directed upon the ground that such testimony as was not conformable to the opening statement of counsel should be stricken out and that what was left made no case within the pleadings, a new trial should be granted where there was testimony remaining to support the declaration.—Kimmerle v. Bonine, 188 Mich. 148.

§ 13. Rulings on admission, exclusion or striking of evidence.

Propriety of rulings on evidence, see Evidence; Examination of Witnesses; Trial, V; Witnesses.

¶ 28. The denial of a motion for a new trial on the ground of the exclusion of testimony is proper, where, if such testimony had been received, it would not have changed the result.—Moore v. Harneck, 200 Mich. 642.

¶ 29. The counsel of a party is not stopped by the court from introducing testimony so as to warrant a new trial where there is no available testimony known to him, which is not given.—Moore v. Harneck, 200 Mich. 642.

¶ 30. In an action for negligent injury the court did not abuse its discretion in granting a new trial at the request of the plaintiff, where after the commencement of the cross-examination the plaintiff by reason of his enfeebled condition was compelled to retire from the court room, and his testimony was on motion stricken out, and there was a verdict by the jury for plaintiff, his counsel having elected to proceed with the trial. There had been, however, a special finding by the jury that there were no box-cars standing or being stored on defendant's side-track on the north-easterly side of the highway at the time when the plaintiff was injured, there being thus an ambiguity between the general verdict and the special finding; the plaintiff's evidence upon the point involved (which was stricken out) was material.—Chicago & G. T. R. Co. v. Genessee Circuit Judge, 89 Mich. 549.

D. MISCONDUCT OF OR IRREGULARITIES AFFECTING JURY.

§ 14. In general.

Disqualification of jurors and irregularities in selection, see post § 15.

Conduct causing or exhibiting prejudice, see post § 16.

Separation of jury during deliberations, see post § 17.

Interference by or association or communication with other persons, see post § 18.

Affidavits of jurors or evidence as to their misconduct in proceedings for new trial, see post § 44.

Misconduct of parties, counsel or witnesses, see ante II, B.

Proper custody and seclusion of jury from improper communications or separation during trial, see Trial, VIII.

¶ 31. A trial judge is incompetent to decide that a verdict was not affected by outside influences to which the jury had been exposed; and if he refuses to set it aside on the ground that it was just, he usurps the functions of the jury. The presumption that the jurors were honest will not save the verdict.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

¶ 32. The fact that it took the jury less than five minutes to reach a verdict is no ground for a new trial.—Farnsworth v. Fraser, 137 Mich. 296.

§ 15. Disqualification of jurors and irregularities in selection.

Eligibility for jury service generally, see Jury, II.

Disqualification of jurors respecting cause, see Jury, III.

¶ 33. In a civil case a juror's disqualification by alienage not discovered until after verdict is not ground for a new trial.—Johr v. People, 26 Mich. 427.

¶ 34. Where a juror, who had served in a condemnation proceeding wherein the jury had disagreed, upon his examination as to his qualifications, denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the contesting party was ignorant of his having acted as a member of the former panel, and of the submission of the question of such necessity to him as a member thereof, until after the second proceedings were ended, he is entitled to have the verdict set aside and to a new trial.—Hester v. Chambers, 84 Mich. 562.

¶ 35. A new trial will not be granted after a verdict for defendant in an action against a city for personal injuries, because one of the jurymen was a member of the common council, where plaintiff's attorney knew of that fact at the time the jury were selected, and made no objection to him on that account.—Walker v. City of Ann Arbor, 111 Mich. 1.

§ 16. Conduct causing or exhibiting prejudice.

¶ 36. In an action against the estate of a decedent for services rendered, the commissioners on claims appointed by the probate court failed to agree as to the claim presented. Claimant appealed to the circuit court, and recovered a judgment. It appeared that several of the jurors had read articles commenting on the cause published in newspapers. The articles were colored, and gave decedent's estate at double what it actually was, and assumed that the commissioners were favorable to claimant, but were unable to agree upon the sum she was

to receive. Held, that it was not ground for a new trial, since it could not be presumed that the jury would render a verdict contrary to the sworn testimony in the case.—In re Thompson's Estate, 157 Mich. 669; Forsythe v. Thompson's Estate, Id.

¶ 37. Where, during the progress of a trial and before the submission of the case, a juror has made statements outside the jury room concerning the case or evidence offered therein, indicating a fixed opinion unfavorable to the moving party or ill-will towards him, it is ground for a new trial, and it need not be shown that the verdict was actually influenced by such improper conduct.—Cooper v. Carr, 161 Mich. 405.

¶ 38. The expression of mirth by a juror, upon cross-examination of the defendant, because of his apparent inconsistent statements as to the amount due on a mortgage, held not ground for new trial, especially in the absence of an exception at the time of the incident.—Cutler v. Spens, 191 Mich. 603.

§ 17. Separation of jury during deliberations.

¶ 39. Separation of a jury before arriving at a verdict and going for supper to their respective boarding houses unaccompanied by an officer, by consent of both parties to the case, held not ground for new trial in the absence of any prejudice shown.—Hampton v. Van Nest's Estate, 196 Mich. 404.

¶ 40. In order that the separation of the jury during deliberation may be ground for the granting of a new trial, it must be shown that it was prejudicial to the defeated party, or the facts of the separation must be such as to create a presumption that there was prejudice, in that a juror might have been improperly approached.—Spencer v. Johnson, 185 Mich. 85.

¶ 41. The fact that by reason of illness, a juror was absent from the jury room during the deliberations of the jury, for several hours under the care of a physician, held not prejudicial to the defendant, so as to entitle him to a new trial.—Spencer v. Johnson, 185 Mich. 85.

§ 18. Interference by or association or communication with other persons.

See also post ¶ 124.

¶ 42. The denial of a motion for new trial based upon the ground that the sheriff in charge of the jury was in the jury room with the jury and within hearing while they were deliberating on their verdict, held not erroneous where the evidence tended to show he was not present during deliberations of the jury and only as occasion required for the purpose of replenishing the fire in the room and furnishing water to the jury.—Hampton v. Van Nest's Estate, 196 Mich. 404.

¶ 43. The mere fact that a lawyer converses with a juror while the case is on trial, is not sufficient ground for a new trial where the conversation is upon indifferent matters.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 44. A new trial should be granted a defeated party where a juror, after the jury had been cautioned not to talk with the witnesses or attorneys connected with the case, was, during the course of the trial, entertained at a large social gathering at the home of an attorney of record of the successful party, although the trial was not discussed, and such attorney had withdrawn from active participation in the trial because of being a very material witness for the successful party.—McCartney v. Saul, 180 Mich. 502; In re Quinn's Estate, Id.

¶ 45. It is not necessary, in order to obtain a new trial, because of the entertainment of a juror during its progress by an attorney of record, that a bad motive or intent existed, or that the defeated party was unfavorably affected thereby.—McCartney v. Saul, 180 Mich. 502; In re Quinn's Estate, Id.

¶ 46. An attorney who stayed at the same hotel during the trial of a particular case and other cases tried previously to such case and occupied the same table during such period, and goes into the dining room on a particular day with no knowledge that one of the jurymen in a case in which he is trying is present at the table, and is seated by the head waitress at the same table with the juryman and other people, and converses with the juror, is not guilty of misconduct authorizing a new trial.—Vincent v. Heenan, 194 Mich. 316.

E. VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE OR UNSUPPORTED BY EVIDENCE.

§ 19. In general; verdict contrary to law or instructions.

Verdict contrary to or unsupported by evidence, see post §§ 20-22.

Inadequacy or excessiveness of verdict, see post § 23.

Successive verdicts, see post § 24.

Irregularities in verdict or finding, see post II, F.

Surprise, accident or mistake as ground, see post II, G.

Newly discovered evidence as ground, see post II, H.

Sufficiency of the evidence to support the verdict, see Evidence, X, and see also portions of specific topics treating of proofs and evidence.

Power of court to order new hearing before referee on ground that referee's conclusion is contrary to weight of evidence, see Reference, VI.

General requisites and sufficiency of verdicts and findings, see Verdicts and Findings.

Presumption on error as to verdict or findings, basis and manner of agreement, and adequacy or excessiveness, see Appeal §§ 382-385.
Tests applied on review of sufficiency of evidence to sustain verdict, see Appeal §§ 452-454.
Direction of verdict on evidence insufficient to sustain verdict against motion for new trial, see Directing Verdict § 8.

¶ 47. Where the jury ignores the charge of the court and the evidence in the case, and agrees upon a compromise verdict outside of the evidence, the trial court should set aside the verdict.—Morley v. Liverpool, London & Globe Ins. Co., 85 Mich. 210.

§ 20. Verdict contrary to or unsupported by evidence.

Conflicting evidence, see post § 21.
Number and credibility of witnesses, see post § 22.
Newly discovered evidence as ground, see post, II, H.
Absence of expected evidence as ground for surprise entitling to new trial, see post § 27.
Surprise from unexpected evidence as ground, see post § 28.

¶ 48. Where a verdict is palpably unjust and at variance with the great preponderance of the evidence a new trial should be granted.—Whipple v. Michigan Cent. R. Co., 130 Mich. 460.

¶ 49. A verdict for six cents damages for sale of liquor to plaintiff's husband is ground for new trial as against the evidence, where the evidence showed a sale after notice not to sell, a material loss of support, and beatings by the husband when drunk.—Fleming v. Gemein, 168 Mich. 541.

¶ 50. Motion for a new trial was properly denied, where the testimony upon all the material questions preponderated in the prevailing party's favor and error did not appear.—Hartz v. Eddy, 140 Mich. 479.

¶ 51. A new trial will be granted where a verdict for plaintiff for the entire amount claimed is not warranted by his own evidence.—Salmer v. Hicks, 188 Mich. 391.

¶ 52. In an action for personal injuries by a fireman of a locomotive through a collision, evidence examined and held that the testimony presented so strongly required an affirmative answer to the two vitally important questions submitted on the question of the negligence of the train dispatcher instead of the negative answer given by the jury that the motion for a new trial should have been granted.—Moon v. Pere Marquette R. Co., 143 Mich. 125.

¶ 52a. A motion for a new trial on the ground that findings are against the weight of evidence and are contrary to the evidence will not lie in cases of findings by a referee, since there is no way to have the evidence before the court in determining such a motion.—People ex rel. First Nat. Bank v. Wayne Circuit Judge, 18 Mich. 483.

§ 21. ——Conflicting evidence.

¶ 53. It is not error to refuse a motion for new trial on the ground that a verdict is against the weight of evidence when the evidence is sharply conflicting on material questions.—Gleason v. Stone, 200 Mich. 187.

¶ 54. It is not error to deny a motion for new trial on the ground that the verdict for plaintiff is against the evidence where there is a sharp conflict in the testimony as to whether plaintiff, who was run over by a motor truck after falling from his bicycle, was about 100 feet ahead of the truck or fell directly under the wheels.—Goosen v. Packard Motor Car Co., 174 Mich. 654.

¶ 55. In an action by a beet sugar company against a railroad company to recover demurrage charges paid under protest for "spotting" cars for plaintiff's plant, held that the verdict for plaintiff was not against the overwhelming weight of evidence so as to warrant a new trial.—Mt. Clemens Sugar Co. v. Grand Trunk Ry. Co., 200 Mich. 33.

§ 22. ——Number and credibility of witnesses.

Absence of expected witness as ground, see post § 27.

¶ 56. Where two witnesses testify to one state of facts and three to another, it cannot be said, as a matter of law, on motion for a new trial, that the verdict is against the clear weight of the evidence.—Morrison v. Carpenter, 179 Mich. 207.

¶ 57. In a suit for injuries against a street railway for starting up its car while plaintiff was alighting, where plaintiff's case is made out only by her unsupported testimony, which is contradicted by four disinterested and unimpeached witnesses and by the physical facts attending the accident, it is the duty of the trial court to overturn the verdict as being against the weight of the evidence.—Krouse v. Detroit United Ry., 166 Mich. 147.

¶ 58. In an action for personal injuries caused by a rope coming off a hoisting apparatus where plaintiff testified he had never before operated the hoist, but also showed great familiarity with it, and numerous other witnesses testified that they had seen him operate it, the weight of the evidence was so overwhelmingly against him that if he went to the jury because of such evidence and recovered, a new trial should be granted.—Bays v. Warren Featherbone Co., 131 Mich. 205.

§ 23. Inadequacy or excessiveness of verdict.

Irregularities in verdict or findings, see post II, F.

Adequacy and excessiveness of verdicts for damages, see Damages, IX.

Verdict against evidence, excessive amount of damages, see also Damages ¶ 88.

¶ 59. The remedy for inadequacy in the amount of the verdict is by motion for a new trial.—Love v. Halladay, 139 Mich. 575.

¶ 60. A verdict for six cents in an action for damages for personal injuries should be set aside as inadequate and as against the weight of evidence and a new trial granted where the uncontradicted testimony shows that the plaintiff is entitled to substantial damages.—Walker v. Britton, 193 Mich. 174.

¶ 61. A verdict in an action on a claim against an estate for services rendered deceased and his wife, should be set aside as excessive where there is no competent testimony which would warrant so large a verdict.—Oliver v. Jessup's Estate, 137 Mich. 642.

¶ 62. Where one who sues for an injury to his knee alleged to have been caused by his being ejected from a railroad train, made no claim of injury to those who saw him immediately after, and at once walked four miles to a lumber camp, and where one of his physicians testifies that he would eventually get the full motion of his knee joint, but not in less than a year, while his other physicians testify that he will always be somewhat lame, the court's refusal to grant a new trial upon a verdict of $7,000, is close to an abuse of judicial discretion.—Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 5.

¶ 63. In an action of trespass for cutting and removing timber, a new trial on the ground that the verdict is excessive and against the weight of evidence, will not be granted where it appears that defendant had full notice of plaintiff's claims, and instead of keeping an account of the timber cut, intentionally mingled it with other timber then being cut by defendant in carrying on extensive lumbering operations.—North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495.

¶ 64. It cannot be said that a verdict for $3,000 for libel is the result of vindictiveness or prejudice, where it appears that the jury offered to return a verdict for $1,500 with a condition that defendant publish a retraction, and that having been informed that they could not legally return such a verdict they then retired and brought in one for double the amount; since the jury may have thought that retraction would prevent future injury to plaintiff.—McCormick v. Hawkins, 169 Mich. 641.

§ 24. Successive verdicts.

Force of successive verdicts with same result, see Appeal § 449.

¶ 65. Where a jury renders a verdi against the weight of the evidence, eithe through inadvertence, sympathy or preju dice, it is the duty of the trial court to se it aside, and the fact that a second jury fal under the same error affords no reason fo changing the rule or its application.—Krous v. Detroit United Ry., 166 Mich. 147.

¶ 66. The fact that two duly qualified an disinterested juries have reached the sam result, while not controlling, is significan and the court will only interfere when suc a verdict is so manifestly against the ove whelming weight of evidence and so palp bly wrong as to force the conviction that was the result of either passion or preju dice or a dense incapacity to analyze test mony and discern the truth.—Silverstone London Assurance Corporation, 187 Mic 333.

F. IRREGULARITIES IN VERDICT O FINDINGS.

§ 25. In general.

Verdict or findings contrary to law or ev dence, see ante II, E.

Verdict unsupported by the evidence, s ante §§ 20-22.

Inadequacy or excessiveness of verdict, s ante § 23.

Effect of successive verdicts, see ante § 2

General requisites of verdicts and finding see Verdicts and Findings.

Sufficiency of the evidence to support th verdict, see Evidence, X, and see als portions of specific topics treating proofs and evidence.

¶ 67. New trial will not be granted correct the erroneous allowance, in a judg ment, of interest, when the precise extent the error is easily determinable.—Bresn han v. Nugent, 97 Mich. 359.

¶ 68. Unless the jury abuse their discretio a verdict is not to be set aside merely b cause it does not appear exactly how it wa made up.—Swift v. Plessner, 39 Mich. 178.

¶ 69. The plaintiff sued a newspaper an a private person for publishing an allege libelous article. The jury found the privat person guilty, but not the newspaper. Plai tiff appealed. Held, that notwithstanding h had recovered against one of two join defendants, the erroneous acquittal of th other defendant was prejudicial and plai tiff was entitled to a new trial.—Lawrenc v. Herald Pub. Co., 158 Mich. 459.

¶ 70. Where the contract received in ev dence differs so radically from the one d clared upon as to be inadmissible under th

special count in the declaration, and plaintiff, on objection being made, does not choose to amend his declaration, and the findings of fact and law show that the judgment was rendered upon said special count, the judgment will be reversed, and a new trial ordered.—Reynolds v. Reeder, 104 Mich. 265.

G. SURPRISE, ACCIDENT OR MISTAKE.

§ 26. In general.

Absence of witness or evidence, see post § 27.
Surprise from unexpected evidence or change in theory of case, see post § 28.
Necessity for showing of diligence to procure witness or evidence, see post ¶ 73.

¶ 71. The affidavit of counsel for defendant that he had not expected to try a case, and had intended only to assist at the trial, and was not as familiar with the details of the testimony to be presented for the defendant as he otherwise would have been, and had a mistaken idea of the character of some of the evidence, and, though prompted by defendant's wife, when defendant was on the stand, failed to get the significance of her advice that plaintiff, the owner of a telephone system, who was suing to recover the telephone and attachments which defendant was claiming the right to use after the expiration of the period for which he had rented it, had orally promised to give defendant a rebate, is not a sufficient excuse for failure to present such testimony at the trial, so as to warrant a new trial.—Moore v. Harneck, 200 Mich. 642.

¶ 72. Motion for new trial on the ground that defendant had been deprived of the use of certain evidence given by plaintiff upon a former trial, is properly denied where the evidence in question had reference to testimony at a trial immediately preceding which the stenographer, who was the same at both trials, had not had time to copy since the testimony could have been read from the notes during the trial.—Stevens v. McLachlan, 120 Mich. 285.

§ 27. Absence of witness or evidence.

¶ 73. Sufficient diligence to procure the testimony of a witness, formerly the superintendent of the movant's factory at F. in Michigan, is not shown by proof that the movant's president on October 1st, ten days after the trial, wrote a letter from Pittsburg addressed to such former superintendent, sent such letter to a person at F. with request to have the superintendent's father, who lived there, forward the letter, and that on the 9th a reply from said superintendent, dated in Texas, was received.—Grand Rapids Elec. Co. v. Walsh Mfg. Co., 142 Mich. 4.

§ 28. Surprise from unexpected evidence or change in theory of case.

¶ 74. The administrator is not guilty of laches in failing to introduce upon the trial of an appealed claim in circuit court the testimony of the attorney who drew the deed and bill of sale out of which the claim arose, to the effect that the transfer was in trust, so as to preclude him from asking a new trial upon the discovery of such evidence, although he knew the papers were in the attorney's handwriting, since there was nothing to indicate that claimant would proceed on appeal upon a new and different theory.—Raub v. Nisbett, 111 Mich. 88.

H. NEWLY DISCOVERED EVIDENCE.

§ 29. In general.

Sufficiency of evidence discovered and probability of different result, see post §§ 30-34.
Willingness to change testimony, see post § 35.
Diligence in procuring evidence, see post §§ 36-38.
Sufficiency of affidavits on ground of newly discovered evidence, see post § 43.
Motion, procedure and order or ruling, see post III.
Newly discovered evidence as ground for rehearing in equity, and cumulative effect of it as ground for denying rehearing, see Equity § 229.
Newly discovered evidence as ground for bill of review, see Equity § 241.

¶ 75. Whether a new trial will be granted on the ground of newly discovered evidence is largely a matter of discretion.—Luckhurst v. Schroeder, 183 Mich. 487.

Discovery of facts after the trial minimizing the injury as ground for new trial, see note, 6 N. C. C. A. 417-419.
Matters occurring subsequent to trial as newly discovered evidence on question of extent of injury, see note, 4 N. C. C. A. 94-109.

§ 30. Sufficiency of evidence discovered and probability of different result.

See also post ¶¶ 130-135.
Inadmissible, incompetent or irrelevant evidence, see post § 31.
Evidence which is merely cumulative, see post § 32.
Evidence impeaching witness, see post § 33.
Evidence going only to question of damages, see post § 34.
Effect of willingness of witness to change testimony, see post § 35.
Necessity for diligence in procuring evidence, see post §§ 36-38.
Probability of different result as test of materiality of ground generally, see ante § 6.

¶ 76. A new trial will not be granted for newly discovered evidence which, if admitted, would not result in a different verdict.—A. E. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672.

¶ 77. The denial of a new trial because of newly discovered evidence, is not an abuse of discretion, where it cannot be said that such evidence would produce a different result if a new trial were granted.—Luckhurst v. Schroeder, 183 Mich. 487.

¶ 78. A new trial should not be granted upon the ground of newly discovered evidence unless such evidence is very clear and satisfactory, and likely to seriously affect the result if admitted.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 79. In an action by an officer of a corporation to recover an amount for services alleged to be due under a written contract held that a sufficient showing as to newly discovered evidence had been made to warrant the granting of a new trial.—Clark v. Onaway-Alpena Tel. Co., 196 Mich. 168.

¶ 80. Whether newly discovered evidence is of such a character and a different conclusion ought to follow, or is probable on a retrial, is a question primarily and peculiarly addressed to the good judgment and discretion of the judge who heard and saw the witnesses, and such discretion will not be interfered with, except in case of manifest abuse.—Wilson v. Johnson, 195 Mich. 94.

§ 31. ——Inadmissible, incompetent or irrelevant evidence.

Evidence going only to question of damages, see post § 34.

¶ 81. The trial court properly denies a new trial on the ground of newly discovered evidence where the evidence tendered is inadmissible as being hearsay.—Antosik v. Michigan Alkali Co., 166 Mich. 415.

¶ 82. A new trial on the ground of newly discovered evidence should not be granted in a personal injury suit on affidavits made by a physician after the trial and containing evidence which would not have been admissible had said physician appeared at the trial to testify for defendant.—Wilkens v. Detroit United Ry., 169 Mich. 437.

¶ 83. It is not error, in an action by a wife under the Civil Damage Act to recover for the death of her husband due to falling in a hot pond while intoxicated by liquor purchased from defendants, to refuse to grant a new trial on the ground of newly discovered evidence consisting of alleged contradictory statements made in proofs of claim for insurance on the life of her husband, where it appears that they were made by a doctor, were not in fact inconsistent, and it was not shown that plaintiff had knowledge of the statements nor that by due diligence defendant could not have procured the testimony in time for trial.—Holtquist v. O'Connell, 196 Mich. 484.

§ 32. ——Evidence which is merely cumulative.

¶ 84. Newly discovered evidence which is merely cumulative is not ground for a new trial.—Morin v. Robarge, 132 Mich. 337.

¶ 85. A new trial on the ground of newly discovered evidence will not be granted where such evidence is merely cumulative.—In re Rockett's Estate, 191 Mich. 499.

¶ 86. A motion for new trial on the ground of newly discovered evidence is properly denied where the proposed evidence is merely cumulative, is on an unimportant question, and the verdict would be no different if it was admitted.—Bilakos v. Kelley, 200 Mich. 125.

¶ 87. Where the only ground urged in support of a motion for a new trial is newly discovered evidence, and the same is merely cumulative, there is no abuse of discretion by the circuit judge in refusing the motion.—Guerold v. Holtz, 103 Mich. 118; White v. Peabody, 106 Mich. 144.

¶ 88. A new trial will not be granted because of the absence and inability to procure attendance of a witness whose testimony would have been merely cumulative on the question of damages, and whose intended absence was known to counsel, if not to the party, before the trial.—North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495.

¶ 89. A new trial will not be granted because of newly discovered evidence where such evidence is merely cumulative, and, as bearing upon whether a verdict should be directed, would not have changed the result.—Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 313.

¶ 90. A motion for a new trial on the ground of newly discovered evidence is properly refused by the trial court, in the exercise of its discretion, where the evidence is merely cumulative and it is not shown that, by the exercise of diligence, the evidence could not have been produced at the trial.—Hydrex Silent Exhaust Works v. Seager Engine Works, 189 Mich. 431.

¶ 91. There is no abuse of discretion in denying a new trial on the ground of newly discovered evidence which was merely cumulative and not upon the real question in the case.—Guerold v. Holtz, 103 Mich. 118.

¶ 92. Denial of a motion for a new trial in a personal injury action against a street railway company, on newly discovered evidence which was merely cumulative in character, held not an abuse of discretion.—Goodyear v. Detroit United Ry., 177 Mich. 129.

¶ 93. The discretion of a trial judge in denying a motion for new trial on the ground of newly discovered evidence is not abused where it does not appear that the evidence was not cumulative and it would produce a different result on a new trial.—Wilson v. Johnson, 195 Mich. 94.

¶ 94. A motion for the new trial of a case tried five years after the actionable occurrence, on the ground of newly discovered evidence, will not be granted where the evidence of the new witness is cumulative only and could have been discovered by reasonable diligence.—National Surety Co. v. Grant, 177 Mich. 348.

§ 33. ——Evidence impeaching witness.

¶ 95. Ordinarily a new trial will not be granted on the ground of newly discovered evidence merely of an impeaching character.—Luckhurst v. Schroeder, 183 Mich. 487.

¶ 96. Evidence which might have been but was not introduced on the trial in impeachment of other witnesses is not newly discovered evidence such as to authorize a new trial.—Spring v. Perkins, 156 Mich. 327.

¶ 97. Ordinarily a new trial will not be granted because of newly discovered evidence to impeach a witness.—Spray v. Ayotte, 161 Mich. 593.

¶ 98. Where counsel for defendant has learned subsequent to trial that several witnesses for plaintiff had been arrested, and he on cross-examining them during the trial failed to make inquiry on this point, no issue was made for the introduction of impeaching testimony, and he will not be granted a new trial in order to cross-examine them in reference thereto.—Bosek v. Detroit United Railway, 175 Mich. 8.

§ 34. ——Evidence going only to question of damages.

¶ 99. Where in a suit upon a contract of hiring the newly discovered evidence upon which defendant seeks a new trial goes merely to the question of the amount of damages to which plaintiff is entitled, no sufficient ground for granting a new trial is established.—Richards v. Church Balance-Gear Co., 166 Mich. 464.

§ 35. Willingness to change testimony.

¶ 100. After a verdict for plaintiff in a suit on a contract of hiring, defendant's affidavit that his witness has since found several memorandum books which refresh his recollection, and have a very important bearing upon the issues in the case, and will, in his belief, bring about an entirely different result in case a new trial is granted, presents no reason for granting a new trial.—Richards v. Church Balance-Gear Co., 166 Mich. 464.

¶ 101. A motion for new trial on the ground of newly discovered evidence, is properly denied in an action by a building contractor against a school district to recover on the contract, where based upon affidavits of three members of the building committee who swore that after the trial they had made a further examination of the building and had become convinced that their testimony given on the trial was wrong, and that they had been deceived during the progress of the work by the contractor and architect, as such evidence was not newly discovered.—McMillan v. Portsmouth Township School District No. 2, 200 Mich. 280.

§ 36. Diligence in procuring evidence.

Evidence known or obtainable at time of trial, see post § 37.

Evidence existing in public records, see post § 38.

Diligence required to avoid absence of witness, see also ante ¶ 73.

Necessity that affidavit show diligence exercised to secure evidence before trial, see also ante ¶ 134.

¶ 102. To entitle a party to a new trial upon the ground of newly discovered evidence he must show diligence.—Gray v. Barton, 62 Mich. 186.

¶ 103. A new trial upon the ground of newly discovered evidence is properly denied in the absence of a showing of diligence.—Burke v. Bay City Traction & Elec. Co., 147 Mich. 172.

¶ 104. Failure to exercise reasonable care to secure alleged newly discovered evidence will defeat a motion for a new trial.—A. E. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672.

¶ 105. The law requires of parties care, diligence, and vigilance in securing and presenting evidence at the trial; and a motion for a new trial on the ground of newly discovered evidence will be overruled unless it is shown that the evidence in question has in fact been newly discovered, that the failure to produce it at the trial was not due to a lack of reasonable diligence, that it is not cumulative merely, and that it is of a character calculated to render a different result probable on a retrial of the cause.—Canfield v. City of Jackson, 112 Mich. 120.

¶ 106. A new trial will not be granted on the ground of newly discovered evidence where due diligence was not exercised to bring in such evidence at the first trial.—Spray v. Ayotte, 161 Mich. 593.

¶ 107. A new trial in a personal injury suit demanded on the ground of newly discovered evidence is properly refused where defendant does not show that diligence was exercised in procuring said evidence upon

the trial, and where it is not shown that such portions of said evidence as would be competent would result in changing the outcome of the trial in any degree.—Leonard v. Leahy, 169 Mich. 406.

¶ 108. Where defendant has not used due diligence, and where an amendment of the pleadings and a retrial upon a different issue would be necessitated, it is proper to refuse a new trial on the ground of newly discovered evidence.—Ferris v. Court of Honor, 152 Mich. 322.

§ 37. ——Evidence known or obtainable at time of trial.

¶ 109. A motion for a new trial on the ground of newly discovered evidence will be refused where such evidence was known to the defendant at the trial but was not presented because of lack of diligence on his part.—Houser v. Carmody, 173 Mich. 121.

¶ 110. A new trial will not be granted on the ground of newly discovered testimony where the matters were within the knowledge of the party prior to the trial, and the evidence might have been secured by the exercise of reasonable diligence.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

¶ 111. Where evidence that witnesses for plaintiff had been arrested was within reach while they were upon the stand, if inquiry had been made in regard thereto, and no diligence on the part of counsel to obtain the same is shown to have been used, no showing is made to warrant a new trial.—Bosek v. Detroit United Railway, 175 Mich. 8.

¶ 112. It is not error to overrule a motion for a new trial based on newly discovered evidence where the affidavits show that all the witnesses lived in the jurisdiction and it is not shown that their testimony could not have been obtained by proper diligence.—Pinkerton Bros. Co. v. Bromley, 128 Mich. 236.

¶ 113. A new trial will not be granted upon the ground of newly discovered evidence, where, with the exercise of reasonable diligence, the evidence of the witness could have been discovered and produced in time for the trial.—Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 313.

¶ 114. A new trial will not be granted on the ground of newly discovered evidence, in an action for damages resulting from the explosion of a boiler, when based on the alleged fact that expert witnesses, who testified at the trial and who were unable to state the cause of the explosion, had on a subsequent examination discovered it, where it did not appear, but that such evidence would have been available at the trial had due diligence been exercised.—Sturgis v. Mt. Clemens Sugar Co., 184 Mich. 456.

¶ 115. In an action for injuries sustaine by one riding in a buggy which was struc by a street car, the fact that the driver of th buggy who was the plaintiff's son-in-law wa not called as a witness will not entitle de fendant to a new trial upon producing hir in support of the motion for a new trial, an showing his testimony material to the defens and contradictory to that given by the plair tiff in the absence of any showing of dili gence.—Edwards v. Foote, 129 Mich. 121.

§ 38. ——Evidence existing in public record

¶ 116. Where a party has taken two year to prepare his case for trial and all the fact are matters of public record, a motion for new trial on the ground of newly discovere evidence is properly denied.—Harrison Gran ite Co. v. Grand Trunk Ry. Co., 175 Mich 144.

III. MOTION, PROCEDURE AND ORDEI OR RULING.

§ 39. In general; motion and notice.

Time for application and effect of delay, se post § 40.

Presenting question and obtaining ruling pre paratory to moving, see post § 41.

Affidavits and extrinsic evidence, see pos §§ 42-44.

Conditions on granting or refusing new trial see post § 45.

Orders and disposal of motion, exception and reconsideration, see post §§ 46-48.

Effect of order or ruling, see post § 49.

Motion and procedure for new trial in qu warranto, see Quo Warranto, IV.

Pendency of motion as extending time fo settling bill of exceptions, see Appea § 95.

Insufficiency of new trial motion as mean of saving question of bar by limitation for review, see Saving Questions.

Sufficiency of bill or case to review ruling see Appeal § 191.

Time when execution may issue on judg ment, see Executions § 3.

Motion for new trial as precluding equitable relief from judgment, see Judgments § 85.

Reviewableness on certiorari of new trial orders, see Certiorari § 10.

Moving for new trial to accomplish vacation of judgment and thus open default, see Defaults ¶ 119.

Practice on motion, see Jud. Act, chap. I. § 24; Comp. L. 1915, § 12029.

Bond to stay proceedings pending motion for new trial, see Jud. Act, chap. XXII, § 23 et seq.; Comp. L. 1915, § 12812 et seq.

¶ 117. A motion for a new trial based on newly discovered evidence should include the nature and materiality of the evidence.—Elkhoff v. Wayne Circuit Judge, 129 Mich. 150.

¶ 118. A proper practice on motion for new trial based on evidence to be taken

would be to serve the motion papers, show the necessity and ask for time to take testimony which could be granted in the discretion of the court.—Eikhoff v. Wayne Circuit Judge, 129 Mich. 150.

¶ 119. The rule requiring a motion for a new trial to be accompanied by a statement of the ground of the new motion is not satisfied by a statement that it is based on newly discovered evidence and "testimony in the case and testimony to be taken."—Eikhoff v. Wayne Circuit Judge, 129 Mich. 150.

§ 40. Time for application and effect of delay.

Time after new trial motion decided for making or extending time to make bill or case, see Appeal § 96.

Delay in suing as affecting case made for new trial, witnesses being dispersed, see also Carriers ¶ 642.

Time prescribed by court rule, see 1916 C. C. Rule 48.

¶ 120. Comp. Laws 1897, § 205, and 1897 Cir. Ct. Law Rule No. 21, in regard to new trials in civil causes, do not fix any limit of "further time" within which a motion for a new trial is in the discretion of the court.—Hayes v. Ionia Circuit Judge, 125 Mich. 277.

¶ 121. Circuit Court Rule 31, requiring motions for new trial to be made in two days, was not intended to interfere with the common-law discretion of the court to entertain motions for new trials. Whether it applies to motions for new trials based on newly discovered evidence, quære.—People ex rel. Ætna Live Stock Fire & Tornado Ins. Co. v. Wayne Circuit Judge, 20 Mich. 220.

¶ 122. 1897 C. C. Rule No. 21, requiring a motion for a new trial to be taken promptly and recognizing the circuit judge's authority to enlarge the time prescribed does not dispense with the necessity of a meritorious showing.—Eikhoff v. Wayne Circuit Judge, 129 Mich. 150.

¶ 123. It is irregular to seek to amend a motion for judgment non obstante veredicto made after judgment so as to make it a motion for a new trial more than five months after an order vacating a judgment under Circuit Court Rule 48, relating to the time of making motions for new trials, especially where several terms of court have intervened.—Yerkes v. Antrim Circuit Judge, 200 Mich. 443.

¶ 124. A juror during the course of the trial expressed fixed opinions on the case to outsiders. Defendant's counsel, upon hearing of this, had affidavits to such fact made and presented to the court, moved to have the jury discharged, and was writing out such motion when the jury entered and gave judgment against his client. Held, the defendant acted with sufficient promptness in the matter to entitle him to a new trial.—Cooper v. Carr, 161 Mich. 405.

¶ 124a. A motion for a new trial in a quo warranto case should be made at the term at which the report of the trial is filed, where there is ample time to make it before the close of the term.—People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248.

§ 41. Presenting question and obtaining ruling preparatory to moving.

Hearing and procedure thereon, see 1916 C. C. Rule 48.

¶ 125. Where a verdict was directed for defendant on appeal from the justice, and the directed verdict was based on the specific ground that a discharge in bankruptcy ended defendant's liability but leave to move for a new trial and verdict for plaintiff was reserved, if on new trial the court should become convinced that such was the proper action, the objection by defendant could not be made on the new trial motion for the first time to support the verdict that certain evidence essential to plaintiff was incompetent and ineffectual.—Wineman v. Fisher, 135 Mich. 604.

¶ 126. Where a witness is wanted for further cross-examination on the ground of new information, and he cannot be produced, a request for a continuance or a motion to strike out his testimony should be made before a new trial will be granted.—Bosek v. Detroit United Railway, 175 Mich. 8.

§ 42. Affidavits and extrinsic evidence.

Sufficiency of affidavits on ground of newly discovered evidence, see post § 43.

Affidavits of jurors or evidence as to their misconduct, see post § 44.

Inadmissibility of affidavits to impeach verdict, conclusiveness and effect of verdict, see Verdicts, VI.

Incompetency of witnesses to testify in violation of secrecy of jury proceedings, see Witnesses, II, V.

Right to new trial in reference on basis of affidavits of extrinsic matter, see Reference, VI.

Depositions in support of motion, see Depositions § 1, ¶ 4.

Practice on motion, see Jud. Act, chap. I, § 24; Comp. L. 1915, § 12029.

¶ 127. Affidavits on motion for a new trial being rebutted by counter-affidavits and being found inherently improbable by the trial judge are properly rejected by him.—Bosek v. Detroit United Railway, 175 Mich. 8.

¶ 128. Where plaintiff was injured by a defective belt while oiling a fan, an affidavit for a new trial stating that defendant expected to prove by a certain person that plaintiff had stated that he was injured while filling another oil cup than that alleged, held too uncertain to justify a new trial.—Cummins v. Boyne City Tanning Co., 177 Mich. 217.

¶ 129. Where a plaintiff makes a motion for a new trial based not only on the record, but upon affidavits, the court may properly refuse such motion where a sufficient counter-showing is made by affidavits filed by defendant.—Lapier v. Beaubien Ice & Coal Co., 162 Mich. 533.

§ 43. ——Sufficiency of affidavits on ground of newly discovered evidence.

¶ 130. A motion for a new trial is properly denied where the affidavit merely states what the party supposed the newly discovered witness would testify to, the witness' affidavit not being given and counter-affidavits having been filed.—Hammond v. Pullman, 129 Mich. 567.

¶ 131. Motion for new trial on alleged newly discovered evidence, held properly denied where the showing was not in compliance with the statute, no witnesses being named nor the proposed testimony of affidavits set out.—Hampton v. Van Nest's Estate, 196 Mich. 404.

¶ 132. A motion for new trial on the ground of newly discovered evidence is properly refused where the affidavit of the proposed absent witness is not produced, but there is substituted therefor the affidavits of the plaintiff and his counsel, as such latter affidavits are mere hearsay.—Connor v. McRae, 193 Mich. 682.

¶ 133. An affidavit used as a basis for a new trial on the ground of newly discovered evidence which simply states what the affiant believes the proposed witness will testify to without producing an affidavit of the witness, is insufficient.—Cutler v. Spens, 191 Mich. 603.

¶ 134. Denial of a new trial, urged on the ground of newly discovered evidence, held not erroneous where affidavit offered in support thereof did not show diligent effort to produce such evidence on the trial.—Kincade v. Peck, 193 Mich. 207.

¶ 135. An affidavit by a witness not called at the trial, that he was interviewed by plaintiff's lawyer, but did not, from dislike of mixing up in the matter, tell him what he knew, will not sustain a request for a new trial on the ground of newly discovered evidence.—Storch v. Rose, 152 Mich. 521.

§ 44. ——Affidavits of jurors or evidence as to their misconduct.

¶ 136. Affidavits of jurors cannot be received to show misconduct of the jury, in support of a motion for a new trial.—City of Battle Creek v. Haak, 139 Mich. 514.

¶ 137. On a motion for a new trial affidavits of jurors cannot be used to impeach their verdict.—Stevenson v. Detroit & Mackinac Ry. Co., 118 Mich. 651.

¶ 138. On motion for a new trial the opinions and discussions of individual jurors cannot be inquired into.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

§ 45. Conditions on granting or refusing new trial.

Remission of excess or disclaimer to avoid granting of new trial, see Harmless Error, III, F.

Enforcement of condition on which granted as matter for discretion, see also Appeal ¶ 1764.

¶ 139. Where a new trial is not a matter of right, the judge in granting it may properly impose such a condition as that the parties must waive any supposed right of removal and try the case at the following term.—People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31.

¶ 140. Making a new trial dependent upon a refusal to remit a portion of the verdict in personal injury cases, is discretionary and follows a well-settled practice.—Detzur v. B. Stroh Brewing Co., 119 Mich. 282.

¶ 141. It is proper to refuse a new trial on condition that the owner of the verdict will remit the recovery to an amount which the evidence, in the judgment of the trial court, will support.—City of Grand Rapids v. Coit, 149 Mich. 668.

¶ 142. In a suit for unlawfully selling intoxicating liquors to plaintiff's husband, the jury found for defendant saloonkeeper. On the motion for a new trial the judge held that the verdict was clearly against the weight of the evidence with respect to the fact of the making of the unlawful sales, but that the evidence of damage was so slight as to entitle plaintiff only to nominal damages. He ordered a new trial with the provision that the defendant might within thirty days tender into court for the use of plaintiff attorney's fees of thirty dollars, and other witness, jury, stenographer and clerk fees, amounting to a total of fifty-four dollars. Defendant having made such tender, judgment was entered for defendant. Held, the disposition of the case was improper, as plaintiff was clearly entitled to a new trial and to have the jury assess her damages.—Stanton v. Foley, 168 Mich. 453.

¶ 143. Where, on a motion for a new trial in an action of trespass for cutting and removing timber, on the ground of excessive damages, the trial court after considering the affidavits filed in support of the motion, concludes that the verdict is excessive and orders a remittitur, a claim that he should have submitted the matter to another jury, instead of fixing the amount of damages, is not well taken, where the court did not find defendant excused for failure to produce at the trial better evidence of the amount of timber cut.—North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495.

¶ 144. The court erred in denying plaintiff's motion for a new trial upon defendant's electing to pay in settlement of the case a sum named by the court, where the testimony was conflicting and the damages awarded by the jury were merely nominal; since by so doing the court assumed to fix the damages without any option on the part of the plaintiff to refuse the court's award.—Lorf v. City of Detroit, 145 Mich. 265.

§ 46. Orders and disposal of motion, exceptions and reconsideration.

Incidental order or relief, see post § 47.
Statement of reasons for denial or granting of motion, see post § 48.
Effect of order or ruling, see post § 49.
Order valid as grant of new trial but invalid as extension of time to settle bill of exceptions, see also Motions and Orders ¶ 36.
Denial of new trial as in effect a denial of coupled motion for other relief dependent thereon, see Motions and Orders ¶ 34.
Scope of review of order where reasons are not shown in record, see Appeal § 325.
Entry of judgment before expiration of time granted to move for new trial, see Judgments ¶ 100.
Mandamus to correct improper order granting or denying new trial, see Mandamus § 36.
Matters to be included in bill of exceptions or case, see Appeal § 102.
Inclusion of supplemental reasons for ruling in pending bill of exceptions, see Appeal § 102.
Right to writ of error for sole purpose of reviewing new trial order, see Appeal § 50.
Practice on motion, see Jud. Act, chap. I, § 24; Comp. L. 1915, § 12029.
Time at which motion may be disposed of, see 1916 C. C. Rule 48.
Notice of order to be served on attorneys by clerk, see 1916 C. C. Rule 48.

¶ 145. On a motion for a new trial a verdict for plaintiff cannot be set aside and one entered for defendant as on a direction to the jury and judgment then rendered for defendant without actually trying the case again.—Prowell v. Neuendorf, 141 Mich. 272.

¶ 146. Where exceptions filed to the ruling of a trial judge in denying a motion for a new trial appeal to him, he may vacate his order and grant a new trial.—United States Graphite Co. v. Saginaw Circuit Judge, 158 Mich. 598.

§ 47. ——Incidental order or relief.

¶ 147. Where a default judgment was taken against a garnishee defendant the granting of a new trial on his motion would be ineffective unless the default were also set aside since the new trial would merely be an assessment of the damages and the result will be the same as before.—Travelers' Ins. Co. of Hartford v. Kent Circuit Judge, 144 Mich. 687.

§ 48. ——Statement of reasons for denial or granting of motion.

¶ 148. The circuit judge, while not assigning specifically his reasons for overruling plaintiff's motion for a new trial, which was based upon newly discovered testimony, and upon the ground that the verdict was against the law and the evidence, stated that the affidavits in support of the motion did not correctly state what occurred on the application by plaintiff at the trial to continue said case. Held, that it cannot be said that there was an abuse of discretion in refusing to grant the motion for a new trial.—Aultman, Miller & Co. v. Dodson, 104 Mich. 507.

¶ 149. Where counsel requests that reasons for denying a motion for new trial be filed, a statement that the mover has not "shown sufficient grounds and reasons to justify it" is not a compliance with the law. —Cronin v. Fire Ass'n of Philadelphia, 123 Mich. 277.

§ 49. Effect of order or ruling.

Effect of grant of new trial on execution sale, see Executions § 124.
Seeking new trial as general appearance, see Appearance § 8.
Effect of new trial motion to prolong time for bringing error, see Appeal § 75.
Possibility of new trial as affecting right to issuance of execution, see Executions § 3.
Effect of ruling on motion for new trial as res adjudicata, see Former Adjudication § 16.
Conclusiveness as bar or estoppel of judgments susceptible of new trial, see Former Adjudication § 25.

¶ 150. A granting of a new trial as to a portion of the defendants, in an action under the Civil Damage Act, and the allowance of a judgment as to the remainder of the defendants, is not error, as the action is several as well as joint, and the right exists to proceed against a portion or all of the defendants, wherefore the plaintiff should not be compelled to lose a judgment against some defendants because others are entitled to a new trial.—Moreland v. Durocher, 121 Mich. 398.

¶ 151. Where a judgment is recovered jointly against a principal and a surety on a joint and several bond, and the court grants a new trial to the surety, the judgment against the principal is not thereby vacated. —McPharlin v. Fidelity & Deposit Co. of Maryland, 162 Mich. 141.

IV. PROCEDURE AND ISSUES ON NEW TRIAL.

§ 50. In general.

New trial granted on conditions, see ante § 45.

Procedure on new trial on quo warranto, see Quo Warranto, IV.
Manner, course and conduct of trial generally, see Trial, II.
Former decision as law of the case on retrial or on second review, see Appeal, XII, G, XV.
Changing theory on retrial after remand, see Appeal § 559.
Directing verdict on evidence adduced at new trial similar to former proofs, see Directing Verdict § 9.
Introduction of defense of limitations on retrial, see Limitations § 103.
Costs on retrial after remand, see Costs § 59.

¶ 152. A second trial must be conducted in the same manner, and by the same rules, as the first.—Barker v. Hebbard, 81 Mich. 267.

¶ 153. Upon each new trial the case must be tried just as if it had never been tried before. The burden of proof remains the same.—Donahue v. Klassner, 22 Mich. 252.

¶ 154. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before; and, rulings made on a former trial are not binding.—Gott v. Superior Court Judge, 42 Mich. 625.

¶ 155. Where, on the first trial of a case, the declaration has been amended to meet the evidence, the jury on a second trial has nothing to do with what happened on the first trial, but must try the case upon the amended pleadings and determine what the facts are from the evidence admitted during the second trial.—Shippy v. Village of Au Sable, 85 Mich. 280.

¶ 155a. A party who has been compelled to elect between the common and special counts of his declaration is at liberty, on a new trial, to proceed upon the other counts.—Gott v. Superior Court Judge, 42 Mich. 625.

¶ 155b. A ruling requiring a party to elect between the counts of his declaration, and the practice thereon, would not bind the court upon a new trial of the case if brought to trial in the same shape as before.—Gott v. Superior Court Judge, 42 Mich. 625.

§ 51. Rights waived or barred on first trial.

¶ 156. The appointment of an administrator upon a woman's estate is held to have been acquiesced in by her husband if in a litigation with the administrator he raises no objection to the latter's authority, when the disposition of such an objection would dispose of the case. And no objection so waived can be afterwards raised upon a new trial.—Bassett v. Shepardson, 57 Mich. 428.

NEW YEAR'S DAY to NEWLY DISCOVERED EVIDENCE.

Cross-References.

New Year's Day—
See Holidays.
Newly Discovered Evidence—
Ground for new trial, rehearing or review, see New Trial, II, H; Indictment § 478; Equity, XI; Appeal §§ 542, 545.

NEWSPAPERS.

TREATS of periodical publications for distribution of news, and more particularly those in which legal notices or official matter may be lawfully published.

Analysis.

§ 1. In general; what constitutes.
§ 2. Designation as "official."
§ 3. Legality for publications and notices.

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§ 1. In general; what constitutes.
Designation as "official," see post § 2.
Legality for publications and notices, see post § 3.
Service of process by publication, see Process, II.
Publication of notices by advertisement, see Notices, Foreclosure, Local Improvements, Taxes and other topics treating of notice of sale, hearing, etc.
Constitutional guaranties of freedom of the press, see Constitutional Law § 186.
Liability of newspapers for printing libelous matter, see Libel and Slander § 30.
Right to recover on implied contract for printing ordinances, see also Public Contracts, V.
Constitutional provision against establishment of state paper by legislature, see Const. art. V, § 35.

¶ 1. A weekly paper primarily devoted to the interests of the legal profession, and containing the proceedings and opinions of

courts, and records of transfers and mortgages of real estate, etc., was held to be a newspaper within the meaning of How. St. §§ 5801, 5866, 6808, concerning the publication of notice of hearing of applications for appointment of administrators, and of probate notices generally.—Lynch v. Wayne Probate Judge, 101 Mich. 171.

§ 2. Designation as "official."

Power to designate paper for publication of ordinances, see also Municipal Corporations ¶ 187.
Power of probate court to determine newspaper for publication of probate notices, see Estates of Decedents ¶ 112.
Choice of newspaper for publication of resolution by municipal council in street opening proceedings, see Highways ¶ 269.
Designations and publication of local option notices, see Intoxicating Liquors §§ 24, 26.

§ 3. Legality for publications and notices.

Legality of notice of guardianship sale in newspaper published mainly in German language, see Guardianship ¶ 146.
Proof of publication of notices in newspaper, see Notices § 8.
Proof of publication of process, see Process, II, D.
Paper for publication of legal notices, see Jud. Act, chap. XX, § 3; Comp. L. 1915, § 12739.

¶ 2. A notice of sale of mortgaged premises is sufficient if published in a "weekly newspaper of legal and business information," which has been for many years a medium for publication of legal advertisements; publication in a daily newspaper of general circulation is not necessary.—Hoock v. Sloman, 155 Mich. 1.

¶ 3. Publication in a part of a newspaper marked "Supplement" is sufficient publication in the newspaper since designating part as supplement makes it no less a part of the newspaper.—Mann v. Carson, 120 Mich. 631.

¶ 4. English being the recognized language of this country, whenever a statute refers to publication in the newspapers it means those published in the language of the country.—Auditor General v. Hutchinson, 113 Mich. 245; Visscher v. Ottawa Circuit Judge, 116 Mich. 666.

¶ 5. A publication of a notice of petition to sell lands for delinquent taxes in English but in a Dutch language paper containing no other matter in the English language is not a publication in the English language sufficient under How. St. § 7251, requiring all legal proceedings to be in the English language. and Pub. Acts 1893, No. 206, § 66, requiring publication in a "newspaper" of such petition.—Visscher v. Ottawa Circuit Judge, 116 Mich. 666.

NEXT EVENTUAL ESTATE to NON-JOINDER.

Cross-References.

Next Eventual Estate—
Successor to void bequests or accumulations, see Perpetuities; Wills, VI.
Next Friend—
See Guardians ad Litem.
Next of Kin—
See generally Descent; Wills, VI.
Distributees in recovery for death by wrongful act, see Death by Wrongful Act, § 42.
Nighttime—
Time of entry as element in burglary, see Crimes §§ 51-54.
Time of arrest as aggravation of false imprisonment, see False Imprisonment § 3.
Nisi Prius Decisions—
As precedents, see Courts § 27.
Noise—
As nuisance, see Nuisances, I.
As element of damages from condemnation, see Eminent Domain § 37 et seq.
Nolle Prosequi—
In criminal cases, see Indictment, VII.
In civil cases, see Discontinuance § 2 et seq.
Nominal Conditions—
In deeds, effect of breach, see Deeds § 89.
Nominal Damages—
See Damages, VIII.
Right to costs, see Costs § 17 et seq.
Nominal Parties—
See Parties; Equity, VI.
Nominal Partners—
See Partnership.
Nominations—
For public office, see Elections, IV.
Mandamus to compel performance of official duties in respect to nominations, see Mandamus § 82.
In wills for appointment as executor or trustee or guardian, see Estates of Decedents, III, A; Guardianship § 11; Wills, I, VI.
Non Compos Mentis—
See Insane Persons; Wills, II; Gifts § 29.
Non Est Factum—
Mode of pleading and necessary affidavit, see Pleading, III, IX; Justices of the Peace § 97.
Non Obstante Veredicto—
See Judgments § 27.
Nonacceptance—
Of bills and checks, see Negotiable Instruments, VIII; Banking, II, B.
See also "Acceptance."
Nonceremonial Marriages—
See Marriage § 3.
Nondelegability—
See cross-references under "Delegable," etc., "Delegation of Power."
Nondelivery—
See Bailments; Carriers, II, E; Conversion, I; Sales; Telegraphs.

Nonexpert Opinions—
See Evidence, VI, A; Indictment, VIII, B, 4.
Nonfeasance—
As negligence, see Negligence; and see also specific topics treating of negligence in particular relations.
As official delinquency, see Officers, VI.
Nonjoinder—
General rules for joinder of parties, see Parties (mode of objecting for nonjoinder); Equity, VII, C; Pleading, IV.

NON-NEGOTIABLE PAPER.

TREATS of promises in writing to pay money or of orders by one person on another to pay money to a third but in neither case having the attributes of negotiable paper. It excludes official orders or warrants on public treasurers for payments on claims (see Municipal Corporations, XIV; Townships, VI; Schools, IV; Counties, VI) except when such orders involve no element of law peculiarly applicable to themselves.

Analysis.

§ 1. In general; transfer and assignment.
§ 2. Effect of transfer or assignment and resulting rights and liabilities.
§ 3. Acceptance by drawee and rights and liabilities of acceptor.
§ 4. Presentment, demand and notice of nonpayment.
§ 5. Actions.
§ 6. ——Parties.
§ 7. ——Pleading.
§ 8. ——Issues, evidence and trial.

§ 1. In general; transfer and assignment.

Matters rendering paper non-negotiable, see Negotiable Instruments, I.
Negotiation and transfer of negotiable paper, see Negotiable Instruments § 31.
Presumption as to consideration, see Contracts § 138.
Authority of agents to make or deal with paper, see Agency, II.
Duty to see that collecting agent has possession of paper, see Agency ¶ 119.
Sufficiency of indorsement as assignment of the contract to which the paper is incident, see Assignments § 2, ¶ 11.
Instruments constituting "orders" within forgery statutes, see Crimes § 84.
Drain orders and warrants, see Drains § 53.
Leviability of orders for payment, see Executions § 19.
Transfer of guaranty of payment indorsed on bond, see Guaranty § 13.

¶ 1. A non-negotiable instrument can be transferred only by assignment.—Story v. Lamb, 52 Mich. 525.

¶ 2. The indorsement "without recourse" of a non-negotiable note by the payee to a third party, accompanied by a delivery of the note, constitutes a sufficient assignment to pass title to the instrument.—Merchants' Nat. Bank v. Gregg, 107 Mich. 146; Steere v. Trebilcock, 108 Mich. 464.

¶ 3. The indorsement and delivery of a non-negotiable note by the payee operates as an assignment thereof.—Merchants' Nat. Bank v. Gregg, 107 Mich. 146; Steere v. Trebilcock, 108 Mich. 464.

§ 2. Effect of transfer or assignment and resulting rights and liabilities.

Of negotiable paper, see Negotiable Instruments § 33.
Transfer of paper as cutting off right to garnishee holder, see Garnishment ¶ 21.
Honoring orders as implying assignment of claims, see Assignments ¶ 45.
Assignments as subject to equities, see generally Assignments § 16 et seq.
Transfer of paper as carrying contract for which it was given, see Assignments § 18.
Right of pledgee of non-negotiable note to enforce same to satisfy debt secured by pledge, see Pledges, II.

¶ 4. Indorsement of a non-negotiable note by the payee transfers the title merely and does not render him liable thereon in case of nonpayment by the maker.—Barger v. Farnham, 130 Mich. 487.

¶ 5. A promise to pay "on or before four years from date, * * * with interest * * * not to be paid annually unless the promisor can make it convenient, and other security to be taken in exchange for this note when said [promisor] can realize the same in proper shape from" [a specified source], is not negotiable, and its form is sufficient to put an assignee upon inquiry.—Humphrey v. Beckwith, 48 Mich. 151.

¶ 6. A non-negotiable instrument can only be transferred by assignment; and though the payee may perhaps assign it by indorsing it, he does not thereby make himself liable for the amount to be paid.—Story v. Lamb, 52 Mich. 525.

¶ 7. An instrument satisfying some but not all of the requisites of a promissory note may, if valid, be proved as a contract, and may be assigned; but the assignee takes only such rights as the payees had.—First Nat. Bank v. Carson, 60 Mich. 432.

¶ 8. Village warrants or orders drawn in payment for work and materials done and furnished are not negotiable instruments, and an indorsee takes them subject to all the equities existing between the village and the payee.—Miner v. Vedder, 66 Mich. 101.

¶ 9. A village warrant drawn on the treasurer for payment of a sum certain for account of a designated fund is not negotiable and the transferee takes it subject to all defenses against the payee.—Field v. Village of Highland Park, 141 Mich. 69.

¶ 10. The term "promissory note" is not correctly applied to an agreement to pay a fixed sum of money at a certain date, with seven per cent interest from date, and eight per cent interest after maturity, and five per cent attorney's fees, without relief from homestead, valuation or appraisement laws, to which is added a waiver by the makers and indorsers of presentment for payment, protest and notice of protest and non-payment, with right to extend the time of payment; and such an instrument is open to the same defenses in the hands of a transferee as in those of the payee.—Second Nat. Bank v. Wheeler, 75 Mich. 546.

¶ 11. A non-negotiable instrument in the hands of bona fide holders is open to the defense that it was given for a machine bought on trial but which failed to do work as represented by the vendors, and was, accordingly, returned.—Second Nat. Bank v. Wheeler, 75 Mich. 546.

¶ 12. In a suit by an assignee to foreclose a mortgage given to secure a non-negotiable note, it appeared that the note and mortgage were given to raise money to pay off a prior mortgage on the same land, given by defendants, mortgagors, to complainant's assignor, and by him assigned, without the knowledge of defendants, to a stranger to the suit; that the assignor promised to discharge the prior mortgage, but died without doing so. There was nothing in the record to show that mortgagors had any knowledge that the complainant proposed to buy the second mortgage, or that they did any act, or failed to do any act, that caused complainant to make the purchase. Held, that complainant took no other or greater equity by his purchase and assignment than his assignor had and the mortgagors were not estopped to assert equities.—Walker v. Thompson, 108 Mich. 686.

¶ 13. A purchaser of non-negotiable paper given without sufficient consideration cannot invoke the rule against the maker that, where one of two innocent parties must suffer loss from the conduct of a third, such loss should fall upon the one whose act enabled the wrong to be committed.—Carmody v. Crane, 110 Mich. 508.

§ 3. Acceptance by drawee and rights and liabilities of acceptor.

Acceptance of negotiable paper, see Negotiable Instruments § 35.

Orders for payment of laborers as "labor claims" in hands of drawee who honored them, see Corporations § 332.

Validity of parol promise to pay orders drawn in payment of goods furnished another, see Frauds, Statute of ¶ 97.

Novation of contracts by acceptance of order and substitution of debtors, see Novation.

¶ 14. An order given to one partner alone for money due, did not make the drawee indebted to such partner where the order was never accepted in writing by the drawee, and consequently the money was not subject to garnishment in the hands of the drawee for a debt of such partner.—Stone v. Dowling, 119 Mich. 476.

¶ 15. One who has accepted an order for payment of money to become due on a contract, subject to all the conditions of the contract, may set off as against the payee the amount of expense incurred in completing the contract after it was abandoned by the contractor, who drew the order.—Jenks v. Wells, 90 Mich. 515.

§ 4. Presentment, demand and notice of nonpayment.

Necessity of demand on drawee as precedent to action on order, see also Assignments ¶ 101.

¶ 16. Presentment for payment on a certain date, of orders for the payment of money, payable on the tenth of each month only, is not required where payment is refused by the drawer on the ground that he does not owe the money.—Ryerson v. Tourcotte, 121 Mich. 78.

¶ 17. The rule requiring immediate notice in case of the nonpayment of commercial paper does not apply to a non-negotiable order drawn upon a debtor, and taken by a creditor of the maker merely as a conditional payment, to be applied in case it is collected.—Briggs v. Parsons, 39 Mich. 400.

¶ 18. Under the law of West Virginia a note not made payable at a bank is non-negotiable and indorsers need not be served with notice of nonpayment.—Barger v. Farnham, 130 Mich. 487.

§ 5. Actions.

Assumpsit on the instrument, see also Assumpsit.

Actions on negotiable paper, see Negotiable Instruments, XIV.

¶ 19. A note payable in chattels is transferable, and the assignee may sue on it.—Hicks v. Lyle, 46 Mich. 488.

¶ 20. The mere possession of a due-bill not payable to bearer and not negotiable raises no presumption of ownership; and where plaintiff sues upon it in his own right, and for his own use and benefit, he is not entitled to recover if it appears that the bill always belonged to the wife and was given for her money.—Blackwood v. Brown, 32 Mich. 104.

¶ 21. A firm borrowed from one of the partners, and gave him a non-negotiable due-bill, which he turned over to his wife in payment of a debt he owed her. Held, that this would transfer to her the title thereto, and she could enforce payment, even though the amount remained to her husband's credit on the partnership books; still, if the firm knew nothing of the transfer, its settlement with the husband would probably be a defense to such enforcement. But if she arranged with her husband as one of the firm to take up the due-bill and give her the firm's note, her right of action on the note could not be prejudiced by the fact that the original credit remained and was allowed to the husband on a subsequent settlement.—Moore v. Foote, 34 Mich. 443.

§ 6. ——Parties.

Right to sue on the paper, see also ante § 5.
Parties to actions on negotiable instruments, see Negotiable Instruments § 95.

¶ 22. The assignee of a non-negotiable demand may still sue thereon in the name of the original contracting party, as he was compelled to do at common law.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489: Peters v. Gallagher, 37 Mich. 407; Moon v. Harder, 38 Mich. 566; Park v. Toledo, C. S. & D. R. Co., 41 Mich. 352; McRoberts v. Lyon, 79 Mich. 25.

¶ 23. The assignment of a non-negotiable demand does not at the common law entitle the assignee to sue in his own name upon the contract; Laws 1862, p. 102, How. St., § 7344, which allows it, is only permissive; and the assignee is still at liberty to sue in the name of the contracting party.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 24. The assignee of a non-negotiable chose in action can sue on it in his own name or in that of his assignor.—Park v. Toledo, C. S. & D. R. Co., 41 Mich. 352.

¶ 25. The assignee of a non-negotiable note may sue thereon in his own name.—Peltier v. Babillion, 45 Mich. 384.

¶ 26. The payee of a negotiable note wrote on the back thereof, "For value received, I hereby assign all interest in and to this note to W.," and the latter transferred it by mere indorsement to C. Held, that if negotiability was destroyed by the first transfer, C. could sue in his own name under How. St., § 7344, allowing an assignee of a non-negotiable note to sue in his own name, but if it was not destroyed C. could sue as indorsee.—Stevens v. Hannan, 86 Mich. 305.

§ 7. ——Pleading.

Sufficiency of declaration in justice's court upon non-negotiable instrument, see also Justices of the Peace ¶ 385.
Pleading in actions on negotiable instruments, see Negotiable Instruments § 101.

¶ 27. A declaration by an assignee upon a conditional note not negotiable need not aver any formal assignment, but is sufficient if it avers plaintiff to be the owner and holder.—Draper v. Fletcher, 26 Mich. 154.

¶ 28. Where an assignee of a non-negotiable chose in action sues in his own name he must allege the assignment in his declaration.—Blackwood v. Brown, 32 Mich. 104; Altman v. Fowler, 70 Mich. 57.

¶ 29. Complainant filed a bill in equity alleging that she had executed such a note and mortgage; that she had delivered the same to the payee, relying upon his promise to pay off an outstanding incumbrance before placing the mortgage of record; that he had failed to procure the discharge of the incumbrance, but that defendant, to whom the note and mortgage had been transferred, claimed the right to enforce payment for the full amount. Held, that the facts alleged did not constitute such an averment of the agency of the payee as would estop complainant from denying the validity of the note.—Carmody v. Crane, 110 Mich. 508.

§ 8. ——Issues, evidence and trial.

General law as to issues and variance, see Pleading, IX, X.
Issues, proof and variance in actions on negotiable instruments, see Negotiable Paper § 103.
Admissibility of parol evidence as to genesis and circumstances of making or indorsing, see Evidence § 159.
Rebuttal evidence as to promise to reimburse for cashing orders, see also Evidence ¶ 445.
Paper as evidence under common counts, see Assumpsit § 61.
Honoring orders for sale of goods to servant as evidence of account stated, see Account Stated ¶ 43.

¶ 30. In an action between original parties upon an instrument that is not negotiable, it is competent for the defendant to show the circumstances under which he indorsed it to the plaintiff, if the evidence does not vary any positive legal agreement made by him.—Lamb v. Story, 45 Mich. 488.

¶ 31. A non-negotiable note not purporting to be for value received may be given in evi-

dence under the common counts.—Rickey v. Morrison, 69 Mich. 139.

¶ 32. Where an instrument containing the usual form of a promissory note, and the usual power of attorney to confess judgment thereon against the maker, is declared on under the common counts by the payee, such instrument, though not negotiable, is admissible in evidence.—Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 33. A non-negotiable note not purporting to be for value received was admitted in evidence against objection, and plaintiff rested without proving any consideration. Held, that the want of such proof could not be complained of if defendant himself went into such proof and plaintiff was permitted to controvert him.—Rickey v. Morrison, 69 Mich. 139.

¶ 34. The admission of value received in a non-negotiable note is prima facie sufficient to show a consideration.—Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 35. An instrument in the form of a promissory note, but rendered non-negotiable by a condition appearing on its face, was indorsed on its back with the name of the payee. Evidence was offered that it was purchased by an agent, and delivered to the holder. Held, the trial court erred in holding there was not sufficient proof of assignment.—Worden Grocer Co. v. Blanding, 161 Mich. 254.

¶ 36. In an action on a promissory note for $1,000 payable in one year which provides that it is given to secure the payee against a mortgage of $1,000 upon property contemporaneously conveyed and if the maker within a year pays the mortgage the note to be void, the failure to pay the mortgage entitles the payee to recover the face of the note, but without interest where the maker has paid interest on the mortgage.—Stearns v. Stearns, 129 Mich. 451.

NONPAYMENT to NOT GUILTY.

Cross-References.

Nonpayment—
- Effect of nonpayment as a breach of contract or sale or as breach of conditions therein, see Contracts, VII; Sales, VII; Vendors and Purchasers, IV; Insurance § 150 et seq.; Fraternal Associations § 50; Landlord and Tenant §§ 40, 123 et seq.

Nonresidents—
- See topics treating of particular thing or question with respect to which residence or nonresidence is material. The following cross-references are illustrative.
- Citizenship, domicile and status, see Aliens; Domicile.
- Conflict of laws and the question of which law governs, see Conflict of Laws.
- Jurisdiction of actions between, see Courts § 46.
- Jurisdiction respecting estates, administration, and probate, see Estates of Decedents § 15 et seq.; Wills, V.
- Proper venue determinable by residence of party or parties, see Venue, I.
- Attachment because of nonresidence of debtor, see Attachment § 10.
- Right to equal protection under the constitution, see Constitutional Law, X; Commerce.
- Rights of action for death by wrongful act, see Death by Wrongful Act §§ 9, 10.
- Right of nonresident widow to dower, see Dower § 5.
- Administration of estates of nonresidents, see Estates of Decedents §§ 15-17; Wills, V.
- Eligibility or fitness for letters, see Estates of Decedents § 18.
- Effect of nonresidence of infant or guardian, see Guardianship § 5.
- Fishing and hunting regulations, see Fish and Game § 4.
- Rights to claim exemptions from execution, see Exemptions § 5; Homesteads § 5.
- Suspension of limitations by reason of nonresidence, see Limitations, III, C.
- Care and support of poor persons having nonresident status, see Poor Persons.
- Process and service on nonresident parties, see Process.
- Security for costs from nonresident plaintiff, see Security for Costs.
- Taxation of nonresidents' property, see Taxes.
- Wills by nonresidents and probate and construction of same, see Wills.
- Corporations as residents or nonresidents, see Corporations § 20.
- Rights and status of foreign corporations, see Foreign Corporations.

Nonsuit—
- See Discontinuance, Dismissal and Nonsuit.

Nonsupport—
- As ground for divorce, see Divorce § 12.
- As crime, see Crimes §§ 38, 63.

Nonuser—
- Effect of nonuser to extinguish easements, see Easements § 34; Highways § 129.
- Of corporate franchise as extinguishing it, see Corporations §§ 254, 258.

Noon—
- Time of commencement of day, see Time; Insurance.

Normal Schools—
- See Schools.

Northampton Tables—
- Tables used in measuring expectancy, see "Mortality Tables"; and see Damages §§ 329, 330; Death by Wrongful Act § 26; Life Estates, II.

Not Guilty—
Plea in prosecution for crime, see Indictment, V.

Plea to action of trespass, see Trespass, II; and see also Pleading, III, IX.

NOTARIES PUBLIC.

TREATS of powers, duties, compensation and liabilities of notaries public; excludes sufficiency and requisites of Oaths, Affidavits and Acknowledgments, which topics see.

Analysis.

§ 1. In general; nature of office.
§ 2. Persons eligible and entitled to hold.
§ 3. Powers and authority.
§ 4. Fees and compensation.
§ 5. Liability and actions against bond.
§ 6. Presumptions and proof of office.

Acknowledgment of bail before notary, see Civil Arrest § 46.
Oath, jurat, signature and date on attachment affidavits, see Attachment § 34.
Seal, signature and authentication of acknowledgments, see Acknowledgments § 15.
Conclusion of witness that he demanded payment and note was "dishonored," see Evidence ¶ 1273.

§ 1. In general; nature of office.

Persons eligible and entitled to hold, see post § 2.
Power and authority, see post § 3.
Fees and compensation, see post § 4.
Liability and actions against bond, see post § 5.
Presumptions and proof of office, see post § 6.
Office and duties of notaries public, see Comp. L. 1915, § 2491 et seq.

¶ 1. A notary public is in no sense a county officer.—Sullivan v. Hall, 86 Mich. 7.

¶ 2. A notary public is a state officer whose official acts are not confined to the county where he resides, and his certificate is not fatally defective if the designation of the county is omitted.—Sullivan v. Hall, 86 Mich. 7.

§ 2. Persons eligible and entitled to hold.

Right of sheriff in capacity of notary to acknowledge statutory foreclosure deed executed by under-sheriff, see Foreclosure ¶ 177.

¶ 3. A wife of an attorney is not barred from acting as a notary in a cause in which the husband is professionally engaged under Comp. L. 1897, § 2640, How. 2nd Ed., § 1286.—Timm v. Cass Circuit Judge, 192 Mich. 508.

§ 3. Powers and authority.

Liability and actions against bond, see post § 5.
Oaths in general, see Oaths.
Conferring on notary judicial powers, see Constitutional Law § 59.
Power to take acknowledgments, see Acknowledgments §§ 4, 5.
Competency and authority of notaries to take depositions, see Depositions § 8.
Sufficiency of affidavit to log lien statement, see Forestry § 19.
Oath by notary to his copartner swearing to mechanic's lien claim, see Mechanics' Liens ¶ 134.
Powers of notaries, see Comp. L. 1915, § 2496.

¶ 4. Since it would confer on them judicial power, notaries public cannot be empowered to hear and determine applications for dissolution.—Chandler v. Nash, 5 Mich. 409.

¶ 5. The authority of notaries public to administer oaths is statutory, and does not pertain to their office by usage or custom.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 6. A notary public before whom as special commissioner the parties have stipulated to take the testimony in a case in chancery has power to administer oaths to the witnesses examined, by virtue of his general authority as notary, whether his appointment as special commissioner is valid or not.—Crone v. Angell, 14 Mich. 340.

¶ 7. Where an attorney-at-law, who as notary public has sworn a claimant to a statement of lien, subsequently appears in justice's court as the claimant's attorney to enforce said lien, the verification does not violate How. St., § 637.—Sullivan v. Hall, 86 Mich. 7.

¶ 8. The presumption being, according to the usual custom, that a notary public can administer oaths, one should not, without proof, be held incompetent to do so.—Pinkham v. Cockell, 77 Mich. 265.

¶ 9. A claim against a city for damages for personal injuries is not void under Comp. L. 1897, § 2640, making it unlawful for notaries public to administer oaths in causes in which they are engaged as attorneys, where such claim was verified before a notary public who subsequently brought a suit for such injuries as attorney for claimant.—Allen v. City of West Bay City, 140 Mich. 111.

§ 4. Fees and compensation.

Right to fees as notary received by clerk in county clerk's office, accountability to county, see Counties § 38.

Fees of notaries, see Comp. L. 1915, § 14605.

§ 5. Liability and actions against bond.

Liability for negligence or fraud in taking or certifying acknowledgments, see Acknowledgments § 24.

¶ 10. A notary's sureties are liable only for such damages as are the proximate result of the notary's false or fraudulent certificate.—People ex rel. Young v. Nederlander, 177 Mich. 434.

¶ 11. The sureties on a notarial bond are not liable to a person parting with money upon false statements of the notary, and afterwards receiving a forged deed with his fraudulent certificate, since the misrepresentations and not the certificate of the notary were the proximate cause.—People ex rel. Young v. Nederlander, 177 Mich. 434.

¶ 12. A false certificate of acknowledgment by a notary public upon a mortgage may be regarded as proximate cause of the loss of a loan made by a person who took the mortgage as genuine.—People for use of Doran v. Butler, 74 Mich. 643.

¶ 13. In an action on the bond of a notary, conditioned to perform his official duties faithfully without fraud, a verdict cannot be directed in favor of a lender, who took as security a mortgage executed and acknowledged by an impostor in the name of a land owner, where the certificate stated that he was personally known to the notary to be the "same person described in and who executed" the mortgage, where it appeared that the impostor had first visited the notary and was sent to the lender, though this was denied, where it was testified and denied that the notary knew the true identity of the impostor, and where it appeared by testimony of the lender that he had satisfied himself as to the value of the land and had no thought as to the identity of the borrower, leaving open only the question of the validity of the title offered as security, which question the notary passed on, he being also a lawyer.—People for use of Cook v. Cole, 139 Mich. 312.

Liability of public officer for negligence in taking of acknowledgment, see note 11 N. C. C. A. 581-598.

§ 6. Presumptions and proof of office.

Certification by court clerk that notary taking deposition was such, see Depositions § 20.

General law of evidence, see Evidence.

¶ 14. The official character of a notary public of another state, before whom an affidavit of the amount due upon a justice's judgment rendered in this state, and a transcript of which is offered for filing with the county clerk, is sworn to, must be certified to as required by How. St., § 7448 (subd. 3), to authorize such filing or the entry and docketing of said judgment.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 15. The certificate of a notary carries with it the usual presumption that the officer making it has certified to the truth, and has not been guilty of a wrongful or criminal act.—Donahue v. Vosper, 189 Mich. 78.

¶ 16. The notary's official seal is not evidence of his authority to take an affidavit.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

NOTES to NOTICE.

Cross-References.

Notes—
- Promissory notes, see Negotiable Instruments.
- Bank dealings in notes and discounts, see Banking, VI, VIII.

Notice—
- For references to notice of a particular fact or of a proposed act or proceeding, see cross-references collated in topic Notices following analysis thereof.
- In the sense of actual or imputed mental cognizance of a fact notice is treated in the specific topics treating of that to which notice or knowledge is material. Thus the doctrine of protection to bona fide takers without notice is treated in Notice and Record of Title; Negotiable Instruments, XIII; Sales, XI. As an element in the quality or wrongfulness of an act done, notice is treated in Estoppel § 30; Fraud § 9; Election § 1.

Notice and Opportunity for Hearing—
- As essential to due process of law or to jurisdiction, see Courts § 40; Constitutional Law § 128.

NOTICE AND RECORD OF TITLE.

TREATS of actual or constructive notice to takers of interests in land or liens thereon of the prior rights, estates, and claims of others, whether such notice is by reason of actual knowledge or of the equitable doctrines of notice or of the statutory effect of record under the recording acts. It also treats of the requisites and indicia of a bona fide taking of the land for value and without notice and of the rights and equities of such takers. Rights, equities and priorities under land transfers and liens, due to the effect of the transaction and not due to notice or record or a taking without notice, are treated in specific topics such as Mortgages, V; Liens § 11; Executions, V, VII, C; Attachment, VIII; Foreclosure, IV. Good faith or fraudulency of transfers as against creditors is treated in Fraudulent Conveyances. The recording or filing or notice of transfers of or instruments of lien on personal property is treated in Chattel Mortgages, I; Sales, XI, XII; Shipping, II, and the doctrine of bona fides as applied to transfers of bills and notes in Negotiable Instruments, XIII.

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I. GENERAL DOCTRINE OF NOTICE AND OF BONA FIDE PURCHASE.

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¶ 1. A statute (e. g., R. S. 1838, p. 260, § 25) requiring actual notice to validate an unrecorded conveyance excludes constructive notice, such as notice from possession in fact not known, or from filing attachment levy and sale thereunder.—Hubbard v. Smith, 2 Mich. 207; Millar v. Babcock, 25 Mich. 137.

¶ 2. A long abstract of title in the hands of an aged and illiterate man is not necessarily such notice to him as to affect him with contributory negligence in taking mortgages represented to be prior incumbrances.—Goodrich v. Smith, 87 Mich. 1.

¶ 3. A grantee gave back a purchase-money mortgage before delivery of the deed. Afterwards, at the time the deed was actually delivered, this grantee mortgaged the premises to a third party in whose presence the delivery was made, and who had no notice of the former mortgage. Held, that the delivery of the deed in the latter's presence was notice to him that until then the mortgagor had no title to incumber to his prejudice. The second mortgage was accordingly given precedence of the first.—Heffron v. Flanigan, 37 Mich. 274.

§ 2. Sufficiency and source of notice.

Knowledge of existence of instrument as notice, see post § 3.
Knowledge of persons in fiduciary, professional or official relationships, see post § 4.
Necessity and sufficiency of notice of claim to establish easement by prescription, see Easements § 18.

¶ 4. Notice of a prior incumbrance to charge a subsequent incumbrancer or pur-

chaser need not come from a party in interest.—Willcox v. Hill, 11 Mich. 256.

¶ 5. Where, while one was examining a mill with reference to lending money upon it as security, he was informed that the water power was furnished under an arrangement with a third person, and was told something of the terms of payment, held that he was put upon inquiry as to the terms of the agreement, and was charged with notice that it included a provision giving it the effect of a mortgage upon the premises.—Gordon v. Constantine Hydraulic Co., 117 Mich. 620.

¶ 6. A mortgagee who has notice that since the mortgage was given a portion of the land has been sold cannot release any part of the land to the prejudice of the purchasers. It is enough if he is notified by letter from the mortgagor as to the names of the buyers, and if the deed is on record.—Hall v. Edwards, 43 Mich. 473.

¶ 7. A mortgagee's knowledge of a record of a deed to, and of possession and improvement by, a subsequent purchaser of part of the mortgaged premises, is enough to put him on inquiry before releasing other parts of the premises from the mortgage.—Dewey v. Ingersoll, 42 Mich. 17.

¶ 8. One who, knowing of a wife's claim for alimony on land held by her husband under a contract of purchase, takes an assignment of the contract from the latter for the purpose of defrauding the wife, will be held to have obtained no interest as against a lien subsequently decreed to the wife to secure the payment of her claim; nor will he be protected to the extent of payments thereafter made upon the contract, where it appears that, at the time of the assignment, other property of the husband was turned over to him equaling in value the payments so made.—Glick v. Glick, 110 Mich. 304.

¶ 9. A second mortgagee, at the time of taking his mortgage, was informed that the complainant had a first mortgage. He went to the abstract office and the recorder's office and found no prior mortgage recorded, but did not inquire of the complainant, who was near by. Held, the second mortgagee was put upon inquiry by the notice from the mortgagor, and, being bound to inquire of complainant, must take subject to the latter's mortgage, though he had his mortgage recorded first.—Wattles v. Slater, 154 Mich. 686.

¶ 10. A widow quit-claimed her dower rights in a homestead to her eldest married son in consideration of a written agreement (unrecorded) to the effect that she be permitted to continue to occupy a certain portion of the house and be given a certain portion of the annual crops. The son then mortgaged the property to purchase the share of a brother. After various transactions the title to the property became vested in the eldest brother and his wife as an entirety, and the wife, the defendant, on being granted a divorce got title to the property. The widow returned after a few years' absence, filed a bill in equity to have her rights under the agreement established. Held, that the defendant being a member of the family, such facts gave her constructive notice of the widow's equity and that she therefore took subject to it.—Holden v. Butler, 173 Mich. 116.

¶ 11. One who purchases mortgaged property is chargeable with notice that the mortgage is a lien in the hands of any person to whom it might legally have been transferred, and that such transfer need not be recorded to be valid.—Babcock v. Young, 117 Mich. 155.

§ 3. Knowledge of existence of instrument as notice.

Effect of actual knowledge of void claim or instrument, see post § 7.

¶ 12. A person who, when he buys, has knowledge of an unrecorded deed, is bound by it as much as if it were on record.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 13. He is not a bona fide purchaser who accepts a deed of land knowing of the existence of a prior unrecorded contract of his grantor for the sale of the land, and who fails to inquire of the vendee in such contract in regard to his claims.—Hains v. Hains, 69 Mich. 581.

¶ 14. A person cannot be an innocent purchaser of land which his grantor informs him has already been conveyed by him to another person.—Oliver v. Sanborn, 60 Mich. 346.

¶ 15. A person who, at the time of receiving a deed from another, knows him to have no title, or has notice of his want of title, cannot be a bona fide purchaser under the recording laws, whether the real owner of the title is known to him or not.—Fitzhugh v. Barnard, 12 Mich. 104.

¶ 16. One who takes the acknowledgment of a deed of the nature of which he is informed at the time is charged thereafter with notice of the grantee's rights.—Meigs v. McFarlan, 72 Mich. 194.

§ 4. Knowledge of persons in fiduciary, professional or official relationships.

Knowledge of partnership as fact calling for inquiry, see post § 14.

General doctrine that agent's notice or knowledge is imputable to principal, see Agency, II, E.

Doctrine of notice imputed to corporation from knowledge of its officers or agents, see Corporations, XVII, E.

Imputed notice to corporation by notice to promoters, see Corporations § 41, ¶ 152.

¶ 17. An attorney's knowledge of title is not that of his principal in matters in which he is not acting as attorney.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 18. A person insured has no constructive knowledge that foreclosure proceedings were instituted against the premises though the attorney for the mortgagee had done business for him as an attorney, where such attorney was not acting for him when the proceedings were commenced, and was never employed to look after the premises in question and did not give him notice of the proceedings.—Foiles v. Detroit Fire & Marine Ins. Co., 175 Mich. 716.

¶ 19. An attorney and adviser is chargeable with the conduct and knowledge of his principal as to the equities existing against a quitclaim deed to tax titles held by the principal and conveyed by her to the attorney.—Backus v. Cowley, 162 Mich. 585.

¶ 20. Notice to one of several trustees, of the revocation of an oral license, is notice to all.—Druse v. Wheeler, 26 Mich. 189.

¶ 21. Notice invalidating the lien of a duly filed levy of execution on land is not, under How. St. § 6173, chargeable to an assignee for value of the certificate of the execution sale because of the fact that the sheriff when he made the levy knew of a prior, unrecorded deed.—Luton v. Sharp, 94 Mich. 202.

§ 5. Effect of actual knowledge or notice.

Reliance on mistakes or omissions in record despite knowledge, see post § 6.
Actual notice of void claim or instrument, see post § 7.
Taking with notice from one protected as bona fide taker, see post § 8.
Actual notice as affecting priority of levy, see also Executions § 34.

¶ 22. One cannot be a bona fide purchaser of land which his grantor informs him has been conveyed to another.—Oliver v. Sanborn, 60 Mich. 346.

¶ 23. A purchaser who has notice that another has claims upon the property, and that certain unrecorded papers relating thereto have been executed, and still, without seeing those papers, or inquiring into the nature of such claims, sees fit to buy upon the assumption that they relate only to a mortgage of record in favor of the same person, is not entitled to protection as a bona fide purchaser against such claims.—Hosley v. Holmes, 27 Mich. 416.

¶ 24. A subsequent purchaser who has notice, actual or legal, of a prior conveyance, is not protected, unless the grantee in such conveyance, or person to be benefited by the charge, was a particeps criminis in the fraud.—Fox v. Willis, 1 Mich. 321.

¶ 25. One who advanced money without security to enable another to purchase land which he had reason to believe was sold in fraud of the rights of a former contract purchaser was held to be without any equities as a bona fide incumbrancer on the land to secure his loan.—Simon v. Brown, 38 Mich. 552.

¶ 26. As against a grantee who seeks to have correction of mistakes in his deed, a subsequent grantee from the same person is not a bona fide purchaser if he knew of the mistake before he bought.—Kinyon v. Young, 44 Mich. 339.

¶ 27. As between two deeds, priority was not given to the later deed through its having been recorded, where the deceased grantee had actual notice of the prior deed.—Dennis v. Dennis, 119 Mich. 380.

¶ 28. A mortgage taken with knowledge of a lessee's rights under a life-lease which has not been acknowledged or recorded is subject to such lease.—Arnold v. Whitcomb, 83 Mich. 19.

¶ 29. Notice by the grantee of land to his grantor to remove timber which the grantee knows has been previously sold to another, is not binding on the purchaser of the timber.—Wood v. Elliott, 51 Mich. 320.

¶ 30. A sale of standing timber being one of an interest in real estate, a subsequent purchaser by warranty deed of the land with notice thereof cannot sue the vendee of timber for removing it.—Russell v. Myers, 32 Mich. 522.

¶ 31. If one who has contracted to sell land conveys to a third person, such person, if aware of the contract, takes the property subject to the same equities to which it was subject in the grantor's hands.—Hogsett v. Ellis, 17 Mich. 351.

¶ 32. One who purchases with knowledge that the vendor holds the property in trust to raise money for the use of the real owner, and who, as consideration for the transfer gives the real owner's note and a due bill of his own, is not a bona fide purchaser without notice.—Storrs v. Wallace, 61 Mich. 437.

¶ 33. A man who had promised to loan money to a widow on her giving him a mortgage upon lands wherein she had the apparent legal title of record, fraudulently procured from her a mortgage naming, without her knowledge, a third party as mortgagee. No money was ever paid to her by either person, and the circumstances were such that the mortgagee was chargeable with knowledge of all facts known to the one who procured the mortgage for him. Held, that for want of equity the security was not enforceable either against the mortgagor or against the interests of an infant heir for

whom she was in equity holding title.—Terry v. Tuttle, 24 Mich. 206.

§ 6. ——Reliance on mistakes or omissions in record despite knowledge.

See also ante ¶ 26.

Effect of mistakes, defects or omissions on sufficiency of record, see post §§ 57-59.

Suits for reformation of instruments, see Reformation.

¶ 34. One who has notice of a prior unrecorded deed cannot, without further inquiry, rely upon a search of the records and the fact that no such deed is found recorded; and one who purchases with such notice and upon such search is not entitled to be considered a bona fide purchaser.—Shotwell v. Harrison, 30 Mich. 179.

¶ 35. Priority of record will not avail one who takes a deed from heirs of a deceased person with notice of a claim under a prior unrecorded deed from his grantor's ancestor; his failure to find the prior deed in the registry would give him no legal right to suppose such claim to be unfounded.—Munroe v. Eastman, 31 Mich. 283.

¶ 36. A mere oral statement to him by the execution creditor that such premises have been levied upon, without any suggestion that a mistake had been made in such notice, would only make it his duty to search the records before purchasing; if the records show a notice of a levy on other lands, but not on those in question, he may rely on the record as correct rather than the oral statement.—Barnard v. Campau, 29 Mich. 162.

¶ 37. One who purchases land from his neighbor whom he knows well and who has no other land in the neighborhood will be charged with notice of a mortgage on the land which has been erroneously indexed, where he went with the vendor to the register of deed's office where he claimed to have been informed that there was no mortgage upon the land, but where they found the index of a mortgage executed by his vendor as on an adjoining piece of land, the record of which they declined to examine, and it also appeared that the mortgage on the land was referred to during the negotiations for the purchase.—Farwell v. Halladay, 120 Mich. 402.

¶ 38. Where there was actual knowledge of it, it makes no difference that a land contract (which was executed prior to How. St. §§ 5709-5713) has no certificate of acknowledgment, and was not, therefore, entitled to record.—Hains v. Hains, 69 Mich. 581.

¶ 39. If a deed that has been incorrectly recorded is shown to a prospective purchaser of the land conveyed by it, or if, the sheriff had shown the execution and the levy upon the land in question thereon indorsed, whether such positive and unequivocal notice would have any effect as against the record, quære.—Barnard v. Campau, 29 Mich. 162.

¶ 40. Where an attorney for complainant corporation, which was acquiring shooting privileges on a certain lake, had notice that defendants had already been granted such privileges by the owner, but did not investigate the matter further than to inquire of the only person interested in concealing from him the extent of the privileges so granted, and to consult the public records, complainant corporation is thereby charged with notice of defendant's rights, and has not the rights of a bona fide purchaser.—St. Helen Shooting Club v. Barber, 150 Mich. 571.

¶ 41. One who takes a second mortgage, having had sufficient notice of a misdescription in the first to put him on inquiry, cannot claim priority as to a tract that was designed to be embraced in the first.—Michigan Mut. Life Ins. Co. v. Conant, 40 Mich. 530.

¶ 42. C. gave a mortgage misdescribing the premises, but in another mortgage, referring to the first, described them differently. A lawyer, familiar with the land and owning a partnership interest in an adjacent lot, after examining these mortgages and noticing the discrepancy, sold his lot to C. and took from him a mortgage covering land that the first one ought to have covered. C. then discovered the mistake in the first mortgage and gave a new one correcting it. Held, that the lawyer had had sufficient notice to put him on inquiry, and could not defend against the foreclosure of the corrected mortgage on the ground of the priority of his own.—Michigan Mut. Life Ins. Co. v. Conant, 40 Mich. 530.

¶ 43. Where, in recording a deed of lands two descriptions were omitted without the knowledge of the grantee, whose subsequent mortgage of all the lands was duly recorded, whereupon a land speculator secured a quitclaim deed of the section containing the omitted lands, and then quitclaimed one of such omitted descriptions to a person who had sufficient notice to put him on inquiry, such grantee was not a bona fide purchaser. —Peters v. Cartier, 80 Mich. 124.

¶ 44. Where a mortgagee in good faith brought a bill for the correction of the description in the original deed of the premises to his mortgagor, it was held that it did not lie with the original grantor or his heirs, or purchasers from them without consideration, to say that inasmuch as a careful inspection of the record would have disclosed the mistake, the mortgagee did not take his mortgage in good faith. The record could be no better notice to him than the deed itself was to the grantor or grantee, or than the record was to the heirs.—Cummings v. Freer, 26 Mich. 128.

§ 7. ——Actual notice of void claim or instrument.

Knowledge of existence of instrument, see also ante § 3.

Effect of recordation of void instrument, see post § 82.

¶ 45. A purchaser for value with notice of a previous contract of sale that is void under the statute of frauds gets a good title. —Messmore v. Cunningham, 78 Mich. 623.

§ 8. ——Taking with notice from one protected as bona fide taker.

¶ 46. Though he himself has notice, the grantee, immediate or mediate, of a bona fide purchaser for a valuable consideration, is protected against an unrecorded instrument that would not have bound such purchaser.—Godfroy v. Disbrow, W. 260; Shotwell v. Harrison, 22 Mich. 410.

§ 9. Effect of taking after notice sufficient to put on inquiry.

Implied notice from facts calling for inquiry, see post I, B.

Effect of notice or knowledge to prevent estoppel by misrepresentation, see Estoppel § 30.

¶ 47. One purchasing land takes it subject to an outstanding contract of sale of which he has notice sufficient to put him upon inquiry.—Solomon v. Shewitz, 185 Mich. 620.

¶ 48. Notice of a prior mortgage puts a subsequent purchaser upon inquiry as to its extent, and he takes subject to its amount. —Doyle v. Stevens, 4 Mich. 87.

§ 10. Burden of proof and presumptions.

Evidence and proof of actual notice, see post § 11.

Presumptions and evidence as to notice implied from recitals, possession or facts calling for inquiry, see post § 22.

¶ 49. The burden of proving notice, either actual or constructive, is on the party alleging it.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 50. Notice on purchaser's part of a prior unrecorded deed is an affirmative fact to be proved by the party claiming under such deed.—Shotwell v. Harrison, 22 Mich. 410.

¶ 51. In a suit to correct and foreclose a mortgage, the burden of proof is on complainant to show that a subsequent purchaser had notice of complainant's unrecorded lien.— Hanold v. Kays, 64 Mich. 439.

¶ 52. One who seeks, as against a subsequent purchaser, to have a mistake in the description of the land in his unrecorded mortgage corrected, must show that the purchaser had notice of the mortgage when he bought.—Hanold v. Kays, 64 Mich. 439.

¶ 53. Under the recording law of June 9, 1819, it was necessary for a party who would avoid the effect of a subsequent conveyance first recorded to show that the grantee in such conveyance had notice of the prior conveyance when he took his deed, or that he had not paid a valuable consideration.—Godfroy v. Disbrow, W. 260.

¶ 54. Notice to a purchaser from an agent to sell lands, of the agent's fraud in obtaining a deed to himself from his principal, cannot be presumed without proof.—Moore v. Mandlebaum, 8 Mich. 433.

¶ 55. Where an execution purchaser of land has recorded the certificate of sale in advance of any conveyance from the debtor to other persons, he is presumed, until the contrary appears, to be entitled to recover in an action of ejectment against the latter, who have the burden of proving themselves to be or to derive title from bona fide purchasers.—Atwood v. Bearss, 45 Mich. 469.

¶ 56. Third persons are not bound to take notice of arrangements to extend times for payment or to exchange securities, and cannot be presumed to have knowledge thereof. —Morgan v. Michigan Air Line R. Co., 57 Mich. 430.

§ 11. Evidence and proof of actual notice.

Burden of proof and presumptions as to parting with value without notice and in good faith, see post § 42.

General law of evidence, see Evidence.

Admissions and declarations by party or by predecessor or by persons in privity as evidence of notice, see Evidence, VII, C.

Admissibility over hearsay objection of other persons' statements as showing notice brought home to hearers, see Evidence § 328.

Admissibility of person's own statements made out of court evincing notice or knowledge, see Evidence § 333.

Admissibility of deed records in prosecutions for crime, see Indictment § 288.

¶ 57. That one has actual knowledge can only be shown by proof of facts from which such knowledge may fairly be inferred.— Fink v. Chambers, 95 Mich. 508.

¶ 58. Notice to a subsequent mortgagee of a prior unrecorded deed is not made out by proof of blind remarks and of ambiguous and misleading hints, not understood by him in such sense as to put him on inquiry.— Shepard v. Shepard, 36 Mich. 173.

¶ 59. Statements of one who has taken a second mortgage on property, the first mortgage on which has not been recorded, may be considered along with a presumption of knowledge, based on the relation of the par-

ties, to show notice on the part of the second mortgagee.—McGill v. Hawks, 95 Mich. 158.

¶ 60. Notice to a grantee that grantor supposed an alley to exist where none was called for as the boundary, the grant being of a lot by number according to a plat, is not sufficiently proved to limit grantee's tract accordingly, where it appears that the original plat was lost after filing but before recording, that it showed no alley, that no alley was visibly in use, and that an abstract furnished with the deed tendered to grantee had a plat attached showing an alley called for by the calls for another adjacent tract, but that the grantee's title examiner did not examine the plat so attached because title appeared good from the abstract, and that a deed earlier in grantee's chain of title called for an alley as the corresponding boundary of the lot but did not define it.—Leever v. Central City Lumber Co., 189 Mich. 181.

¶ 61. Notice of an unrecorded mortgage on the part of purchasers and mortgagees holding under instruments which were duly recorded and which contained no reference to such unrecorded mortgage, was not shown in an action to foreclose such unrecorded mortgage, where the only evidence of such notice was an alleged conversation between third persons occurring nearly seventeen years previous to the suit, but which was reported by plaintiff's witness in incredibly minute detail.—Grosvenor v. Harrison, 54 Mich. 194.

¶ 62. The fact that the value of land is not enough to secure two loans is significant, but not conclusive, evidence that the second mortgagee had no notice of the prior lien.—Matteson v. Blackmer, 46 Mich. 393.

¶ 63. Where an aged father conveys land to his son, the fact that the price paid is low (though not grossly inadequate) is not evidence that the son had notice that there was a mortgage lien against the property which had been discharged from the record by inadvertence and mistake and took charged with such knowledge, nor would the fact of relationship indicate such notice and knowledge.—Sheldon v. Holmes, 58 Mich. 138.

¶ 64. It seems the foreclosure of a mortgage cannot be defeated by presumptions in favor of an issue made by a subsequent incumbrancer as to the assignment of the mortgage, if such incumbrancer had not relied upon the records or upon inquiry in taking an interest in the premises in suit.—Jakway v. Jenison, 46 Mich. 521.

¶ 65. While inadequacy of price paid for land may have some bearing upon the purchaser's good faith, it cannot have weight in determining his knowledge of a previous sale to another person, where the purchaser knows he is buying a law suit.—Culbertson v. H. Witbeck Co., 92 Mich. 469.

B. IMPLIED NOTICE FROM RECITALS, POSSESSION OR OTHER FACTS CALLING FOR INQUIRY.

§ 12. In general; implied or constructive notice.

Facts and circumstances calling for inquiry in general, see post §§ 13, 14.
Recitals in deed or incumbrance, see post §§ 15, 16.
Possession, use or visible condition of property as notice, see post §§ 17-20.
Existing or apparent easements, see post § 21.
Presumptions and evidence, see post § 22.
Effect of taking after notice sufficient to put on inquiry, see also ante § 9.
Parting with value without notice and in good faith, see post I, C.
Actual notice or knowledge and effect of such notice, see ante I, A.
Constructive notice from the record, see post II, C.

¶ 66. One cannot claim to be ignorant where reason and experience show that knowledge would be a necessary consequence of the facts established.—Michigan Mut. Life Ins. Co. v. Conant, 40 Mich. 530.

¶ 67. Whatever fairly puts a party upon inquiry is sufficient notice, where the means of knowledge are at hand, and the omission to make such inquiry charges him with knowledge of all the facts which by a proper inquiry he might have ascertained.—Moore v. Township of Kenockee, 75 Mich. 332.

¶ 68. A purchaser of real estate should investigate his vendor's title and take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry.—Schweiss v. Woodruff, 73 Mich. 473.

¶ 69. A vendee of land who fails to use due diligence in inquiring as to the rights of third persons is chargeable with notice of facts which such inquiry would have disclosed.—Schweiss v. Woodruff, 73 Mich. 473.

¶ 70. Where one purchases land from an executrix, it seems that her telling him that she does not know whether or not her husband, the testator, had sold it, is not notice sufficient in law to prevent his becoming a bona fide purchaser, the circumstances being such as to invite an inference in the purchaser's mind favorable to the title.—Culbertson v. H. Whitbeck Co., 92 Mich. 469.

§ 13. Facts and circumstances calling for inquiry in general.

Partnership relationship and notice of joint ownership, see post § 14.
Nondelivery of collateral securities as notice to owner of equity of redemption as to

ownership of mortgage, see Foreclosure ¶ 56.

¶ 71. A person is chargeable with constructive notice when, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained. —Converse v. Blumrich, 14 Mich. 109; Hains v. Hains, 69 Mich. 581; Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 72. One is chargeable with notice, not only where the evidence raises a presumption that he knew, but where there is just ground for inferring that reasonable diligence would have led him to a discovery of the truth.—Oliver v. Sanborn, 60 Mich. 346.

¶ 73. Such notice as men usually act upon in the ordinary affairs of life is all that can be required to charge a subsequent purchaser or incumbrancer. If it is sufficient to direct attention to the prior right and to enable its nature to be ascertained by inquiry, it is enough.—Willcox v. Hill, 11 Mich. 256.

¶ 74. A purchaser as against a previous unrecorded deed is charged with notice not only of all that is definitely communicated to him, but of all that a proper use of that information would have enabled him to ascertain.—Oliver v. Sanborn, 60 Mich. 346.

¶ 75. One is not bound to investigate mere neighborhood rumors as notice.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 76. Where one purchases property which was subject to an equity in the seller's hands, it is enough that he have knowledge of such facts and circumstances indicating the equity as would have led a prudent man to inquire in regard to it, and that he omitted to do so.—James v. Brown, 11 Mich. 25.

¶ 77. A prior mortgagee who merely fails to make inquiry is not chargeable with notice of a subsequent mortgage; he should have actual knowledge.—James v. Brown, 11 Mich. 25.

¶ 78. Where the terms of a contract providing for the sale and disposition of the proceeds of an accompanying mortgage are such that no one in the possession of his senses would be apt to execute said instrument, an assignee having notice of the contract is chargeable with notice of the mortgagor's incompetency.—Kent v. Mellus, 69 Mich. 71.

¶ 79. One who, before taking a mortgage, learns from the mortgagor that a third person claims some interest in the land, takes with constructive notice of all that reasonable inquiry would have disclosed, e. g., as to matters involved in a suit pending between such third party and the mortgagor wherein the former claims that the title is his, and that the latter's was, under a patent, procured by fraud from the state; and he can claim no more than his mortgagor's rights.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 80. If the purchaser inquires of the party in interest, he will not be responsible for not pushing his inquiries further, unless the answer he receives corroborates other information, or reveals the existence of other sources of information.—Converse v. Blumrich, 14 Mich. 109.

¶ 81. How. St. §§ 6190, 6193, invalidating transfers, not accompanied by immediate delivery, unless evidenced by a written instrument duly recorded, have reference only to mortgages and transfers of chattels.—Haug v. Third National Bank, 95 Mich. 249.

¶ 82. Parties claiming title through a general assignee are bound, in case of a controversy, to inquire of him for any facts in his knowledge bearing upon it, and failure to do so is gross negligence.—Ryerson v. Eldred, 23 Mich. 537.

¶ 83. One who purchases premises covered by an undischarged mortgage, the mortgagee being well known and easily accessible to him, and he having knowledge of facts sufficient to put a prudent man on inquiry, cannot claim to be a purchaser without notice of the equities of the mortgage simply because the mortgagor has possession of, and exhibits to him, the notes described in the mortgage; he stands in no better position than the mortgagor himself.—Boxheimer v. Gunn, 24 Mich. 372.

¶ 84. A. sold land to B., and B. sold it to C., but the former deed was not recorded, and A. sold it again to D., who appears to have had notice of the other conveyances. S., hearing that the land had been abandoned, got an abstract of title which showed the conveyance to C. He immediately took a quitclaim from D., leased the land, and filed a bill to remove the cloud on his title. Held, that he had sufficient notice to put him on inquiry, was therefore not a bona fide purchaser, and could not maintain his bill. —Stetson v. Cook, 39 Mich. 750.

¶ 85. One dealing in good faith with a person in whom legal title stands has no concern with, and need not inquire into, any parol understanding of which he has no notice, and by which some equitable interest in the land is claimed by another.—Hull v. Swarthout, 29 Mich. 249.

§ 14. ——Partnership relationship and notice of joint ownership.

See also post ¶ 447.

¶ 86. A partnership relation is not notice to a purchaser in good faith that land held by the partners from different grantors and under deeds of different dates is partnership property, even if held in common and used for partnership purposes.—Reynolds v. Ruckman, 35 Mich. 80.

¶ 87. In purchasing from a tenant in common, one has a right to suppose the usual relations exist, and is not bound by partnership equities between the tenants affecting the land in their hands.—Adams v. Bradley, 12 Mich. 346.

¶ 88. Notice calling for inquiry is imputable to one who, being offered a mortgage by a surviving partner to the administrator of the deceased partner and covering only the survivor's interest in firm lands, declined it and suggested the making and assignment to him of a mortgage covering both interests, and who at the same time took an assignment of a chattel mortgage on all of the firm personal assets to secure the same debt; where the facts, if followed up, tended to show that no debt existed and that the original mortgage was a fraud on creditors of the firm, or if it had any existence that it was for an individual debt of the survivor incurred while he was winding up; and accordingly such assignee or his heir could not enforce such mortgage contrary to equity even against the surviving partner's interest in the lands.—Brown v. Watson, 66 Mich. 223.

¶ 89. A mortgagee must be held to have taken with notice that the debt was an individual one and not one for a firm debt; where, on being offered a mortgage made in the name of the surviving partner and covering only his interest in firm lands and running to the administrator of the deceased partner, he declined to buy it and suggested the making of a mortgage covering both the mortgagor's and the decedent's interest which was done and such substitute mortgage assigned to him.—Brown v. Watson, 66 Mich. 223.

§ 15. Recitals in deed or incumbrance.

Recital referring to "remaining interest," see post § 16.

Recital of consideration as evidence of value paid, see also Evidence ¶ 2576.

General law of deeds, see Deeds.

¶ 90. A grantee or mortgagee is chargeable with notice of whatever appears in the chain of title through which he claims.—Mason v. Payne, W. 459; Fitzhugh v. Barnard, 12 Mich. 104; King v. Potter, 18 Mich. 134; Case v. Erwin, 18 Mich. 434; Browning v. Howard, 19 Mich. 323; Baker v. Mather, 25 Mich. 51; Dwight v. Tyler, 49 Mich. 614; Wait v. Baldwin, 60 Mich. 622; Plumer v. Johnston, 63 Mich. 165; McKay v. Williams, 67 Mich. 547.

¶ 91. One who takes up a mortgage that refers to another has constructive notice of the latter.—Kitchell v. Mudgett, 37 Mich. 81.

¶ 92. A second mortgage that states that it is given subject to an earlier one, renders it unnecessary for the first mortgage to be the first filed, in order to maintain the priority.—Flory v. Comstock, 61 Mich. 522.

¶ 93. It is error to submit to the jury, in a case involving the good faith of a purchaser of land, the question whether the fact that the record of a warranty deed forming a part of his chain of title shows that the covenants are limited to the acts of the grantor should have suggested an examination as to whether the grantor had previously deeded to another, the limitation being, so far as it went, an assertion that he had not.—Jennings v. Dockham, 99 Mich. 253.

¶ 94. A deed conveyed land to three partners in the proportion of an undivided half to one and an undivided fourth to each of the others, and added, "this being the proportional undivided interest of each of the above partners in the lumber firm and lands of Milo A. Skinner & Co." The first-named grantee mortgaged his undivided half. Held, that the deed did not necessarily import notice of the rights and interests of others in the portion mortgaged.—Van Slyck v. Skinner, 41 Mich. 186.

¶ 95. A second mortgagee takes subject to a prior unrecorded mortgage expressly referred to in the deed to his mortgagor and excepted therefrom.—Baker v. Mather, 25 Mich. 51.

¶ 96. A mortgage was given in 1832, and was foreclosed in 1835, and the premises conveyed to the mortgagees; but the deed was not recorded in the proper county. The mortgagees soon after transferred the land by deed, which was duly recorded. In 1856 the mortgagor made a deed of the same premises, subject to the mortgage, describing it as given "in 1830 or 1831." Held, that this was sufficient notice to the grantee, not only of the mortgage, but that it was still unpaid; and after the lapse of twenty-four years he had every reason to believe it had been foreclosed. The grantee, therefore, could not, in good faith, claim anything in opposition to the mortgage and the rights which had accrued under it.—Fitzhugh v. Barnard, 12 Mich. 104.

¶ 97. Where a purchaser cannot make out a title but by a deed which leads him to another fact, he is presumed to have knowledge of that fact.—Norris v. Hill, 1 Mich. 202.

¶ 98. Notice of a part of an agreement under which a lessee holds and occupies must be deemed notice of the whole of it to his assignee.—Norris v. Showerman, 2 D. 16.

¶ 99. One, who takes title to "the north half of S. street, so called, on the south side of block 12" from a grantor who acquired a fee in the street subject to the public easement, has notice that the grantor does not possess an absolute title unless the street has been abandoned by the public at the time of the deed.—Village of Grandville v. Jenison, 86 Mich. 567, adhering on rehearing to opinion in 84 Mich. 54.

¶ 100. The record of a deed, conveying a parcel as block number "six" according to a recorded plat referred to in such deed, puts on inquiry a subsequent purchaser of the tract including such block although on the plat as recorded the blocks are not numbered.—Schweiss v. Woodruff, 73 Mich. 473.

¶ 100a. Where the trust appears on the face of a deed it is notice to all of the trustee's character and duties.—Pierce v. Grimley, 77 Mich. 273.

§ 16. ——Recital referring to "remaining interest."

Deed of "now remaining" estate as compatible with former unrecorded deed, see Deeds § 28, ¶ 89.

¶ 101. A prior unrecorded deed is not defeated by a recorded conveyance of the grantor's "now remaining interest"; the two deeds may stand together.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 102. Whether an unrecorded deed is void as against a subsequent recorded one that is a mere quitclaim of such interest as remains in the grantor, and that follows mesne conveyances to persons who were affected by notice of the first grantee's rights, quære; the court being equally divided.—De Veaux v. Fosbender, 57 Mich. 579.

§ 17. Possession, use, or visible condition of property as notice.

See also post ¶ 411.

Possession of grantee or vendee, see post § 18.

Possession of tenant, see post § 19.

Hostility or friendliness of possession, see post § 20.

Existing or apparent easements, see post § 21.

Knowledge of existence and ownership of railroad tract as constructive notice of title, see also post ¶ 159.

Existing type of construction as notice of building restriction, see also post ¶ 160.

Constructive notice from possession in fact not known, see also ante ¶ 1.

Validity of parol gift of land with possession as against subsequent transferees and incumbrancers, see Gifts ¶ 97.

Possession as prima facie ownership, see also Evidence §§ 54, 55.

Actual possession as notice affecting priority of levy, see Executions § 34.

Notice from possession as to movable character of building, see Fixtures ¶ 94.

¶ 103. Actual possession of realty constitutes constructive notice to purchasers of the claim of the party in possession.—Holmes v. Deppert, 122 Mich. 275.

¶ 104. When land is sold while in the possession of another than the grantor, the purchaser is bound to ascertain the rights of the possessor.—Howatt v. Green, 139 Mich. 289.

¶ 105. Actual possession of lands is notice of the title of the party in possession, whatever it may be, and not merely of that which the registry may happen to disclose.—Russell v. Sweezey, 22 Mich. 235.

¶ 106. Occupancy of land, within clearly defined boundaries, as a pasture, to which purpose it is alone adapted, is sufficient to charge a purchaser with constructive notice of the occupant's rights.—Miner v. Wilson, 107 Mich. 57.

¶ 107. Where a party purchases land in the possession of a third person, with a knowledge of that fact, he takes it subject to all equities existing between his vendor and the person in possession.—Rood v. Chapin, W. 79; Godfroy v. Disbrow, W. 260; Norris v. Showerman, 2 D. 16; Woodward v. Clark, 15 Mich. 104.

¶ 108. Where one when he gave a mortgage was in possession under color of title, he is presumed, in the absence of anything to the contrary, to be owner of the inheritance and a purchaser takes title accordingly in the absence of notice.—Wyman v. Baer, 46 Mich. 418.

¶ 109. One who purchases lands in the actual possession of third parties with full knowledge of the possession held and the rights claimed by such parties is in no better position to assert equities against them than his grantor.—Dunks v. Fuller, 32 Mich. 242.

¶ 110. The purchaser or mortgagee of land that is occupied by some one else than the grantor or mortgagor is bound to inquire of the occupant as to the latter's rights, and if he does not is chargeable with notice of them.—McKee v. Wilcox, 11 Mich. 358; Allen v. Cadwell, 55 Mich. 8.

¶ 111. Possession of land is notice to a purchaser that the holder has an interest in it even though no deed to him is recorded. —Hommel v. Devinney, 39 Mich. 522.

¶ 112. Actual possession of real estate is notice, to purchasers or incumbrancers, of the rights of those in possession. It was therefore held in the case of a wife living with her husband on land which they had occupied under a certificate of purchase from the state, but which certificate the husband had assigned without her concurrence to another person who obtained a patent to the

land and mortgaged it, that the mortgagee was chargeable with notice of the wife's homestead rights, and could not be regarded as a bona fide purchaser.—Allen v. Cadwell, 55 Mich. 8.

¶ 113. Immediate possession and constant occupancy by one who holds under a land contract operate as full notice of his rights under the contract, so far, at least, as concerns enclosed premises.—Seager v. Cooley, 44 Mich. 14.

¶ 114. Occupancy of land, when the occupant has a recorded deed to an undivided interest in it and a contract right to the remaining interest, is such notice of the occupant's rights as will protect the land from the lien of a mortgage of later date than the deeds, except to the extent of the interest remaining in the mortgagor.—Weisberger v. Wisner, 55 Mich. 246.

¶ 115. Where a son took possession of, and continued to occupy, land which his father agreed that he should have by way of advancement from his estate, such possession and occupation were notice to the world of his interest in the property.—Michie v. Ellair, 54 Mich. 518.

¶ 116. Where an aged widowed father owned land for thirty years and occupied it as a homestead with his son and the latter's family, occupancy by the son is not notice of any claim of title or right in the son, there being no title of record, and there is a presumption that the son was living with the father under the father's possession.—Nagelspach v. Shaw, 146 Mich. 493.

¶ 117. One who is not a bona fide purchaser cannot rely on the record of a deed from the person he finds in possession to his own grantor, and assume that the deed is harmonious with such possession, though in proper cases he might perhaps do so.—Sartwell v. Young, 126 Mich. 304.

¶ 118. Occupying a house with one's family as a home is constructive notice to every one of all his rights to the property, whatever they may be.—Delosh v. Delosh, 171 Mich. 175.

¶ 119. The purchaser of land that is in possession of some one else than the grantor cannot presume that the occupant has no adverse rights, or that such rights are cut off by the conveyance.—Allen v. Cadwell, 55 Mich. 8.

¶ 120. The actual possession or occupancy of land by a tenant in common is sufficient to put another upon his guard, and such other is chargeable with knowledge of all the facts which he might have learned by making such inquiry of the party in possession.—Schmidt v. Steinbach, 193 Mich. 640.

¶ 121. Possession by an heir having a one-third interest in a farm, subject to the dower of the mother, is notice not only of his record title as shown by proceedings in the probate court, but also of the right of such occupant under a verbal agreement with another heir for the conveyance of his interest.—Schmidt v. Steinbach, 193 Mich. 640.

¶ 122. Where the owner of land upon which there was a mortgage conveyed the property to a contractor to raise money to erect a flat building, taking back a land contract, and subsequently the land was deeded by the grantee to a third party, held, that the fact that the first grantor remained in possession of a part of the premises furnished the last grantee no constructive notice of his rights, the deed being recorded although the land contract was not.—McEwen v. Keary, 178 Mich. 6.

¶ 123. Where a wife conveys to her husband land upon which they are living, his occupancy thereafter is apparently a continuance of his former occupancy as husband of the owner, and is not notice supplying the want of record.—Atwood v. Bearss, 47 Mich. 72.

¶ 124. The selection of a homestead need not be in writing and recorded, nor need any particular formality be observed to fix the right. Occupancy of a parcel of land, within the $1,500 limit, by the placing of a dwelling-house thereon and making the home there, is sufficient to declare it a homestead, and is notice to all of its selection.—Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

¶ 125. An assignee of a purchaser's interest in possession is superior to an attachment by a creditor, whose debt antedated the assignment but whose levy was subsequent to the possession, although the attaching creditor was ignorant of the assignment.—Dumas v. Geer, 144 Mich. 377.

¶ 126. The continued occupation, cultivation and improvement by a husband of homestead premises after his wife has left him and while she is living apart from him, constitute notice of his claim of ownership to one who eight months after the separation acquires title from the wife, although a deed from the husband mediately to the wife is on record.—Stevens v. Castel, 63 Mich. 111.

¶ 127. The fact that for thirty years a third person has been improving another's land, paying taxes, etc., is enough to put a purchaser on inquiry as to his rights.—Twiss v. George, 33 Mich. 253.

¶ 128. Possession of land by a grantor is not notice of any rights or equities in him to one who acquires an interest in the land on the faith of his recorded conveyance.—Bloomer v. Henderson, 8 Mich. 395.

¶ 129. Mere possession after deeding land is not of necessity notice that the grantor still has rights or equities in the premises inconsistent with those conveyed.—Abbott v. Gregory, 39 Mich. 68.

¶ 130. One remaining in possession of lands which he has conveyed by mortgage will be presumed to hold subject to the title so created; and after foreclosure of the mortgage his continued possession will not be notice of any other interest or title he may have acquired but which does not appear of record in him.—Dawson v. Danbury Bank, 15 Mich. 489.

¶ 131. The possession and use of land by a firm is not notice to purchasers that the land is partnership assets where the record title shows that the partners are tenants in common owning undivided half interests therein. It is consistent with individual ownership as tenants in common, and will not even put purchasers upon inquiry.—Hammond v. Paxton, 58 Mich. 393.

¶ 132. Possession alone is not such actual notice, as, under R. S. 1838, p. 260, § 25, would protect the title of one claiming and occupying under an unrecorded deed against one who subsequently took a mortgage from the grantor without being aware of such possession.—Hubbard v. Smith, 2 Mich. 207.

¶ 133. A purchaser from a party in possession of mortgaged premises is bound by a pending foreclosure suit, if he has notice thereof, to the same extent to which the party is bound.—Baker v. Pierson, 5 Mich. 456.

¶ 134. In a suit to secure title to real estate, defendant's claim of ignorance of the fact that complainant was in possession of the property when he bought it can avail defendant nothing even if true.—Delosh v. Delosh, 171 Mich. 175.

¶ 135. The holder of a contract or permit to cut timber, was entitled to priority over subsequent purchasers of the land for a price which was inadequate if the timber was to be included, where when such purchasers visited the land, a freshly cut logging road had been made, and they must have had sufficient knowledge of the operation being conducted to have put a reasonably prudent man upon inquiry.—Oconto Co. v. Lundquist, 119 Mich. 264.

§ 18. ——Possession of grantee or vendee.

Title of vendee in general, see Vendor and Purchaser, III.

¶ 136. Possession under an unrecorded deed is notice to all of the rights of the grantee therein.—Van Husan v. Heames, 96 Mich. 504.

¶ 137. Open and notorious possession under a land contract is notice of the occupant's rights.—Meigs v. McFarlan, 72 Mich. 194; Balen v. Mercier, 75 Mich. 42.

¶ 138. Possession of land by a contract purchaser is constructive notice of his rights. —Atkinson v. Akin, 197 Mich. 289.

¶ 139. A vendee's actual possession under an unrecorded contract of purchase is constructive notice of his rights as against one who levies execution upon the land as the vendor's property and files notice of such levy.—Corey v. Smalley, 106 Mich. 257.

¶ 140. Possession by one claiming through the purchaser under a land contract is constructive notice of his rights to a subsequent mortgagee of the vendor.—Van Baalen v. Cotney, 113 Mich. 202.

¶ 141. The taking of possession of a lot, purchased under contract free from building restrictions for resident purposes, in a then undeveloped subdivision, from one who held title to such subdivision free from building restrictions, protects such purchaser as fully as recording his contract.—Lambrecht v. Gramlich, 187 Mich. 251.

¶ 142. Where an undeveloped subdivision is purchased free from residence building restrictions, and such owner sells the first lot under contract without restrictions, and the owner conveys such lot to another, subject to the contract and to building restrictions, which person sells such lot to another, free from restrictions, and the contract purchaser obtains his deed without mention of restrictions from such last purchaser, and the other lots are sold subject to restrictions, such contract purchaser may ignore the restriction which appears in his chain of title at the time he secures deed where he took immediate possession at the time of purchase, as such possession constituted constructive notice of his rights under the contract.—Lambrecht v. Gramlich, 187 Mich. 251.

¶ 143. A mortgagee of land sold under contract, had constructive notice by possession of the rights of the contract purchaser where such purchaser took possession of such premises with the consent of vendor in good faith two days before the mortgage was recorded and the money paid for which the mortgage was security, and it appeared that the family had supper in the house on the evening of the first day, that on the following day all their household goods were on the premises, and that the family continuously occupied the premises thereafter.—Fraser v. Fleming, 190 Mich. 238.

¶ 144. A purchaser of a portion of some mortgaged premises situated on one of the principal streets of the village where the mortgagee resided, promptly recorded the deed and went into actual possession, improving the premises and living on them. Held, that the mortgagee's knowledge of this

was enough to put him on inquiry before releasing other parts of the premises from the mortgage lien.—Dewey v. Ingersoll, 42 Mich. 17.

¶ 145. Where the evidence shows that the grantor in an unrecorded deed held possession of the realty thereafter as the grantee's agent, such possession is notice of the grantee's title of which a sheriff who levies on the land as belonging to the grantor is bound to take notice.—Blish v. Collins, 68 Mich. 542.

¶ 146. Possession and occupancy of land by a grantee is not sufficient notice to subsequent purchasers to answer the purpose of recording the deed, if it is not open, manifest, unequivocal and apparently by virtue of the unrecorded conveyance. So held where the grantee was the grantor's husband and continued to live on the premises with her. —Atwood v. Bearss, 47 Mich. 72.

¶ 147. Occupancy of premises by a railroad in course of construction is constructive notice of the company's rights under a contract for the purchase of the property.—Detroit & M. R. Co. v. Brown, 37 Mich. 533.

§ 19. ——Possession of tenant.

¶ 148. The possession of a tenant is notice to a purchaser of the actual interest the tenant may have in the premises.—Disbrow v. Jones, H. 48.

¶ 149. A tenant's possession of land is notice to put a purchaser on inquiry, but the force of the notice is broken if on inquiry the tenant disclaims title. So held where, at a sale of land, a tenant in possession under an oral lease was present and stated his claims, but made no claim to a tree which by the terms of his lease he had a right to cut for fuel; title to such tree accordingly passed to a purchaser without notice.—Trumpower v. Marcey, 92 Mich. 529.

¶ 150. While the possession of lessees is notice of their rights it is not notice to a bona fide purchaser that the lessor's title has been incumbered by an assignment of the leases, reserving rent to himself.—Steel v. DeMay, 102 Mich. 274.

¶ 151. Information to a vendee before purchasing land that third parties are in possession as tenants puts him upon inquiry and charges him with knowledge of all facts that he might have learned by making inquiry of such tenants.—Lambert v. Weber, 83 Mich. 395.

¶ 152. One Brady, Sr., conveyed by absolute deed a piece of land to one Raymond, to secure a debt. Raymond, upon payment of the debt, deeded the land back to complainant, a son of Brady, Sr., the latter being in possession all the time since his conveyance to Raymond. Complainant immediately put his tenant in possession. Brady, Sr., never recorded the deed from Raymond. Defendant, an execution creditor of Raymond, levied on the land after the reconveyance to complainant, and while complainant's tenant was in possession. Held, the possession of the tenant put defendant on inquiry as to the true owner of the land, and a bill would lie to set aside the levy and sale on execution.—Brady v. Sloman, 156 Mich. 423.

¶ 153. Where one who has leased land to a firm buys out the right of one of the partners and afterwards gives a mortgage on the premises, the possession of the new firm is notice to the mortgagee that erections put up by the former firm are not covered by the mortgage, because the other partner's rights cannot be taken away.—Kerr v. Kingsbury, 39 Mich. 150.

§ 20. ——Hostility or friendliness of possession.

Recordation as assertion of hostile title, see post § 76.

¶ 154. When possession is originally taken by the consent of the true owner and in recognition of his rights, that possession does not become adverse and the statute of limitations does not commence to run until the owner knows that the possessor asserts a hostile claim, and the doctrine of constructive notice has no application.—Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co., 136 Mich. 599.

¶ 155. Information that a possession is adverse need not come from the possessor or from any other particular source it being sufficient if the holder of the record title acquire knowledge thereof from any source. —Howatt v. Green, 139 Mich. 289.

¶ 156. One who purchases land of which another than the grantor is in possession under a recorded deed purporting to convey in fee is charged with notice of the possessor's interest and title though he does not actually know of the hostile character of such possession nor was it known to his grantor against whom it was originally permissive.—Howatt v. Green, 139 Mich. 289.

§ 21. Existing or apparent easements.

Effect of purchase of land burdened with unknown and invisible easement or use, see also Easements § 27.

Invisibility of easement or use by another as affecting rights passing on transfer of dominant or servient land, see also Easements § 27.

¶ 157. The principle that possession or use of any kind of real property is constructive notice to the whole world of the paper title under which the possession or use is enjoyed, has no application where the user of a strip of land, which had been used as an easement of necessity, claimed a prescriptive right without actual notice of the hos-

tile claim having been given to the owner of the servient tenement, but where the claim had been asserted in recorded deeds.—Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co., 136 Mich. 599.

¶ 158. It seems that possession and use by the licensee of a way of passage continued after revocation by a transfer of title by a licensor is notice that the licensee no longer makes use under the license but under a claim of right; and the grantee is bound by such notice to assume that the continued use is under claim of right and will become prescriptive.—Toney v. Knapp, 142 Mich. 652, per Carpenter, C. J., Moore, McAlvay and Hooker, JJ.; Montgomery, J., concurring in the result.

¶ 159. A purchaser of a paper plant is charged with constructive notice of the terms of a contract entered into by its vendor with a railroad company for the construction and use of a sidetrack adjacent to the plant, since it knew of the existence, location and ownership of the track and had only to inquire to learn of the terms of the contract. —Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co., 132 Mich. 324.

¶ 160. The mere building of single dwellings or the adoption of a particular style of architecture by others in a block is not notice to the owner of a lot only restricted to residential purposes that he must do likewise or protest in order to protect his right to build an apartment house.—Casterton v. Plotkin, 188 Mich. 333.

§ 22. Presumptions and evidence.

See also ante ¶ 58.

Presumptions and burden of proof as to actual notice, see ante § 11.

General law of evidence, see Evidence.

¶ 161. On a bill to quiet title brought by the grantee of an unrecorded deed, the evidence held to show that the defendants avoided investigating the title, and confined themselves to a determination of where the record title was, as shown on the face of the abstract, and that the possession of the grantee was so open and notorious as to constitute notice.—Chandler v. Clark, 151 Mich. 159.

C. PARTING WITH VALUE, WITHOUT NOTICE AND IN GOOD FAITH.

§ 23. Bona fide purchasers in general.

Levying creditors and execution or judicial purchasers, see post § 24.

Persons receiving under divorce decree or by partition, see post § 25.

Grantees under quitclaim deed, see post §§ 26, 27.

Heirs and devisees as purchasers, see post § 28.

Persons other than purchaser entitled to claim benefits of doctrine, see post § 29.

Necessity of payment or parting with value, see post §§ 30-32.

Sufficiency of consideration or value, see post §§ 33, 34.

Payment partly before and partly after notice, see post § 35.

Necessity and materiality of good faith, see post § 36.

What constitutes good faith, see post § 37.

Priority and protection afforded in general, see post §§ 38, 39.

Protection against unrecorded dower interests, see post § 40.

Priority between unrecorded instruments, see post § 41.

Burden of proof and presumptions, see post § 42.

Evidence to establish good faith, see post § 43.

Protection afforded bona fide purchasers against unrecorded instruments, see post II, C.

Effect on title of bona fide purchaser at guardianship sale of guardian's failure to give requisite statutory notice, see Guardianship ¶ 171.

Effect on rights of bona fide purchasers who trace title through representative who purchased at his own sale, see Estates of Decedents ¶¶ 852, 855-857, 859.

Purchase of trust property with knowledge of trust or defects in title of trustee, see Trusts.

Right to rescission of conveyance fraudulently procured as against subsequent grantee with notice but free from fraud, see Rescission.

Right to reformation of instrument in hands of bona fide holder, see Reformation.

Rights of bona fide purchasers under recording act, see Comp. L. 1915, § 11721.

¶ 162. One who purchases property without looking into the title deed of his grantor is chargeable with notice of any defect in the title appearing on the face of such deed. —Wilson v. Arnold, 5 Mich. 98.

¶ 163. The vendee of property who has no notice such as even to put him on inquiry as to any right or claim of an adjoining property owner to a small tract of land between the two properties is a bona fide purchaser for value without notice.—Robertson v. Smith, 191 Mich. 660.

¶ 164. A mortgagor gave a warranty deed of the land subject to the mortgage. A woman, acting through her husband, bought it from the mortgagor's grantee. The mortgage was foreclosed and the mortgagor bid in the land. The woman filed a bill to remove the cloud from her title and to compel the mortgagor to convey to her the interest he received by the foreclosure sale. The court found that she was not a bona fide purchaser without notice that the land was sold subject to the mortgage, and held that it would be unjust to compel a conveyance without payment of the mortgage, and dis-

missed the bill with costs.—Berry v. Whitney, 40 Mich. 65.

¶ 164a. A person taking assignment of a mortgage with knowledge that it represented an investment of the proceeds of land conveyed under a parol agreement to the mortgagee to sell and invest the proceeds for the grantors, cannot be regarded as a bona fide holder.—Edinger v. Heiser, 62 Mich. 598.

§ 24. ——Levying creditors and execution or judicial purchasers.

Applicability of limitation to action for recovery of land held under unrecorded judicial or involuntary sale, see Limitations § 10.

See also post ¶ 208.

Rights of bona fide takers as against defects in execution sales, see Executions § 93.

Right of execution purchaser to assume condition of title, see Executions § 70.

Notice of execution purchaser of possibility that new trial may open judgment, see Executions ¶ 191.

Assignees for creditors as bona fide purchasers, see Assignments for Creditors § 21.

¶ 165. By filing an attachment levy or by levying execution one does not become a bona fide purchaser so as to entitle him to object to the restoration of a third person's mortgages upon the land, which, by mistake of fact, were discharged of record before the execution levy.—French v. De Bow, 88 Mich. 708.

¶ 166. Attaching or judgment execution creditors are not "purchasers," within the meaning of the recording law, until the property attached or levied on has been sold in pursuance of law and has been purchased in by them and before such purchase they are not protected against prior unrecorded defeasances.—Columbia Bank v. Jacobs, 10 Mich. 349.

¶ 167. One who bids in lands under an execution sale becomes a "purchaser" within the meaning of the registry laws, even though he does not yet receive the sheriff's deed; and if he records his certificate of sale he is entitled to protection against subsequent purchasers until he can receive his deed.—Atwood v. Bearss, 45 Mich. 469; Drake v. McLean, 47 Mich. 102.

¶ 168. Purchasers at public judicial sales usually buy at their own risk of the regularity of title.—McGoren v. Avery, 37 Mich. 120.

¶ 169. The principle of constructive notice applies in favor of an execution purchaser who records his certificate of sale in advance of previous conveyances from the debtor to third persons.—Atwood v. Bearss, 45 Mich. 469.

§ 25. ——Persons receiving under divorce decree or by partition.

¶ 170. Where a husband voluntarily conveys property to his wife who subsequently causes it to be conveyed to herself and her husband as an entirety and she later obtains the entire property through a divorce, she is not a bona fide purchaser.—Holden v. Butler, 173 Mich. 116.

¶ 171. A tenant in common whose interest becomes severed by partition is a "purchaser for value" of the interest of his cotenants in the lands set apart to him, so as to be protected against a previous execution, levy and sale of which he has no notice.—Campau v. Barnard, 25 Mich. 381.

§ 26. Grantees under quitclaim deed.

Taking by warranty deed from quitclaim purchaser, see post § 27.

Status of grantee in quitclaim deed, see also Deeds § 33.

Protection afforded against unrecorded instruments, see post II, C.

Rights under quitclaim deed, see Comp. L. 1915, § 11721.

¶ 172. One who takes by quitclaim deed is not a bona fide purchaser.—Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

¶ 173. Whether one can claim to be a bona fide purchaser under an executrix's quitclaim deed conveying only the testator's right, title and interest, quære.—Culbertson v. H. Witbeck Co., 92 Mich. 469.

¶ 174. One who takes by quitclaim deed is not a bona fide purchaser and takes only the interest which his grantor had.—Walker v. Schultz, 175 Mich. 280.

¶ 175. The grantee in a quitclaim deed is not a purchaser in good faith, as a matter of law.—Chandler v. Clark, 151 Mich. 159.

¶ 176. The grantee in a quitclaim deed is not a bona fide purchaser, and takes no more interest than his grantor has to convey.—Pellow v. Arctic Iron Co., 164 Mich. 87.

¶ 177. Whether an unrecorded deed would be void where the subsequent deed was a mere quitclaim of such interest as remained in the grantor, and followed sundry mesne conveyances to persons who were affected by notice of the first grantee's equities, quære. A judgment in ejectment to the contrary was left undisturbed by a divided court.—De Veaux v. Fosbender, 57 Mich. 579.

¶ 178. Grantees by quitclaim are not bona fide purchasers, and they take only the interest which their grantors had.—Peters v. Cartier, 80 Mich. 124.

¶ 179. A person claiming title to land by virtue of a quitclaim deed is not a bona

fide purchaser as against a prior deed.—Hoffman v. Simpson, 121 Mich. 501.

¶ 180. Under the recording act, one who takes by quitclaim deed is not a bona fide purchaser as against a prior unrecorded deed.—Messenger v. Peter, 129 Mich. 93.

¶ 181. The recording law (Comp. L. 1897, § 8988) which gives preference to a recorded deed of a bona fide purchaser in good faith for a valuable consideration, over a prior unrecorded deed, does not give a recorded quitclaim deed priority over a prior warranty deed defectively recorded, a holder by quitclaim deed not being a bona fide purchaser within the meaning of the act.—Beakly v. Robert, 120 Mich. 209.

¶ 182. One acquiring title to land under a quitclaim deed occupies no better position than his grantor.—Holmes v. Soule, 180 Mich. 526.

¶ 183. A creditor, plaintiff, seeking cancellation, etc., received in part payment of her claim a deed from the debtor, which subsequently proved to have been a forgery, the debtor-grantor having had only a contract for purchase of the land, and that having been previously assigned to one W., who at time of discovery of the forgery was about to take a deed. Grantor under arrest and about to commit suicide wrote to his sister telling her to take certain life insurance and distribute it, among others to W. on his deeding the land to the creditor holding the spurious deed. The sister's agent sent to carry out the payments did pay the amount to W. but took the deed to himself, then selling and conveying to defendant under a recital of a larger consideration than was the fact, the deed being a quitclaim. Defendant, quitclaim grantee, was an intimate of the suicide, had gone bail for him, knew of the letter to the sister, and had a claim of his own provided for in the letter and had inquired about it. Held, that he had knowledge of plaintiff's claim, even if, holding a quitclaim to a mere equity, he could be a bona fide purchaser under W.—Hill v. Bateman, 112 Mich. 234.

¶ 184. Under Comp. L. 1871, § 4205, providing that a "deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale," and section 4231, providing that every "conveyance of real estate within this state * * * which shall not be recorded * * * shall be void as against any subsequent purchasers in good faith, and for a valuable consideration," the receipt of a quitclaim deed puts the party upon inquiry and prevents his claiming the rights of a bona fide purchaser.—Runyon v. Smith, 18 Fed. 579.

¶ 185. Under Comp. L. 1871, § 4231, providing that "every conveyance of real estate which shall not be recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded," and section 4237, stating that the term "conveyance" embraces every instrument by which any estate or interest in land is created, aliened, mortgaged, or assigned, and section 4205, providing that a "deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale," a purchaser by quitclaim deed may be regarded as a bona fide purchaser without notice of an existing incumbrance.—White v. McGairy, 47 Fed. 420.

¶ 186. Under our statutes the mere fact that the deed set up against the unrecorded conveyance is a quitclaim does not show that the grantee therein is not a purchaser in good faith.—Battershall v. Stephens, 34 Mich. 68.

¶ 187. A conveyance which contains no covenant of warranty is, in effect, only a quitclaim deed, the grantee taking the title subject to any lien which may have existed in favor of the vendor of his grantor; and in a suit to enforce such lien, defendant cannot make a good defense on the ground that he is a bona fide purchaser—Zeigler v. Valley Coal Co., 150 Mich. 82.

§ 27. ——Taking by warranty deed from quitclaim purchaser.

¶ 188. The rule that the grantee in a quitclaim deed cannot be a bona fide purchaser under the recording laws is not to be extended to one taking by warranty deed under such grantee.—Otis v. Kennedy, 107 Mich. 312.

§ 28. Heirs and devisees as purchasers.

Protection afforded against unrecorded instruments, see post II, C.

¶ 189. Heirs or devisees cannot be regarded as bona fide purchasers.—Wright v. Wright, 79 Mich. 527.

¶ 190. A devisee's grantee gets no better title under his deed than his grantor had, and he is chargeable with notice of the facts disclosed by the probate records that the devisor's estate has not been settled, and that a legacy with which the devised lands are charged has not been paid.—In re Appeal of Moores, 84 Mich. 474.

¶ 191. One who takes a deed from heirs of a deceased person with notice of a claim under a prior unrecorded deed from the ancestor of his grantors to another, cannot, by having his deed recorded first, acquire any priority over those claiming under the earlier deed; his failure to find the prior deed disclosed in the registry would give him no right to suppose the claim of which he had notice to be unfounded.—Munroe v. Eastman, 31 Mich. 283.

§ 29. Persons other than purchaser entitled to claim benefits of doctrine.

Protection afforded against unrecorded instruments, see post II, C.

Validity of parol gift of land with possession as against subsequent transferees and incumbrancers, see Gifts ¶ 97.

¶ 192. The defense of a bona fide purchase for a valuable consideration can only be made by the purchaser himself or by some one claiming through his purchase.—Blanchard v. Tyler, 12 Mich. 339.

¶ 193. Although a party may not himself be a bona fide purchaser without notice, yet if his grantor was such a purchaser, the former is entitled to all his rights, and to the protection which the law would give him. —Godfroy v. Disbrow, W. 260.

¶ 194. A defendant's title, resting on priority of record of a second deed, will prevail against that of a plaintiff who claims through a prior unrecorded deed from the same original grantor, if any one of the subsequent mesne purchasers through whom such defendant derives title purchased in good faith and for a valuable consideration, without notice of said prior unrecorded deed (Comp. L. 1857, § 2748, How. St., § 5683).—Shotwell v. Harrison, 22 Mich. 410.

§ 30. Necessity of payment or parting with value.

Time for payment, see post § 31.

Payment by promissory note or deposit in escrow, see post § 32.

Sufficiency of consideration or value, see post §§ 33, 34.

Payment partly before and partly after notice, see post § 35.

Necessity and materiality of good faith, see post § 36.

Effect of estate not receiving purchase money on title of bona fide purchaser from grantee of representative, see Estates of Decedents ¶ 769.

¶ 195. A plea of a bona fide purchase without notice must aver not only a want of notice at the time of the purchase, but also at the time of its completion and the payment of the money. The money must have been actually paid, or the defendant become so bound therefor that the court could not relieve him from the payment of it.—Thomas v. Stone, W. 117.

¶ 196. A previous unrecorded conveyance is valid as against a subsequent purchaser from the same grantor, unless he shows payment of the purchase price: the mere institution of a suit to quiet title does not make him a bona fide purchaser.—Smith v. Williams, 44 Mich. 240.

¶ 197. There is no such thing as a bona fide purchaser without a vendor, and a transfer from that vendor for the consideration paid.—Laprad v. Sherwood, 79 Mich. 520.

¶ 198. Land belonging to an estate was sold by the executors to the guardian to pay debts. The transaction was in good faith on both sides, and full consideration was paid. The guardian afterwards sold to others who knew nothing of the guardianship and had no notice of it from the record of title. Held, that How. St., § 6042, which avoids any sale to a guardian unless for the ward's benefit, would not warrant a ward in bringing ejectment against the purchasers, who were not bound to look beyond the registry of deeds to ascertain their grantor's title (How. St., § 5683).—Taylor v. Brown, 55 Mich. 482.

§ 31. ——Time for payment.

Time from which recording act operates, see post § 74.

¶ 199. To constitute a bona fide purchaser one must have paid the purchase money before notice.—Thomas v. Stone, W. 117; Dixon v. Hill, 5 Mich. 404; Warner v. Whittaker, 6 Mich. 133; Blanchard v. Tyler, 12 Mich. 339; Stone v. Welling, 14 Mich. 514; Palmer v. Williams, 24 Mich. 328.

¶ 200. Payment for land before notice of the rights of others must be made in order to secure title as good faith incumbrancer. —Fraser v. Fleming, 190 Mich. 238.

¶ 201. One who has in good faith contracted to buy land, and has no notice of any claims existing against the other party, nor any knowledge as to his ability to meet them, is not bound to await process on being afterwards notified that the latter's creditors wish to garnish him, but may complete the purchase and pay over the consideration without reference to the creditors.—Fisher v. Hall, 44 Mich. 493.

¶ 202. One who claims as a bona fide purchaser, but who has only given his notes, must also show that he had made payment thereon before notice of the defect in his grantor's title.—Matson v. Melchor, 42 Mich. 477.

§ 32. ——Payment by promissory note or deposit in escrow.

¶ 203. Where defendant gave his note, not negotiable, for land of which complainant held a prior unrecorded deed, but was fully informed of complainant's equities before making payment of the note, it was held that he could not claim the protection of a bona fide purchaser.—Blanchard v. Tyler, 12 Mich. 339.

¶ 204. A vendee who makes and deposits in escrow a note to be delivered when he gets good title and possession is not entitled to the rights of a bona fide purchaser for value. —Lambert v. Weber, 83 Mich. 395.

§ 33. Sufficiency of consideration or value.

Existing indebtedness as consideration, see post § 34.

Payment partly before and partly after notice, see post § 35.
Necessity for payment or parting with value, see ante § 30.
Consideration in general, see Contracts, V.

¶ 205. To constitute one a purchaser for value he need not pay all that the land is worth.—Boydson v. Goodrich, 49 Mich. 65.

¶ 206. Where a son claimed protection as a bona fide purchaser from his father against the reinstatement of a mortgage inadvertently discharged, the fact that he paid only three-fifths of the value of the land did not defeat his claim.—Sheldon v. Holmes, 58 Mich. 138.

¶ 207. A mere executory agreement to surrender to the grantor indebtedness owing by him to the grantee and others is not, while remaining wholly unexecuted, such a valuable consideration as to make the grantee a bona fide purchaser as against a prior mortgage not recorded when the deed was given. —Stone v. Welling, 14 Mich. 514.

¶ 208. Evidence that the creditor purchased the claim for $1.00, that he levied on the land without levying on the personal property of the debtor, that he purchased the land worth $1,000 for $125, that prior to the levy he had a conversation with the debtor in which he had notice that the debtor had no interest in the land and that he might have ascertained the true facts from the tenant on the land is sufficient to set aside an execution sale on suit of one who purchased two months before the levy but recorded subsequent to it.—Spring v. Raymond, 134 Mich. 84.

¶ 209. A valuable consideration for a conveyance consists either of some right, interest, profit or benefit accruing to one party or some forbearance, loss or responsibility given, suffered or undertaken by the other. —Smith v. Maxey, 186 Mich. 151.

¶ 210. Where a principal gave an agent as grantee, an absolute deed of land, which was to be withheld from record until the agreed consideration was paid, which was never done, but the deed was wrongfully recorded by the agent and the land conveyed by him for a mere nominal consideration to the defendant, who had no notice of the limitation of the agent's authority, the defendant's deed held based on a sufficient consideration, where it was received pursuant to the agent's promise to furnish a site for a mill, which would increase the value of other land in the vicinity owned by the principal, and the defendant sold the land to a subsequently organized milling company and received a substantial sum therefor in consideration of valuable services rendered in forming the company.—Smith v. Maxey, 186 Mich. 151.

¶ 211. Where, as security simply for a precedent debt, a conveyance of premises upon which stands a mortgage, valid between the original parties, is given to one who has been led to believe the mortgage satisfied, it does not place the grantee, who has relinquished no remedy and lost no advantage by taking such conveyance, in the position of a bona fide purchaser for value, or clothe him with equities superior to those of such mortgagee, even though he acted in good faith and without notice.—Boxheimer v. Gunn, 24 Mich. 372.

¶ 212. Comp. L. § 4235 (How. St., § 5687), which provides that the recording of an assignment of a mortgage shall not be deemed such notice to the mortgagor as to invalidate payments by him to the mortgagee, applies to a constructive payment; e. g., where, to get rid of the mortgage, he deeds the land on payment by another.—Goodale v. Patterson, 51 Mich. 532.

¶ 213. Where there is no consideration for a warranty deed except a mortgage on the land conveyed by it and a previous quitclaim deed, this is not equivalent to payment.—Chandler v. Clark, 151 Mich. 159.

¶ 214. One is entitled to occupy the position of a bona fide purchaser for value as against a prior grantee claiming under a conveyance recorded as a deed when in fact it was intended to operate only as a mortgage, where he had surrendered his security afforded by a declaration of trust and received in return an absolute deed of the land. —Grand Rapids Nat. Bank v. Ford, 143 Mich. 402.

¶ 215. A subordinate lodge of Odd Fellows purchased a building and lot, taking the title in one of its members who conducted the transaction. Subsequently it sold the property to this member for a fair price which was paid, but no deed was given because the legal title was already in him. He thereafter contracted to sell it and the purchaser assigned the contract to a third, neither of them being members of the lodge. The lodge disbanded and the Grand Lodge took over its assets under the charter provision giving it that right. Suit was brought to recover the property so sold. Held that the last purchaser and his assignee were bona fide purchasers and recovery denied.—Grand Lodge I. O. O. F. v. Barker, 139 Mich. 701.

¶ 216. A purely speculative purchase by quitclaim, where neither party supposed that a good title was being dealt with, and where the consideration was an indefinite sum, depending upon the grantee's outlays in securing a perfect title, did not constitute a bona fide purchase for value.—Battershall v. Stephens, 34 Mich. 68.

¶ 217. Though a mortgage was conditioned for the payment of a negotiable promissory note, and both mortgage and note are assigned before due to secure the assignee for procuring bail, such assignee is a bona fide

holder for the purpose only of securing bail, and when the sureties have been discharged without being damnified, neither he nor one who takes an assignment of the note and mortgage from him after they become due is entitled to collect the amount thereof as bona fide holder.—Colman v. Post, 10 Mich. 422.

§ 34. ——Existing indebtedness as consideration.

General law of consideration, see Contracts, V.

¶ 218. It seems that where the consideration is merely a past indebtedness the purchaser is not entitled to be regarded as a bona fide purchaser.—Battershall v. Stephens, 34 Mich. 68.

¶ 219. One who, for a previous indebtedness, takes from a failing debtor a conveyance of land incumbered with an unrecorded mortgage, cannot defend against the mortgage because it has been withheld from record, where it appears that such withholding did not influence her in her dealings with the mortgagor.—Fifth Nat. Bank v. Pierce, 117 Mich. 376.

¶ 220. An agreement by a creditor to discharge his debtor at a future time cannot avail him as a parting with value to make him a bona fide purchaser against an intervening grantee, where there was such a failure of consideration in the agreement for discharge that it was not binding on such creditor.—Stone v. Welling, 14 Mich. 514.

¶ 221. In the absence of fraud a mortgage upon real estate is not vitiated by being left unrecorded for six weeks, during which time the mortgagor renews at two banks notes which he could not have renewed had not the banks supposed his property was unincumbered.—Cutler v. Steele, 93 Mich. 204.

¶ 222. An assignee of a renewal mortgage securing non-negotiable paper cannot under the recording laws claim any right superior to an assignee of the original mortgage by reason of the latter's failure to record his assignment, especially where the sole consideration for the transfer of the renewal mortgage was the satisfaction of a pre-existing debt, since that fact does not constitute him a bona fide purchaser for value.—Brooke v. Struthers, 110 Mich. 562.

¶ 223. One who takes a mortgage given for a precedent debt is a taker for value.—Hanold v. Kays, 64 Mich. 439, citing Baker v. Pierson, 5 Mich. 456, which, however, does not expressly so decide.

¶ 224. One who takes a deed of land in absolute payment of a debt due him, or who discharges and pays a note for the maker, whereof he is surety, as the consideration for such deed, is a purchaser for value.—Hanold v. Kays, 64 Mich. 439.

¶ 225. One who without notice of equities against his mortgagor takes from a person who is not a bona fide purchaser a mortgage upon the land to secure an antecedent debt, the time of payment of which debt he extends on accepting the mortgage, is a good-faith mortgagee.—DeMey v. Defer, 103 Mich. 239. Writ of error dismissed in 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941.

¶ 226. A second wife who takes a mortgage upon her husband's land for a pre-existing debt with knowledge that the land had been conveyed to him without consideration by his daughter by his first marriage shortly after she became of age, takes it subject to the right of the daughter to have the conveyance set aside.—Graham v. Lamb, 120 Mich. 577.

¶ 227. Where a mortgage had been destroyed without recording, and the mortgagor's son, to whom he had conveyed the land, gave a new mortgage in exchange for the note to which the old one was collateral, held, that in a suit to foreclose the latter mortgage the complainant could not question the validity of the conveyance to defendant from his father, since, having parted with his prior unrecorded lien, said complainant must stand upon the new mortgage received in its stead; whatever defeats the mortgagor's title defeats the mortgage lien.—Sloan v. Holcomb, 29 Mich. 153.

¶ 228. One to whom a note and mortgage are assigned as collateral security for a prior debt of the mortgagee's is not a bona fide holder, and stands in no better situation than the assignor.—Waterbury v. Andrews, 67 Mich. 281.

¶ 229. He is a mortgagee in good faith who, without notice of equities against a person not a bona fide purchaser, himself takes from the latter a mortgage to secure an antecedent debt the time of payment whereof he extends on accepting the mortgage.—DeMey v. Defer, 103 Mich. 239. Writ of error dismissed in 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941.

¶ 230. A bank is not an innocent purchaser for value of a note and mortgage taken as additional security for a pre-existing debt without extending the time of payment of the debt or releasing any security then held.—Maynard v. Davis, 127 Mich. 571.

§ 35. Payment partly before and partly after notice.

¶ 231. If a part has been paid before notice and part remains unpaid, the purchaser is protected in what he has paid but not in subsequent payments.—Thomas v. Stone, W. 117; Kohl v. Lynn, 34 Mich. 360.

¶ 232. In equity a bona fide purchaser is protected to the extent of the payments actually made, and no further, even when future payments are provided for, unless those are

secured in such a manner that the purchaser cannot be relieved against them.—Dixon v. Hill, 5 Mich. 404.

¶ 233. A contract purchaser without a deed is protected by his good faith only so far as he has made payments, if meanwhile he has notice of litigation involving the validity of his vendor's title.—Dickinson v. Wright, 56 Mich. 42.

¶ 234. One who buys mortgage securities that are not delivered to him, and only makes a nominal payment until after receiving notice of another's interest in them, is not entitled to protection as a bona fide purchaser.—Haescig v. Brown, 34 Mich. 503.

¶ 235. A vendee in a contract of purchase of land without a deed who paid a part of the purchase price is only protected as a good faith purchaser to the extent of payments made before notice that his vendor's deed was only a mortgage, where after making such part payment he had notice of litigation to set aside his vendor's deed and to restrain interference with complainants' possession, in which it was held that such deed was a mortgage.—Wiles v. Shaffer, 175 Mich. 704.

¶ 236. Where land is purchased on which there is an unrecorded mortgage, of which the purchaser had no notice, but of which he is notified before a mortgage given by him for purchase money is paid, any payment made by him on his own mortgage after such notice is made in his own wrong, and he is not protected, as to such payment, against the unrecorded mortgage.—Warner v. Whittaker, 6 Mich. 133.

¶ 237. On dismissal of a foreclosure bill as against a subsequent bona fide purchaser who has not made full payment, he may still be held for such sums as remain due after he has been notified of complainant's equities. —Sheldon v. Holmes, 58 Mich. 138.

§ 36. Necessity and materiality of good faith.

What constitutes good faith, see post § 37.

Estoppel of mortgagor to question validity of mortgage given to defraud creditors as against bona fide purchaser, see Fraudulent Conveyances § 111, ¶ 516.

¶ 238. Good faith is not less important than the payment of value in determining whether one is a bona fide purchaser; and it is not to be determined alone upon the party's testimony that he acted in good faith. —Oliver v. Sanborn, 60 Mich. 346.

¶ 239. The question of a subsequent purchaser's good faith does not arise where his deed was not in fact recorded first.—Shelden v. Warner, 45 Mich. 638.

¶ 240. The question of good faith does not arise where the purchaser's deed is forged. —McGinn v. Tobey, 62 Mich. 252.

§ 37. What constitutes good faith.

Necessity and materiality of good faith, see ante § 36.

¶ 241. Whether one is a purchaser in good faith does not necessarily involve any question as to his integrity or the morality of his conduct in procuring a conveyance.—Battershall v. Stephens, 34 Mich. 68.

¶ 242. The question of good faith is one to be determined from all the circumstances. —Miller v. Clark, 56 Mich. 337.

¶ 243. If one buys a speculative title, knowing or having notice of an outstanding one, he is not a purchaser in good faith.— Miller v. Clark, 56 Mich. 337.

¶ 244. A subsequent purchaser's "good faith," in the meaning of Comp. L. 1857, § 2748, How. St., § 5683, is not required to be shown by him otherwise than by proof of the record, upon which he had a right to rely if he had no notice of the prior deed aside from the record.—Shotwell v. Harrison, 22 Mich. 410.

§ 38. Priority and protection afforded in general.

Restitution of consideration to bona fide purchaser, see post § 39.

Protection against unrecorded dower interests, see post § 40.

Priority between unrecorded instruments, see post § 41.

Constructive notice from the record, see post II, C.

Title of bona fide purchasers and transferees with respect to defrauded creditors, see Fraudulent Conveyances § 115.

Right to urge laches against senior title, see Equity ¶ 209.

Priorities between mechanics' liens and other titles, incumbrances and interests, see Mechanics' Liens, VI.

Subjection of taker to rights in existing party wall, see Party Walls ¶ 8.

¶ 245. Purchasers in good faith, etc., under a deed recorded before an earlier mortgage are protected.—Shelden v. Warner, 45 Mich. 638.

¶ 246. A bona fide purchaser of land without notice is protected against a prior unrecorded sale of the timber the same as against any other unrecorded instrument.—Russell v. Myers, 32 Mich. 522.

¶ 247. Where purchasers of land, the record title of which is free from any indication of a valid outstanding claim in any one, hold a good legal title combined with the full equities of bona fide purchasers without notice, they cannot be disturbed in their right without superior equities, and there are no equities superior to those of such purchasers. —Loomis v. Brush, 36 Mich. 40.

¶ 248. A bill in equity to establish rights in land should be dismissed as to a bona fide purchaser of a portion of it who had no notice of complainant's equities; but if his grantor is charged with notice, the land retained by such grantor may properly be charged with the whole amount of complainant's lien.—Holcomb v. Mosher, 50 Mich. 252.

¶ 249. Neither the city of Detroit as donee of the United States, nor persons taking conveyance from the city with notice, can claim protection, as bona fide purchasers, against correction of a deed by the city to a city lot.—Farmers' & Mechanics' Bank of Michigan v. City of Detroit, 12 Mich. 445.

¶ 250. Mortgagees in good faith under the grantee of an insane person cannot be considered bona fide purchasers in order to uphold the deed.—Rogers v. Blackwell, 49 Mich. 192.

¶ 251. A mortgagee of B., the father and donor, subsequent to the alleged parol gift to a son, but not charged with notice of it, could not in any event be affected thereby.—Jones v. Tyler, 6 Mich. 364.

¶ 252. The object of the registry law is to protect bona fide purchasers, and a failure to record a deed will not divest the grantee of his rights except as to a bona fide purchaser or incumbrancer.—Wooden v. Wooden, 72 Mich. 347.

¶ 253. Purchasers buy at their own risk as to the validity of a decree under which title is derived.—Cook v. French, 96 Mich. 525.

¶ 254. Failure to record an assignment of an instalment of a purchase-money mortgage, which but for such assignment would on reconveyance to the vendor have merged in the fee, postpones the assignee's claim to a subsequent mortgage taken without knowledge and superior in equity.—Pritchard v. Kalamazoo College, 82 Mich. 587.

¶ 255. Where a mortgage is left unrecorded, and the mortgagor's heirs give a second mortgage, which is put on record, an assignee of the second mortgage, who takes it in good faith for a full consideration actually paid, and without any notice, actual or constructive, that any claim exists against the premises, and whose assignment has also been recorded, is, by virtue of Comp. L. 1871, § 4231 (How. St. § 5683), protected and given precedence.—Burns v. Berry, 42 Mich. 176.

¶ 256. An attachment levied in October, and sale under it in February, 1842, the not being recorded until 1863, will not against a bona fide purchaser whose was recorded in 1843.—Millar v. Bab- 25 Mich. 137.

¶ 257. Pending a chancery suit in which lis pendens had been filed, affecting lands to which the defendant had the complete legal title of record, such defendant executed a mortgage to a third person to secure a bona fide debt, and then made a settlement of the suit. Held, that the mortgagee had a right to rely upon the record title, and was not bound by the settlement.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 258. A mortgage executed but not recorded, it being placed in escrow under a stipulation that it was to be delivered to a creditor on a certain contingency requiring the consent of the debtor, is inferior to a deed of trust given to secure another creditor, which deed is duly recorded and followed by possession.—Belding Sav. Bank v. Moore, 118 Mich. 150.

¶ 259. One who finds upon the record, uncancelled, a mortgage securing a note, can only be protected as a good-faith purchaser of the land by obtaining a discharge from him who holds the note and mortgage, nor can he presume that the original mortgagee is still such holder and owner.—Babcock v. Young, 117 Mich. 155.

¶ 260. An unrecorded defeasance is void only against purchasers for a valuable consideration without actual notice of its existence (Comp. L. 1857, § 2751, How. St., § 5686).—Columbia Bank v. Jacobs, 10 Mich. 349.

¶ 261. Unless a prior mortgagee has notice of facts enough to put a prudent man on inquiry he may release portions of the mortgaged premises without examining the records to ascertain, or inquiring, whether there are subsequent purchasers or incumbrancers to be affected by the release.—James v. Brown, 11 Mich. 25; Dewey v. Ingersoll, 42 Mich. 17.

¶ 262. One who has given a mortgage to be sold for a fraudulent purpose cannot set up the fraud as a defense to the mortgage in the hands of a bona fide purchaser.—Bloomer v. Henderson, 8 Mich. 395.

¶ 263. Where plaintiff's father for convenience had a brother take deeds to realty in the latter's name, held, that even though the brother were a trustee a bank taking a mortgage from him without knowledge of the interest of plaintiff's father was protected.—Beidler v. City Bank of Battle Creek, 172 Mich. 381.

¶ 264. A purchaser of a forged mortgage, and of forged notes purporting to be secured thereby, acquires no rights as against a prior assignee from the same person of genuine instruments the counterpart of those forged, although the latter's assignment was not of record at the time the forged instruments were purchased.—Lee v. Kellogg, 108 Mich. 535.

¶ 265. A mortgagee without notice is not affected by the fact that the land was con-

veyed to his mortgagor upon the latter's agreement to pay the grantor's debts.—Farrand v. Caton, 69 Mich. 235.

§ 39. ——Restitution of consideration to bona fide purchaser.

¶ 266. Where an assignment of an undivided equitable interest in land had for more than twenty years been left unrecorded, it was held that as against a subsequent bona fide purchaser title should not be confirmed in the owner of such outstanding interest, even upon his making restitution to such purchaser of the purchase-price.—Culbertson v. H. Witbeck Co., 92 Mich. 469.

§ 40. Protection against unrecorded dower interests.

Dower rights in general, see Dower.

Inferiority of dower to bona fide purchase without notice, see Dower § 32.

Inferiority of dower to mortgage not signed by wife where marriage not known to mortgagee, see Dower § 32.

¶ 267. A subsequent bona fide purchaser whose deed is recorded is protected against a claim of dower that depends solely on a prior unrecorded deed to claimant's husband. —Wheeler v. Smith, 55 Mich. 355.

§ 41. Priority between unrecorded instruments.

Effect of failure to record, see post § 77.

¶ 268. As against a prior unrecorded deed a purchase in good faith and for a valuable consideration is necessary to give a later unrecorded one priority, and these are in their nature distinct questions.—Shotwell v. Harrison, 22 Mich. 410.

§ 42. Burden of proof and presumptions.

Burden of proof and presumptions as to actual notice, see ante § 11.

Imputation of notice to transferee of franchise of burdens and conditions thereon, see Franchises § 5.

Burden of proof and presumptions as to notice implied from possession or other facts calling for inquiry, see ante § 22.

¶ 269. The burden of proof is on the defendant, who claims title by virtue of priority of record, against a prior but unrecorded deed, to show affirmatively the payment of a valuable consideration, and such showing must be by some other evidence than the mere recital of it in the deed.—Shotwell v. Harrison, 22 Mich. 410.

¶ 270. If a subsequent purchaser had notice other than the record it must be shown by the party claiming under the prior recorded deed.—Shotwell v. Harrison, 22 Mich. 410.

¶ 271. The burden of proving notice, either actual or constructive, of a prior unrecorded deed, is on the party claiming thereunder.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 272. The burden of proof is upon the complainants in foreclosure, prosecuted by them as alleged bona fide holders of the mortgage, to establish that they are such holders, where it is conceded that it would be fraudulent for their assignor to make any claim to the mortgage note, which he should have delivered up to the maker.—Cooper v. Smith, 75 Mich. 247.

¶ 273. In a suit to foreclose an assigned mortgage, where the defendant has established fraud in procuring the note and mortgage, the burden is upon the complainant to prove it was a holder for value before due without notice.—John Schweyer & Co. v. Mellon, 196 Mich. 590.

¶ 274. Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed.—Letson v. Reed, 45 Mich. 27.

¶ 275. A subsequent purchaser whose deed is first recorded is presumed to be a bona fide purchaser without notice until the contrary appears.—Godfroy v. Disbrow, W. 260.

§ 43. Evidence to establish good faith.

General law of evidence, see Evidence.

Parol evidence of true consideration as affecting question of bona fide purchase for value, see Evidence § 161.

¶ 276. Where plaintiff in ejectment claims title from an assignor before assignment but recorded after it and defendant claims from an assignee for creditors' benefit, proof of the assignment and of a bona fide purchase from the assignee cannot be rejected because not accompanied by proof of execution of bond by assignee; since the bond is only to protect creditors and the assignor.—Munro v. Meech, 94 Mich. 596.

¶ 277. A client who bought land on which execution had been levied was not permitted to show in proof of good faith that his attorney advised him that the execution was returned satisfied and the levy was no longer a lien; since if it was true the execution creditor had no lien and if untrue the lien would prevail.—Vroman v. Thompson, 51 Mich. 452.

¶ 278. The good faith of a purchase of land need only be shown by the purchaser by proof of the record, on which he had a right to rely if he had no notice of the prior deed from any other source.—Shotwell v. Harrison, 22 Mich. 410.

¶ 279. To show that a deed was meant to give a life estate to grantor's daughter and remainder to his grandchildren, it is not admissible to give in evidence against good faith purchasers other deeds to other children about the same time wherein the estates were so limited, such deeds not being

in the same line of title.—Meacham v. Blaess, 141 Mich. 258.

¶ 280. Evidence held insufficient to show that complainant, in a suit to foreclose a mortgage shown to have been procured fraudulently and to have, prior to maturity, been assigned to complainant, was a holder for value or without notice, complainant not producing any witness as to its dealings with the assignor of the mortgage or as to the correctness of its books showing the transaction or as to its good faith in taking assignment.—John Schweyer & Co. v. Mellon, 196 Mich. 590.

II. RECORD UNDER RECORDING ACTS.

A. NECESSITY AND OFFICE OF RECORD AND INSTRUMENTS RECORDABLE.

§ 44. Necessity, purpose and office in general.

Validity between the parties, see post § 45.
Transfers by operation of law, see post § 46.
Propriety or eligibility of instrument for record, see post §§ 47-49.
Formal requisites of instrument for recordation, see post §§ 50-54.
Priority between unrecorded instruments, see ante § 41.
Actual notice or knowledge and effect of such notice, see ante I, A.
Effect of failure to record, see post § 77.
Sufficiency of record, see post II, B.
Destruction or mutilation of record, see post, II, B.
Constructive notice from the record, see post II, C.
Discharges or releases from record, see post II, D.
Effect of illegal or unauthorized record, see post II, E.
Public nature of records and right of access thereto, see Records.
Necessity and sufficiency of filing to give notice of chattel mortgage, see Chattel Mortgages § 26 et seq.
Filing required where mortgage covers personalty as well as realty, see also Chattel Mortgages § 29.
Doctrine of lis pendens and effect thereof, see Lis Pendens.
Filing statutory notices of lis pendens, see Lis Pendens § 2.
Necessity for recordation of assignment of mortgage lien or interest of mortgagee, see Mortgages ¶ 416.
Records affecting ownership and title of vessels and boats, see Shipping, II.
Deed and title under tax title, see Taxes, XII, B.
Records of title to public lands, see Public Lands, III.
Validity of unrecorded government land patent, see Public Lands § 35.
Necessity for recording in land office assignments of warrants or scrip, see Public Lands § 10.
Recordation of contracts and leases of street railway equipment, see Street Railways, II.
Occasion and necessity for recording assignments of patents, see Patents § 3.
Duties compellable by mandamus in respect to deeds and records, see Mandamus ¶ 518.
Necessity for recordation, see Comp. L. 1915, § 11721.
Statutory provisions for recordation of deeds, mortgages and instruments affecting title, see Comp. L. 1915, § 11714 et seq.

¶ 281. The policy of the recording law in giving the preference to the first recorded conveyance is a legislative, not a judicial, question; the design is to insure prompt recording.—Drake v. McLean, 47 Mich. 102.

¶ 282. The design of the recording law is to prevent fraud by securing certainty and publicity in transactions relating to real estate; and the first purchaser should promptly record his conveyance.—Atwood v. Bearss, 47 Mich. 72.

¶ 283. The recording laws point out specifically the danger to which a party failing to record his title is exposed, and the courts cannot add to or extend it.—Smith v. Williams, 44 Mich. 240.

¶ 284. The object of recording a mortgage is to give notice to third persons.—Bacon v. Northwestern Mutual Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 285. The purpose of the recording law is that the true state of the title be represented. If the grantee in a conveyance complies with the terms of the statute, he is protected. If he fails, a subsequent purchaser in good faith is protected, and is not to be charged with constructive notice.—Grand Rapids Nat. Bank v. Ford, 143 Mich. 402.

¶ 286. The recording of a deed is not necessary to pass title. The registry law is only designed to record and preserve evidence of title. Title passes upon the execution of the deed.—Van Husan v. Heames, 96 Mich. 504.

¶ 287. A sale of property upon foreclosure in chancery will not be set aside because the deed has not been filed in the office of the register of deeds where such fact has not deceived a party who attacks the sale into inaction or prevented him from redeeming.—Butters v. Butters, 153 Mich. 153.

¶ 288. Failure to record a mortgage of land does not avoid it as against the mortgagor's assignee and creditors.—Haug v. Third National Bank, 95 Mich. 249.

¶ 289. The validity of a tax-deed does not depend on its being recorded.—Fells v. Barbour, 58 Mich. 49.

¶ 290. A tax-purchaser took a decree by default quieting his title as against the

claims of a certain person who had in fact previously conveyed the land to one who did not record the deed and who was not made a party to the suit. Held, that the neglect to record the deed did not make the decree binding upon the grantee.—Smith v. Williams, 44 Mich. 240.

¶ 291. It is not necessary that a discharge of mortgage be recorded in order to protect a subsequent purchaser or mortgagee.—Moran v. Roberge, 84 Mich. 600.

¶ 292. Patents of lands from the United States do not come within the purview of the recording laws, and the same rule applies to all conveyances by the United States as owner of the original domain. A subsequent recorded deed does not, therefore, take precedence over a prior unrecorded deed from the governor and judges on behalf of the United States.—Moran v. Palmer, 13 Mich. 367.

¶ 293. The validity or operation of a land-patent from the federal government is not impaired by neglecting to record it in the registry of the county where it lies.—Sands v. Davis, 40 Mich. 14.

¶ 294. Under Comp. L. 1871, § 6921, it was not necessary, in order to cut off the equity of redemption, to record a sheriff's deed on foreclosure by advertisement. (How. St. § 8505, says that such deeds shall be recorded, which is probably directory only.)—Sanford v. Cahoon, 63 Mich. 223.

¶ 295. An agreement in the nature of a defeasance is required to be recorded only when it relates to a conveyance that on its face purports to be absolute.—Russell v. Waite, W. 31.

¶ 296. Want of registry does not invalidate an assignment for the benefit of creditors as against an attachment subsequently levied.—Palmer v. Mason, 42 Mich. 146.

¶ 297. An assignment for the benefit of creditors need not be recorded to defeat an attachment levied within ten days after it was made (How. St. § 8739).—Gott v. Hoschna, 57 Mich. 413.

§ 45. ——Validity between the parties.

Validity of unrecorded leases, see Landlord and Tenant § 12.

¶ 298. Recording is not essential to the validity of a deed as between the parties; it is only for the preservation of evidence and for notice to subsequent purchasers and incumbrancers.—Sinclair v. Slawson, 44 Mich. 123.

¶ 299. Recording is not necessary to give a deed effect as between the parties; so held where an unrecorded deed was destroyed by agreement after delivery.—Gugins v. Van Gorder, 10 Mich. 523.

¶ 300. A grantee's neglect to record his deed does not avoid it as against the grantor. So, under the ordinance of 1787, an unrecorded deed was good between the parties.—Godfroy v. Disbrow, W. 260.

¶ 301. An unrecorded deed is good between the parties and against all others rightly chargeable with notice.—Brown v. McCormick, 28 Mich. 215.

¶ 302. A deed may be effectual as a conveyance though it is not recorded.—Wilt v. Cutler, 38 Mich. 189.

¶ 303. One may have an undoubted title to lands though one or more of the conveyances through which he acquires title are unrecorded.—Smith v. Fiting, 37 Mich. 148.

¶ 304. The effect of a deed is not overcome by the fact that after delivery it was not recorded and was later destroyed.—Wilbur v. Grover, 140 Mich. 187.

¶ 305. A deed without the two witnesses required for recording is effective to convey title.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 306. The two witnesses required by the statutes are not necessary to make the instrument binding between the parties.—Fulton v. Priddy, 123 Mich. 298; Agar v. Streeter, 183 Mich. 600.

¶ 307. The object of recording a mortgage is to give notice to third persons; as between the parties a mortgage is effectual for all purposes without recording.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

§ 46. ——Transfers by operation of law.

¶ 308. How. St. § 8498, requiring any assignment of a mortgage to be recorded before the mortgage can be foreclosed by advertisement, does not refer to such transfer as results from the operation of law; e. g., from the mortgagee's death.—Miller v. Clark, 56 Mich. 337.

§ 47. Propriety or eligibility of instrument for record.

Mortgages and equitable mortgages, see post § 48.

Exceptional or special instruments, see post § 49.

Formal requisites of instrument for recordation, see post §§ 50-54.

Effect of recording forged instruments, see post § 84.

Operation and effect of illegal or unauthorized record or recordation of unauthorized instruments, see post II, E.

Admissibility of deeds and plats improperly recorded, see Evidence § 530.

Necessity that instrument state whether parties married or single to be eligible to record, see Comp. L. 1915, § 11716.

Eligibility of copy of divorce decree to record, see Comp. L. 1915, § 11439.

¶ 309. The record of a deed not properly executed is unauthorized.—Brown v. Cady, 11 Mich. 535; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 310. A certified copy of the record in one county of a deed is not authorized to be recorded in another county.—Shotwell v. Harrison, 22 Mich. 410.

¶ 311. An ante-nuptial contract, duly acknowledged, whereby the prospective husband agreed that in case the wife survived him, his administrator should convey to her by a proper deed certain described land, and containing mutual covenants against mortgaging the land during the marriage without joint action, was held to convey such an interest in land as entitled it to be recorded.—Aultman v. Pettys, 59 Mich. 482.

¶ 312. Comp. L. 1871, § 4238, How. St. § 5690, authorizes powers of attorney to be recorded in the records of deeds in the county where the land lies to which they relate.—Morse v. Hewett, 28 Mich. 481.

¶ 313. A lease for more than three years creates an interest in real estate and hence the priority of assignments of such leasehold interest as security is governed by the rules applicable to mortgages of real estate.—Crouse v. Michell, 130 Mich. 347.

§ 48. ——Mortgages and equitable mortgages.

Notice to grantors taking back purchase-money mortgages, see post § 67.

Priority of mortgages for future advances, see post § 69.

¶ 314. A mortgage executed by a vendee in possession of land under a contract signed by the vendor, though such contract is not acknowledged or recorded, is entitled to record.—Balen v. Mercier, 75 Mich. 42.

¶ 315. The registry law of 1838 had reference to conveyances of the real estate, or interest in law, only, except where a trust is created or declared in writing, which, to be notice to subsequent purchasers, the statute (R. S. 1838, p. 260) required to be recorded; and, therefore, a mortgage of lands that were held by the mortgagor under a bond for a deed was held not entitled to record, being a mere equitable mortgage.—Wing v. McDowell, W. 175.

¶ 316. A mortgage covering a leasehold interest in real estate, consisting of a lease of property for 25 years, is governed by the laws regulating the recording of conveyances of real estate, being within the term conveyance as defined by Comp. L. 1897, § 8994, How. St., 2nd Ed., § 10856.—Stearns Lighting & Power Co. v. Central Trust Co., 223 Fed. 962.

¶ 317. The words "deeds and conveyances" in the Act of April 12th, 1827 (Laws of the Territory of Michigan, p. 258), which provided for the recording of deeds and conveyances to lands in the City of Detroit in the city register's office, are broad enough to include mortgages.—Beals v. Hale, 4 How. (45 U. S.) 37, 11 L. ed. 865.

¶ 318. The Act of April 12, 1827, "concerning mortgages," was not controlled in relation to the record of mortgages by the act of the same date "concerning deeds and conveyances"; and where, in compliance with the terms of the former act, a mortgage upon land in the city of Detroit was recorded in the county registry, such record was held valid.—Weed v. Lyon, H. 363; Beals v. Hale, 4 How. (45 U. S.) 37, 11 L. ed. 865.

§ 49. ——Exceptional or special instruments.

Eligibility of copy of divorce decree to record, see Comp. L. 1915, § 11439.

¶ 319. The practice of registers of deeds, which is believed to be uniform throughout the state, of providing a book properly indexed in which to record the exceptional instruments offered for record, such as bills of sale of timber, land contracts, deeds of cemetery lots, leases of buildings and various other kinds of papers, is lawful and commendable.—Mee v. Benedict, 98 Mich. 260, per Hooker, C. J.

§ 50. Formal requisites of instrument for recordation.

Attestation by witnesses and number required, see post § 51.

Acknowledgment and certificates, see post § 52.

Requisites for instruments executed out of state, see post § 53.

Certificate as to payment of taxes or fees, see post § 54.

Power of legislature to regulate admission of instruments to record, see Constitutional Law § 49.

Certificate entitling to record, see Comp. L. 1915, § 11710.

¶ 320. There was no registry at common law, and, therefore, the validity of a deed for purposes of registry can extend no further than the affirmative provisions of the recording law.—Galpin v. Abbott, 6 Mich. 17.

¶ 321. Under the law in force in 1830, a deed not sealed could not lawfully be recorded.—Starkweather v. Martin, 28 Mich. 471.

¶ 322. Under Laws 1887, Act No. 262, § 12, a mortgage is not entitled to record unless it gives the mortgagee's name and residence; said act is held valid.—Attorney General v. Sanilac County Sup'rs, 71 Mich. 16. See Register of Deeds, § 5.

¶ 323. Under Comp. L. 1897, § 3372, requiring that before a plat can be recorded, it shall be forwarded to the auditor general

who, if it conforms to the requirements of the act, shall return it with his approval indorsed thereon, the approval cannot be made by a clerk in his department in the name of the auditor general, the authority being conferred upon the auditor general alone.—City of St. Joseph v. Schulz, 132 Mich. 213.

§ 51. ——Attestation by witnesses and number required.

See also post ¶¶ 338, 344.

¶ 324. Under the amendatory Act of April 20, 1839, p. 219, § 19, the Act of April 1, 1840, p. 166, and the later statutes, two witnesses were required to entitle a deed to registry.—Dougherty v. Randall, 3 Mich. 581; King v. Carpenter, 37 Mich. 368; Price v. Haynes, 37 Mich. 487.

¶ 325. A deed whereto one of the witnesses, being unable to write, put his mark, is nevertheless entitled to record.—Brown v. McCormick, 28 Mich. 215.

¶ 326. Where two witnesses to the execution of a deed are required to entitle it to record, the deed is not entitled to record as a conveyance by a grantor whose signature is attested by but one witness, although there are two witnesses to another grantor's signature.—Hall v. Redson, 10 Mich. 21.

¶ 327. A deed made in good faith and for a sufficient consideration, though there was but one witness to its execution, conveyed upon delivery and recordation a present interest in the premises, such that no possession could be given to any one without grantee's deed or lease.—Aultman v. Pettys, 59 Mich. 482.

¶ 328. The recording of a quitclaim deed signed by only one witness and intended to operate as a mortgage is not constructive notice to a subsequent mortgagee, and in the absence of actual notice the latter must prevail.—Brown v. King, 172 Mich. 355.

§ 52. ——Acknowledgments and certificates.

Acknowledgments made out of state, see post § 53.

General nature, necessity and sufficiency of acknowledgments and of certificates to same, see Acknowledgments.

Certificate as to official capacity and regularity of acknowledgment taken in another state, see Acknowledgments §§ 16, 17.

Sufficiency of description of instrument in certificate of acknowledgment, see Acknowledgments § 12.

Curative acts making defectively acknowledged or certified instruments recordable for purpose of notice, see Acknowledgments §§ 22, 23.

¶ 329. To entitle a deed to registry its execution by the grantor must be proved or acknowledged, and when acknowledged the evidence of acknowledgment must appear by the certificate.—Buell v. Irwin, 24 Mich. 145.

¶ 330. A deed duly executed and acknowledged by a man is admissible to record as his sole deed, although the certificate as to his wife's acknowledgment is defective.—Rayner v. Lee, 20 Mich. 384.

¶ 331. Under the law of 1840 (How. St. § 5660) the certificate of a clerk of a court of record being necessary (unless the acknowledgment is taken before a commissioner of deeds for Michigan), it must be under seal or the deed cannot be recorded.—Pope v. Cutler, 34 Mich. 150.

¶ 332. An agreement to mortgage premises to secure an indebtedness not then existing was acknowledged by the party only to whom the mortgage was to be given, and was recorded. Held, that the record could not operate as constructive notice to any one claiming as subsequent purchaser or incumbrancer from the party who was to give the mortgage.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 333. Under Michigan Laws 1833, p. 279, § 2, providing that an acknowledgment of a deed might be made before a justice of the peace and that the deed should be entitled to record upon the indorsement on the deed of a certificate of the acknowledgment and signing by the person before whom the same was taken, no other proof of the fact that the one taking the acknowledgment was at the time, in fact, a justice of the peace was necessary, in order to entitle the deed to record, than the certificate of the officer himself.—Elwood v. Flannigan, 104 U. S. 562, 26 L. ed. 842.

§ 53. ——Requisites for instruments executed out of state.

¶ 334. Under the Act of 1820 and of April 12, 1827 (Code 1833, p. 281), an acknowledgment taken and certified in another state by an authorized officer, according to the laws of such state, entitled the deed (if executed as our laws require) to record without further evidence or certificate as to the officer or his signature.—Ives v. Kimball, 1 Mich. 308; Lacey v. Davis, 4 Mich. 140; Galpin v. Abbott, 6 Mich. 17; Hogelskamp v. Weeks, 37 Mich. 422.

¶ 335. If the acknowledgment out of the state is made before a Michigan commissioner of deeds, his certificate thereto must be under seal to entitle to recordation.—Buell v. Irwin, 24 Mich. 145.

¶ 336. As under the Act of 1820 and of April 12, 1827, an acknowledgment taken in another state under the laws of such state entitled a deed to record, it was immaterial that the clerk's certificate attached to that of the commissioner of deeds, before whom the acknowledgment was taken, was not

sealed, no certificate being required.—Hogelskamp v. Weeks, 37 Mich. 422.

¶ 337. A deed conveying Michigan lands was executed and acknowledged in New York, and several years afterwards the certificate of the proper clerk was made and attached, certifying that the deed was made and acknowledged according to the "existing" law of New York. Held, a sufficient certificate to entitle the deed to record.—Harrington v. Fish, 10 Mich. 415.

¶ 338. The certificate of a county clerk—it not appearing that he was the clerk of a court of record—dated in 1855, verifying the acknowledgment of a deed without witnesses executed out of the state in 1843, held not to entitle the deed to record.—Donahue v. Klassner, 22 Mich. 252.

¶ 339. A deed executed out of the state was received for record and recorded Aug. 2; but the certificate required by the statute to entitle it to record was dated Aug. 12. Whether, if the certificate was correctly dated, and it was attached to the deed after the deed was recorded, the whole deed should not have been re-recorded in order to cut off prior unrecorded deeds, quære.—Oliver v. Sanborn, 60 Mich. 346.

¶ 340. Under Comp. L. 1897, § 8964, permitting the recording of deeds acknowledged by foreign notaries without certificates of authority, a deed executed and acknowledged prior thereto is entitled to record subsequent to the passage of the act.—Messenger v. Peter, 129 Mich. 93.

¶ 341. An assignment of a mortgage executed in another state and acknowledged before a notary public is not entitled to record here unless it bears the authenticating certificate required by How. St. § 5060, as to the notary's official character and the genuineness of his signature, and as to execution and acknowledgment according to the laws of such other state.—Dohm v. Haskin, 88 Mich. 144.

¶ 342. An assignment of a mortgage of lands in this state acknowledged in New York before a commissioner of deeds for Michigan, as shown by his official certificate and seal, is entitled to record without any certificate that it is executed according to the laws of the state of New York.—Gray v. Waldron, 101 Mich. 612.

¶ 343. Under the Act of April 12, 1827 (Rev. Laws of 1833, p. 279), deeds of Michigan lands executed in other states and countries, as well as those executed in Michigan, required two witnesses to entitle them to record.—Galpin v. Abbott, 6 Mich. 17; Van Auken v. Monroe, 38 Mich. 725.

¶ 344. Under the acts of 1820 and 1827, and the Code of 1833, deeds executed out of Michigan required, to entitle them to record, two witnesses, the same as if executed here.—Galpin v. Abbott, 6 Mich. 17; Brown v. Cady, 11 Mich. 535; Van Auken v. Monroe, 38 Mich. 725.

¶ 345. Comp. L. 1871, § 4253, How. St. § 5727, gives operation as constructive notice to the record of a deed executed in another state and lacking any clerk's certificate of authentication of due execution.—Healey v. Worth, 35 Mich. 166.

§ 54. ——Certificate as to payment of taxes or fees.

¶ 346. The provision in the General Tax Law of 1893, § 135, imposing as a condition precedent to recording a deed the filing with the register of deeds a certificate from the county treasurer or auditor-general that taxes on the property conveyed have been paid for the previous five years, does not require those officers to go outside of the records of their own offices for the information necessary to make the certificate. The presumption is, that payment has been made as to taxes not required by law to be returned, if unpaid, to the county treasurer.—Van Husan v. Heames, 96 Mich. 504.

¶ 347. The instrument is entitled to record unless the certificate as to payment of taxes required by Tax Law of 1893, § 135, shows that all taxes have not been paid for the five years previous to its date. If, at the annual tax sales, the lands have been sold to individuals, this is payment within the meaning of the law.—Van Husan v. Heames, 96 Mich. 504.

¶ 348. A deed is entitled to record notwithstanding the certificate required by Pub. Acts 1893, No. 206, § 135, shows that there are tax liens and tax titles held by the state for taxes which were assessed before the commencement of the five years named, and that there are tax titles held by individuals. Only when the certificate shows that the taxes have not been paid for the five years is it not entitled to record.—Van Husan v. Heames, 96 Mich. 504.

¶ 349. Pub. Acts 1893, No. 206, does not require that the certificate specify the unpaid taxes, nor the outstanding tax titles and liens. The general certificate required by the act is sufficient.—Van Husan v. Heames, 96 Mich. 504.

¶ 350. Where a mortgage recorded prior to January 1, 1912, covers property which may be subsequently acquired by the mortgagor and authorizes the issuance of further bonds secured thereby, a supplemental instrument describing property acquired in another county after January 1, 1912, and referring to the original mortgage is not entitled to registration under Act 91, P. A. 1911, § 3, providing that the certificate of the county treasurer as to the amount secured by a mortgage and the amount of the tax shall not be required with any mortgage

made to correct or perfect a previously recorded mortgage if no new or additional indebtedness is created, since such instrument creates a new or additional indebtedness and does not perfect or correct the original instrument.—Economy Power Co. v. Daskam, 174 Mich. 402.

B. SUFFICIENCY OF RECORD; DESTRUCTION OR MUTILATION OF RECORD.

§ 55. In general; manner and place of recordation.

Proper book or index, see post § 56.
Clerical error, defect and omissions, see post §§ 57-59.
Sufficiency of record of mortgage as deed, see post § 60.
Sufficiency of record where instrument identifies its subject-matter by reference, see post § 61.
Alteration, interlineations and corrections on face of record, see post § 62.
Destruction, mutilation or loss of record, see post § 63.
Presumption of validity and sufficiency, see post § 64.
Effect of recordation in wrong county, see also ante ¶ 96.
Time from which recording acts operate, see post § 74.
What constitutes recordation of instrument, see also post ¶ 463.
Operation and effect of record as constructive notice, see post II, C.
Adverse possession as rendering record unimportant, see Adverse Possession § 41.
Sufficiency of filing to give notice of chattel mortgage, see Chattel Mortgages § 26 et seq.
Sufficiency of identification in lis pendens notice, see Lis Pendens ¶ 7.
Record in proper county as aider of imperfect description (name of county lacking in deed), see Deeds ¶ 216.
Issues as to notice of record title in proceeding to declare priority of mechanic's lien, see Mechanics' Liens § 50.
Sufficiency of record of award of fence viewers, see also Fences ¶ 21.
Identities and variances in names of persons, including doctrine of idem sonans, see Names §§ 2, 3.
Manner of recordation prescribed by statute, see Comp. L. 1915, § 11711 et seq.

¶ 351. He who claims the benefit of the registry laws must bring himself within them.—Sinclair v. Slawson, 44 Mich. 123.

¶ 352. One who relies upon the recording laws to take from the real owner an actual title must make a case strictissimi juris and bring it within the statute in every particular; otherwise he can have no protection.—Helm v. Ellis, 49 Mich. 241.

¶ 353. One who seeks a benefit from the recording laws must incur all risks of the failure to put his papers properly on record, whether the fault be his or an officer's.—Barnard v. Campau, 29 Mich. 162.

¶ 354. A mortgage that includes standing timber is a mortgage of an interest in real estate, and the filing thereof in the town clerk's office is not notice to any one that such interest is incumbered.—Williams v. Hyde, 98 Mich. 152.

§ 56. Proper book and index.

Right to rely on error in index despite actual notice, see ante ¶ 37.
Proper place or county for recordation, see ante § 55.
Sufficiency of record of mortgage as deed, see post § 60.
Sufficiency of record where instrument identifies its subject-matter by reference, see post § 61.
Presumption of validity and sufficiency, see post § 64.
Presumptions favoring record title, see post § 79.
Duty of register to keep index, see Comp. L. 1915, § 11720.

¶ 355. The recordation of a bill of sale of timber in a book designated, "Miscellaneous Records" is sufficient to give constructive notice to the world of the rights conveyed thereunder.—Mee v. Benedict, 98 Mich. 260, per Hooker, C. J.

¶ 356. Where a lease containing a lien clause that was relied upon as a mortgage was indexed as a deed and was recorded in a book—not provided for by the statute then in force—containing miscellaneous liens, whereas the statute required that deeds and mortgages should be entered each in the appropriate book, such index and record were not constructive notice of the lease.—Gordon v. Constantine Hydraulic Co., 117 Mich. 620.

¶ 357. The record, in the registry of deeds, of a lease of a building, which lease by its terms provided that machinery attached by the lessee should be treated as personalty, is not notice to third persons of the existence of a lessor's lien upon such machinery.—Booth v. Oliver, 67 Mich. 664.

§ 57. Clerical error, defects and omissions.

Mistakes in description of property, see post § 58.
Effect of illegibility of record, see post § 59.
Effect of reliance on mistakes or omissions in record despite actual knowledge, see ante § 6.
Propriety and sufficiency of corrections on face of record, see post § 62.
Effect of mistake on constructive notice given, see post ¶ 408.
Presumption of validity and sufficiency, see post § 64.
Sufficiency and effect of unauthorized record, see post II, E.

¶ 358. Where a deed dated Feb. 20, and purported to have been acknowledged on that

day, but was indorsed with a certificate showing recordation Feb. 18, the discrepancy was held referable to clerical mistake.—Munroe v. Eastman, 31 Mich. 283.

¶ 359. In copying a mortgage into the record the register omitted the name of the mortgagee. Held, that this did not defeat the mortgage record as notice to subsequent purchasers, because the entry in the entry-book constituted constructive notice until the actual record, and, as such entry gave the mortgagee's name, the entry-book and the record-book together afforded full information.—Sinclair v. Slawson, 44 Mich. 123.

¶ 360. A failure upon the register's part to sign the record of a deed, as is customary, does not render the record a nullity.—Wilt v. Cutler, 38 Mich. 189.

¶ 361. The entry required by Comp. L. 1871, § 4227 (How. St., § 5675) to show the date at which a deed is received and its order is the only constructive record until the deed is actually recorded, and where such entry is omitted there can be none until that time.—Shelden v. Warner, 45 Mich. 638.

§ 58. ——Mistakes in description of property.

Effect of reliance on mistakes or omissions in record despite actual knowledge, see ante § 6.

Propriety and sufficiency of corrections on face of record, see post § 62.

¶ 362. A contract to give a mortgage was put upon record, but, by mistake in drafting it, only the starting-point in the description of lands was given. A mortgage upon the lands intended to be described was subsequently given and placed upon record. It was held that the record of the contract was not notice to the mortgagee, since no one could say from the contract what was the specific land upon which the mortgage mentioned in it was to be given.—Barrows v. Baughman, 9 Mich. 213.

¶ 363. Where property was described in a mortgage as "lot number one, in section twenty-eight, on the Forsyth or Porter farm in the city of Detroit—being on the southwest corner of Fort and Sixth streets," which description was correct except as to the section, which should have been eighteen, and it did not appear that there was a section twenty-eight on the farm named, it was held that the record of such mortgage was notice to subsequent purchasers of the property.—Cooper v. Bigly, 13 Mich. 463.

¶ 364. Where a description is so framed that it may be intended for one lot as well as another, the record of the instrument is not sufficient to put a purchaser of either upon inquiry.—Stead v. Grosfield, 67 Mich. 289, settling the question raised in Cooper v. Bigly, 13 Mich. 463.

¶ 365. One who purchases lands omitted by mistake from a notice of levy on execution filed by the sheriff with the register of deeds is a purchaser without notice, although the indorsement of the levy on the execution mentions such lands with the rest.—Campau v. Barnard, 25 Mich. 381.

¶ 366. A certificate of levy of execution on "lot seven of lots 12, 13 and 14 of the Labrosse and Baker farms in Detroit" is not sufficient to charge a purchaser with notice that it is intended to cover lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of said farm according to a specified recorded plat.—Burrowes v. Gibson, 42 Mich. 121.

¶ 367. A. and B. bought a triangular lot, A. paying two-thirds of the price and B. one-third, though their deeds conveyed to them respectively the "north half" and the "south half." They occupied the north and south portions without any established division line between them. B.'s portion was afterward bought in good faith and without notice by vendees who assumed that he was lawfully entitled to convey the quantity denoted by the description in his deed. Held, that as against them A. could not have his deed corrected on the ground of a mistake of the scrivener, and on a showing that he had paid the larger share, and had had a prior verbal understanding with B. as to the quantity each should take.—Dart v. Barbour, 32 Mich. 267.

¶ 368. As to the power of chancery to reform, as against the wife, a mortgage intended to include homestead premises, but which omitted them by mistake, quære. However a subsequent grantee who bought with knowledge of the omission and with intent to defraud was not allowed to raise the defense that the wife had not signed the mortgage as to the homestead.—Ford v. Daniells, 71 Mich. 77.

¶ 369. A mortgage describing the parcels of property among others as "lot number nine of B.'s subdivision of," etc., when such subdivision contains several blocks each including a lot of that number, the land being vacant and unoccupied, is void for uncertainty as against a later mortgage giving a correct description, and its record is no notice to such subsequent mortgagee.—Stead v. Grosfield, 67 Mich. 289.

¶ 370. A mortgage described the lands as follows: "Commencing at the northwest corner of land owned by Joseph Watson, on the southwest quarter of section twenty-three, in township number seven." The true description was "the southwest quarter of the southeast quarter" of that section. The mortgagor, as grantee under a like defective description, had taken possession of the land actually meant to be conveyed, and had improved it. A later mortgagee by the same defective description had the omission cor-

rected by decree, and foreclosed, and a stranger bid in the land. Held, that the latter was bound by what the records disclosed as to the title under which he purchased, and could not resist a correction sought by the prior mortgagee.—Dwight v. Tyler, 49 Mich. 614.

§ 59. ——Effect of illegibility of record.

¶ 371. It is not a valid objection to the record of a deed that the name of one of the subscribing witnesses cannot be made out, and that it is apparently a facsimile of the original.—Whitwell v. Emory, 3 Mich. 84.

§ 60. Sufficiency of record of mortgage as deed.

Proper book or index for recordation, see ante § 56.

¶ 372. The record, as a deed, of an instrument in the form of a deed, but in reality given as security, is not constructive notice to an execution creditor levying on the property.—Johnson v. Cook, 179 Mich. 117.

¶ 373. Under the Code of 1833, where a deed absolute in form was shown by contemporaneous writing to be only a mortgage, it should have been recorded as a mortgage; and if recorded as a deed, the record would not give it priority over a prior unrecorded mortgage.—Thompson v. Mack, H. 150.

¶ 374. Where a deed was absolute in form, but intended as between the parties to operate as a mortgage, and was accompanied by an unrecorded defeasance, when recorded in the book of deeds, it is void as a mortgage as to a bona fide purchaser for value.—Grand Rapids Nat. Bank v. Ford, 143 Mich. 402.

§ 61. Sufficiency where instrument identifies its subject-matter by reference.

Proper book and index as affecting sufficiency of record, see ante § 56.

¶ 375. A mortgage was assigned by indorsement referring to it as "the within mortgage," and this was recorded in the same volume but not on the same page with the mortgage, the two being connected by cross-references. Held, a sufficient recording. —Soule v. Corbley, 65 Mich. 109.

¶ 376. A writing was recorded as a separate paper, which referred "to the within mortgage," but did not in any way describe or identify the mortgage. It was held not to be evidence that the writing recorded was indorsed upon any instrument recorded with it, as that was an extrinsic fact not within the purview of the registry laws.—Bassett v. Hathaway, 9 Mich. 28.

§ 62. Alterations, interlineations and corrections on face of record.

Destruction, mutilation or loss of record, see post § 63.

Unauthorized memoranda and additions to record, see post § 83.

Effect of recording forged instruments, see post § 84.

Effect of illegal or unauthorized record, see post II, E.

¶ 377. The registry of a conveyance or plat cannot be altered so as to make it conform to a subsequent acknowledgment.—Burton v. Martz, 38 Mich. 761.

¶ 378. Alterations or interlineations appearing in the public record of a deed are presumed, in the absence of evidence to the contrary, to have been made in a proper manner and by a person authorized to make them.—Hommel v. Devinney, 39 Mich. 522.

¶ 379. Where the record in Wayne county of a deed showed an interlineation, the mere fact that a certified copy of the record from St. Clair county, of the same deed, showed no such interlineation was held to raise no presumption of an improper change or alteration of the Wayne record.—Hommel v. Devinney, 39 Mich. 522.

¶ 380. An attempted correction of the record of a deed, purporting to have been executed by Nathan Chadbourn, by a marginal entry, signed by the deputy register of deeds, that the word "Nahum" was recorded "Nathan" by mistake, and the change of the word "Nathan," where it appears in the body of the deed, to "Nahum," is not authorized by law.—Jennings v. Dockham, 99 Mich. 253.

¶ 381. The subsequent acknowledgment by a wife of a plat of her lands previously acknowledged by her husband as owner, and so recorded, the record being altered to conform to her acknowledgment, does not entitle purchasers to disregard her record title and to hold her as having conveyed to or recognized title in him by means of the plat; since it was not efficacious for that purpose and because rerecording was requisite to bind her.—Burton v. Martz, 38 Mich. 761.

§ 63. Destruction, mutilation or loss of record.

Alterations, interlineations and corrections on face of record, see ante § 62.

Effect of illegal or unauthorized record, see post II, E.

Effect of unauthorized memoranda and additions to record, see post § 83.

Effect of recordation of forged instruments, see post § 84.

¶ 382. The notice implied from a statutory record is not defeated by a careless loss or accidental destruction; if the statute has once been complied with the effect as notice continues, even though the record may fail, for accidental reasons or otherwise, to give the desired information.—Heim v. Ellis, 49 Mich. 241.

§ 64. Presumption of validity and sufficiency.

Presumptions favoring record title, see post § 79.

Interlineation as raising presumption of alteration, see ante ¶ 379.

General law of evidence, see Evidence.

Deed records as evidence, see Evidence § 542.

Instrument with filing indorsement as best evidence of filing, see Evidence § 119.

Records and entries as documentary evidence, see Evidence, VIII, C.

¶ 383. In the absence of evidence to the contrary, it is presumed that the register has done his duty as a public officer.—Ives v. Kimball, 1 Mich. 308.

¶ 384. Where a mortgage was assigned by indorsement thereon, and the instrument, when produced, bears the certificate of registry required by the statute with register's attestation at the date of the assignment, it cannot be presumed that the assignment was not properly recorded.—Jakway v. Jenison, 46 Mich. 521.

¶ 385. "Ashbel Green, of New York," and "Ashbel Green, of the township of Palisades, in the county of Bergen, and state of New Jersey," are presumed to be the same person where they follow in a chain of title.—Tillotson v. Webber, 96 Mich. 144.

C. CONSTRUCTIVE NOTICE FROM THE RECORD.

§ 65. In general; operation and effect of record.

Notice to subsequent purchasers and incumbrancers, see post § 66.

Notice to grantors taking back purchase-money mortgage, see post § 67.

Notice to prior incumbrancers, see post § 68.

Priority of mortgages for future advances, see post § 69.

Record of attachment levy as constructive notice, see post § 70.

Recorded levy of execution as constructive notice, see post § 71.

Record of tax title as constructive notice, see post § 72.

Record as notice of fraud or mistake, see post § 73.

Time from which recording acts operate, see post § 74.

Scope of notice furnished by record, see post §§ 75, 76.

Effect of failure to record, see post § 77.

Burden of proof, presumptions and evidence as to notice and priority, see post § 78.

Presumptions favoring record title, see post § 79.

Purpose of recordation, see ante § 44.

Constructive or implied notice from facts calling for inquiry, see ante § 12 et seq.

Effect of recordation of void instruments, see post § 82.

Sufficiency of record to constitute constructive notice, see ante II, B.

Doctrine of bona fide purchasers in general, see ante I, C.

Unauthorized recordation as notice, see post II, E.

Effect of recordation of conveyance before acquiring title, see post ¶ 417.

Effect of lis pendens notice and filing, see Lis Pendens § 3.

Effect of filing notice of levy on land as constructive notice to subsequent purchasers, see also Attachment § 93.

Effect of recording as real estate transfer to give notice when property is chattel, see Chattel Mortgages, I, C.

Probate and recording of will, see Wills, V.

Effect of recording of deed to road after discontinuance and reverter, see also Highways ¶ 494.

Priority of first unrecorded mortgage over second mortgage taken subject to and expressly referring to the first mortgage, see Mortgages ¶ 358.

Record as notice preventing claim of fraudulent concealment of cause of action suspending limitations, see Limitations § 30.

Notice sufficient to bar claim of fraudulent concealment of cause of action and consequent suspension of limitations, see Limitations § 30.

Recording of plats to make dedication, see Dedication § 20.

Exceptions in deeds of estates previously granted or outstanding, see Deeds §§ 76, 77.

Notice of right to timber as element in conversion by buyer of land, see Conversion § 6.

Effect of knowledge or notice or failure to inquire on liability on covenant for title, see Covenants for Title §§ 9, 10.

Filing and recording of assignments for creditors, see Assignments for Creditors § 5.

Notice of record as affecting riparian rights, see Waters, IV, A.

Mandamus to compel right to inspect records, see Mandamus § 104.

Effect of recordation of notice of assignment of mortgage, see Comp. L. 1915, § 11724.

Rights of subsequent purchasers against unrecorded instrument, see Comp. L. 1915, § 11721.

Statutory provisions for recordation of title instruments, see Comp. L. 1915, § 11714 et seq.

¶ 386. As a general rule parties may rely upon the record as their guide in dealing with titles that appear there.—Reynolds v. Ruckman, 35 Mich. 80; Hull v. Swarthout, 29 Mich. 249.

¶ 387. The record of a deed entitled to be recorded is notice to all the world of the title of the grantees therein.—Galpin v. Abbott, 6 Mich. 17.

¶ 388. The record of a deed is notice to all who deal with the grantor that in giving him credit they must not look to the property conveyed to satisfy the debt.—Hedstrom v. Kingsbury, 40 Mich. 636.

¶ 389. The record of a deed of trust operates as notice, and if it negatives the trustee's power to mortgage property purchased, such mortgage is void.—Hannah v. Carnahan, 65 Mich. 601.

¶ 390. Where a contract could be recorded like a conveyance (How. St. § 5689), anything is notice of the rights under it that would be notice in case of a deed.—Weisberger v. Wisner, 55 Mich. 246.

¶ 391. Under the recording acts the operation of the record as notice is prospective and not retrospective.—Corey v. Smalley, 106 Mich. 257.

¶ 392. Where a lot is purchased under contract free from residence building restrictions from the owner of an unimproved subdivision purchased free from such restrictions, and such purchaser takes possession under his contract, no subsequent act of the owner of the subdivision relative to building restrictions can qualify or restrict the right of the owner of the lot unless by becoming a party to it he estops himself from subsequently denying it.—Lambrecht v. Gramlich, 187 Mich. 251.

¶ 393. The lessee of a tenant for life is charged with notice of the extent of his landlord's title, especially when such title appears of record.—Harrington v. Sheldon, 196 Mich. 388.

¶ 394. One who acquires land from a corporation which, by reason of a defective sale to it by another company, did not acquire all the latter's interest, takes with notice of such infirmity, where it appears as a matter of record.—Marsh v. Breen Iron Co., 181 Mich. 204.

¶ 395. Where a transmission line annexed to an electric power and generating plant was appurtenant to an interest in real estate consisting of a lease when a mortgage attaches thereto and when notice thereof is given by its recording, the effect thereof upon the rights fixed under it was not defeated by the fact that when one who purchased the property at a receiver's sale, subject to the mortgage, sold the property to another the power and generating plant was unoperated and inoperative, and was not included in that sale, nor by the fact that the lease had been declared forfeited for nonpayment of rent.—Stearns Lighting & Power Co. v. Central Trust Co., 223 Fed. 962.

¶ 396. Though the record of a defectively acknowledged conveyance is not evidence of the original instrument, yet under Laws 1861, p. 16, How. St. § 5727, it operates, if the conveyance was made in good faith and upon a valuable consideration, as notice of all the rights secured by the instrument.—Brown v. McCormick, 28 Mich. 215.

¶ 397. Where successive conveyances of the same property have been made and only the later one has been recorded, the transfer of title thereunder is not by force of the conveyance, for the grantor has no title, but results from the operation of the statute, Comp. L. 1871, § 4231 (How. St. § 5683), which provides that an unrecorded conveyance shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate whose conveyance shall be first duly recorded.—Burns v. Berry, 42 Mich. 176.

¶ 398. One who takes an assignment of a mortgage while the records show the existence of a prior mortgage upon the same property to his assignor will be subordinated to the lien of the prior mortgage in case it is in the hands of an assignee, although there is no record of the prior assignment.—Wilson v. Campbell, 110 Mich. 580.

¶ 399. A remote grantee, claiming under a title taken with notice of an unrecorded mortgage, who receives his deed after such mortgage has been recorded, takes his title subject to the mortgagee's equity.—Cook v. French, 96 Mich. 525.

¶ 400. Under Comp. L. 1897, § 8988, providing that conveyances of real estate not recorded shall be void against subsequent bona fide purchasers of the same real estate or any portion thereof whose conveyances shall be first recorded, one who purchases three lots out of four upon which there is a general mortgage without notice of a prior unrecorded purchase of the other lot is entitled to have the mortgagee resort to the other lot first to satisfy his mortgage.—Gray v. H. M. Loud & Sons Lumber Co., 128 Mich. 427.

¶ 401. The policy of the recording law requires that grantees who would have protection for latent equities in property that is being conveyed to them in undivided interests should see to it that the deed contains intelligible hints at least that there are equities, which a legal conveyance by one grantee may not impugn.—Van Slyck v. Skinner, 41 Mich. 186.

¶ 401a. Whether record of a tax-title is constructive notice that the holder claims the land was left undecided in La Coss v. Wadsworth, 56 Mich. 421.

§ 66. Notice to subsequent purchasers and incumbrancers.

Notice to grantors taking back purchase-money mortgage, see post § 67.
Notice to prior incumbrancers, see post § 68.
Priority of mortgages for future advances, see post § 69.
Sufficiency of consideration in general, see ante § 33.
Necessity and materiality of good faith, see ante § 36.

Burden of proof and presumptions as to notice and priority, see post § 78.
General doctrine of bona fide purchaser, see ante I, C.
Exceptions in deed as binding subsequent grantees, see also Deeds § 78.

¶ 402. The proper registry of a deed or conveyance required by law to be recorded is notice to subsequent purchasers of the existence and contents of such deed or conveyance, in equity as well as at law.—Wing v. McDowell, W. 175.

¶ 403. The record of a deed or conveyance is constructive notice to subsequent purchasers, notwithstanding that the statute on the subject does not say so specifically. —Atwood v. Bearss, 45 Mich. 469.

¶ 404. A subsequent purchaser is charged with notice of all that an examination of the records would have disclosed, whether he actually examined them or not.—Barnard v. Campau, 29 Mich. 162; Healey v. Worth, 35 Mich. 166; Larzelere v. Starkweather, 38 Mich. 96.

¶ 405. By "subsequent purchaser" against whom, if his conveyance has been duly recorded, Comp. L. 1871, § 4231 (How. St. § 5683), avoids an unrecorded conveyance, is meant a subsequent purchaser from the same grantor.—Smith v. Williams, 44 Mich. 240.

¶ 406. The object of registry laws is to protect bona fide purchaser against purchasers whose deeds have not been recorded. —Godfroy v. Disbrow, W. 260; Dutton v. Ives, 5 Mich. 515; Columbia Bank v. Jacobs, 10 Mich. 349.

¶ 407. The purchaser of a mortgage is bound by such notice as is afforded by the registry of another mortgage of the same date but of subsequent record, and of which his vendor had actual knowledge.—Van Aken v. Gleason, 34 Mich. 477.

¶ 408. The recording laws cannot be made by equitable construction to embrace cases not within them, or to give constructive notice of things the records do not show; where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts.—Barnard v. Campau, 29 Mich. 162.

¶ 409. Subsequent grantees or incumbrancers of mortgaged premises have a right to rely upon the record as determining the amount of the mortgagee's claim, and they are not charged with notice of the conditions of the bond to which the mortgage is collateral, but which are not expressed in the mortgage.—Payne v. Avery, 21 Mich. 524.

¶ 410. Under Comp. L. 1897, § 8988, providing that unrecorded conveyances of real estate are void as against any subsequent purchaser in good faith for valuable consideration whose conveyance is first duly recorded, a subsequent recorded mortgage takes priority over a prior unrecorded mortgage though the prior mortgagee held the deed to the mortgagor and the mortgage deed and the subsequent mortgagee made no inquiry as to the title.—Jackson City Bank v. Campbell, 172 Mich. 541.

¶ 411. The record of a mortgage executed by a contract purchaser of land, who has gone into possession under an agreement with the vendors, is constructive notice to a subsequent purchaser or incumbrancer of the legal title.—Balen v. Mercier, 75 Mich. 42.

¶ 412. The record of a conveyance by a husband to his wife is notice to those who subsequently give credit to the husband that the property conveyed does not constitute part of his assets.—Strauss v. Parshall, 91 Mich. 475.

¶ 413. The record of a mortgage is constructive notice thereof to one who purchases timber standing on the mortgaged premises. —Webber v. Ramsey, 100 Mich. 58.

¶ 414. Where a purchaser of land has no notice of an unrecorded option for the purchase of the land by another, he should be protected as an innocent purchaser, though thereafter the contract is recorded before he records his conveyance.—Rathbone v. Groh, 137 Mich. 373.

¶ 415. A purchaser of a note secured by a mortgage on land to which the mortgagor had no title at the time, which fact would have been disclosed by an examination of the records, is entitled to no benefit under the mortgage.—Lockwood v. Noble, 113 Mich. 418.

¶ 416. A mortgage of a leasehold interest in real estate, which is duly recorded as a mortgage on real estate, is constructive notice to subsequent purchasers of the existence and contents of the mortgage.—Stearns Lighting & Power Co. v. Central Trust Co., 223 Fed. 962.

§ 67. Notice to grantors taking back purchase-money mortgage.

Sufficiency of consideration in general to protect purchaser, see ante § 33.
Priority of purchase-price mortgages, see Mortgages § 91.

¶ 417. As a rule, if the grantor of lands, on taking back a purchase-money mortgage, has both conveyances promptly recorded, he does all the law requires of him to protect his rights, and will not be affected by any previous conveyance which, without his knowledge, his grantee, the mortgagor, may have placed on record before obtaining title. —Heffron v. Flanigan, 37 Mich. 274.

§ 68. Notice to prior incumbrancers.

Effect of payment partly after and partly before notice, see ante § 35.

¶ 418. The record of a conveyance or incumbrance is not constructive notice to a prior incumbrancer.—James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Mich. 463; Woods v. Love, 27 Mich. 308; Dewey v. Ingersoll, 42 Mich. 17.

¶ 419. A prior mortgagee need not examine the records before releasing portions of the mortgaged premises, unless he has notice enough to put a prudent man on inquiry.—James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Mich. 463; Dewey v. Ingersoll, 42 Mich. 17.

¶ 420. The recording of his deed by a purchaser from a mortgagor is not notice to the mortgagee of the sale.—Balen v. Lewis, 130 Mich. 567.

§ 69. Priority of mortgages for future advances.

Sufficiency of consideration in general to protect purchaser, see ante § 33.

¶ 421. The record of a mortgage given to secure future liabilities or advances which it is optional with the mortgagee to incur or advance is notice to a subsequent purchaser of the premises; but he is chargeable with notice only to the extent of the liabilities actually incurred prior to his purchase.—Ladue v. Detroit & M. R. Co., 13 Mich. 380.

§ 70. Record of attachment levy as constructive notice.

Giving notice of levy of attachment and filing of notice to fix lien, see Attachment §§ 53, 93.

Filing notice of attachment levy on land, see Attachment § 93.

Recording certified copy of attachment levy on land, see Jud. Act, chap. XXVI, §§ 12, 13; Comp. L. 1915, §§ 13039, 13040.

¶ 422. Filing in the register's office a certified copy of an attachment levy does not, it seems, operate as constructive notice to third parties; certainly not as to those whose rights have previously accrued.—Columbia Bank v. Jacobs, 10 Mich. 349; Millar v. Babcock, 25 Mich. 137; French v. De Bow, 38 Mich. 708.

¶ 423. A recorded attachment levy does not take priority over title of a bona fide purchaser without actual notice, as the registry law cannot have operation beyond the fair meaning of its terms.—Millar v. Babcock, 25 Mich. 137.

§ 71. Recorded levy of execution as constructive notice.

Superiority of unrecorded mortgage to attachment, see also Attachment ¶ 246.

Statutory priority of execution lien over prior grants and mortgages without notice to execution plaintiff, see also Attachment ¶ 248.

Filing notice of levy to attach and give priority to lien, see Executions §§ 34, 44.

Filing sheriff's certificate of execution sale as notice, see also Executions § 77.

Filing notice of levy or visible possession as notice of priority, see Executions § 34.

Provisions for filing notice of levy on real estate and for rights of bona fide takers, see Jud. Act, chap. XXIII, § 83; Comp. L. 1915, § 12898.

¶ 424. A sheriff's notice of levy on execution, if filed and indexed as provided in Laws 1875, Act No. 5, p. 3, How. St. § 6173, is constructive notice of the levy and of the execution creditor's rights and lien thereunder.—Ward v. Citizens' Bank, 46 Mich. 332.

¶ 425. Under the Laws of 1841, the deposit of a certificate of levy upon execution in the register's office was not notice to bona fide purchasers.—Campau v. Barnard, 25 Mich. 381.

¶ 426. In a case where the sheriff's notice of levy filed with the register omitted a portion of the lands levied on, it was held that a subsequent purchaser was not affected with notice.—Campau v. Barnard, 25 Mich. 381; Barnard v. Campau, 29 Mich. 162.

¶ 427. A sheriff's certificate of an execution sale is not constructive notice to prior mortgagees, though regularly filed in the register's office; and an execution purchaser cannot, by reason of the filing of such certificate, be authorized to attack a foreclosure in chancery to which he was not made a defendant.—Woods v. Love, 27 Mich. 308.

¶ 428. Under Laws 1875, Act No. 123 (How. St. § 6119), a certificate of a sheriff's sale of lands on execution is, when recorded, entitled to the same record privileges as any other "conveyance" (see How. St. § 5689) of land; and its record is constructive notice to subsequent purchasers.—Atwood v. Bearss, 45 Mich. 469; Drake v. McLean, 47 Mich. 102.

¶ 429. The record of an execution levy is notice of its existence, and is equivalent to actual possession of personal property taken under execution.—Ludeman v. Hirth, 96 Mich. 17.

¶ 430. To make a notice of levy, filed with the register of deeds, constructive notice to subsequent purchasers, the description of the premises in the levy and notice must be sufficiently definite and certain to inform the public as to what particular land has been levied on.—Burrowes v. Gibson, 42 Mich. 121; Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.

¶ 431. After the recording of notice of levy of an execution on land as required by statutory provisions, a judgment creditor is

not affected by subsequently acquired constructive notice of an unrecorded conveyance of the land by the judgment debtor previous to the levy of the execution.—Lachelt v. McInerney, 185 Mich. 413.

§ 72. Record of tax title as constructive notice.

Rights under tax titles generally, see Taxes, XII.

¶ 432. Whether the record of a tax title is constructive notice that the holder claims the land on which it rests, quære.—La Coss v. Wadsworth, 56 Mich. 421.

§ 73. Record as notice of fraud or mistake.

Failure to record as evidence of fraud, see post ¶ 456.
General law of fraud, see Fraud.

¶ 433. The laws of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds.—Converse v. Blumrich, 14 Mich. 109.

¶ 434. One who purchases from one who holds by a record title that is bad on its face for fraud cannot claim to be a bona fide purchaser without notice of the invalidity of his grantor's title.—McKay v. Williams, 67 Mich. 547.

¶ 435. The record of a guardian's deed and of an immediate reconveyance to him individually was held constructive notice to a subsequent purchaser of fraud against the ward's heirs.—Winter v. Truax, 87 Mich. 324.

¶ 436. P., who was the owner in fee simple of land on which he and his wife lived, being very sick and not expected to live, conveyed the land upon which there was a mortgage to his wife by warranty deed without money consideration; and subsequently the husband and wife gave a mortgage thereon to secure their joint note. Shortly thereafter the wife died and both mortgages were foreclosed, and at the sales the first mortgagee purchased under his mortgage and P. himself purchased under the second sale. The first mortgagee and his wife then conveyed to P. by quitclaim. On a bill to set aside certain conveyances based upon P.'s title being procured fraudulently, held, that the record of the title was not notice to any one that any fraud had been committed.—Lucas v. Parks, 84 Mich. 202.

¶ 437. A. received from his wife a power of attorney to sell and convey land, and, on the same day on which it was recorded, he conveyed the land to B., who immediately reconveyed to A. Subsequently A. conveyed to C. Held, that the transaction between A. and B. was void on its face, and that a grantee from A.'s wife could recover in ejectment against C.—McKay v. Williams, 67 Mich. 547.

¶ 438. A mortgage was debarred from the claim of bona fides and the mortgage set aside, where such mortgage was given upon a homestead by a person of feeble intellect for the accommodation of a third party who gave the pretended security of a chattel mortgage on commercial paper not then in existence and on tangible property not owned by him, and where the defendant although he had sufficient notice of the situation to suggest caution, exhibited indifference to such wrongful acts.—Holmes v. Martin, 123 Mich. 155.

¶ 439. One who has given a mortgage to be sold for a fraudulent purpose cannot set up the fraud as a defense to the mortgage in the hands of a bona fide purchaser.—Bloomer v. Henderson, 8 Mich. 395.

¶ 440. The constructive notice furnished by the record of a mortgage will not prevent suit for false representations to a purchaser as to absence of incumbrances.—Weber v. Weber, 47 Mich. 569.

¶ 441. Where an error in a deed appears by construction, the record of the deed is notice to subsequent purchasers of the real land intended.—Anderson v. Baughman, 7 Mich. 69.

§ 74. Time from which recording acts operate.

Recordation as assertion of hostile title, see post § 75.
Instruments bearing same date, see also ante ¶ 407.
Priority between concurrent mortgages of same date, see Mortgages ¶ 386.

¶ 442. When a paper is left with the register with the understanding that it is not to go upon record until further directions, the register, when he receives such directions, must record it as of that time, and not as of the time when it was left with him.—Brigham v. Brown, 44 Mich. 59.

§ 75. Scope of notice furnished by record.

See also ante ¶ 409.

¶ 443. The constructive notice imparted by the record of an instrument is strictly confined to that which is set forth on its face.—Savidge v. Seager, 175 Mich. 47.

¶ 444. A record is not notice for any purpose not declared by statute.—Burton v. Martz, 38 Mich. 761; Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

¶ 445. A record of a mortgage is not notice of a claim not mentioned therein.—Hinchman v. Town, 10 Mich. 508.

¶ 446. Where nothing in the record of the conveyance or conveyances to several persons of land in undivided interests indicates that they are not tenants in common, a mortgagee or grantee from one of them is not

affected by partnership equities whereof he has no notice.—Adams v. Bradley, 12 Mich. 346; Reynolds v. Ruckman, 35 Mich. 80; Van Slyck v. Skinner, 41 Mich. 186; Hammond v. Paxton, 58 Mich. 393.

¶ 447. A mortgage by one partner of his undivided share in lands which had been conveyed to the partners by deed on record, specifying their respective interests, covers such share without being subject to latent equities of the other partners whereof the deed supplies no notice.—Van Slyck v. Skinner, 41 Mich. 186.

¶ 448. As against any latent equities or parol agreements between a life-tenant and the remainder-man, whereby a building erected by the latter is to be personal property, one who takes a mortgage of the land from the latter while the latter is in possession is a bona fide purchaser, and the tenant is confined to his record title.—Stevens v. Rose, 69 Mich. 259.

¶ 449. Where lands are conveyed to three persons, the deed making no reference to a partnership which the three form, one who takes, without notice that such lands are partnership property, a mortgage from one of the three on an undivided third, is not affected by the partnership equities.—Adams v. Bradley, 12 Mich. 346.

¶ 450. The record in the office of the register of deeds of a mortgage of land is not constructive notice of the mortgage of chattels included in the same instrument.—Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

¶ 451. The subsequent grantees or incumbrancers of mortgaged premises have a right to rely upon the record as determining the amount of the mortgagee's claim. They will not be charged with notice of the conditions of the bond, to which the mortgage is collateral, but which are not expressed in the mortgage, though these of course will determine the rights existing between mortgagor and mortgagee; and they will also be entitled to presume that payments made to the mortgagor are applied upon the mortgage as it appears of record.—Payne v. Avery, 21 Mich. 524.

¶ 452. A recorded plat is notice only of the platting and consequent dedication to the public of such interests only as the grantor possesses, and is not notice of any conveyance to private parties merely implied upon its face or in the acknowledgment.—Burton v. Martz, 38 Mich. 761.

¶ 453. The record of a deed from the mortgagor to a mortgagee, the mortgage not being discharged of record, and the property not changing possession and there being no knowledge of an intervening mortgage, does not authorize purchasers, intervening mortgagees, and their assignees in presuming merger.—Cook v. Foster, 96 Mich. 610.

§ 76. ——Recordation as assertion of hostile title.

Notice of adverse title by the hostile nature of possession, see ante § 20.

Adverse possession as against outstanding unrecorded interest in grantor, see Adverse Possession ¶ 102.

¶ 454. One who receives a deed and records it, and makes entry under it, thereby asserts a title hostile to the original owner; and by the mere act of recording he effects such a disseizin as authorizes the bringing of an action of ejectment against him.—Murray v. Hudson, 65 Mich. 670.

¶ 455. The act of recording a deed which appears by the records to be the end of a direct chain of title from the government is a sufficient assertion of title to warrant ejectment against the grantee in such deed, when no person is in actual occupancy of the land.—Goodman v. Nester, 64 Mich. 662.

§ 77. Effect of failure to record.

See also ante ¶¶ 285, 290.

Priority between unrecorded instruments, see ante § 41.

Admissibility of unrecorded deeds, see Evidence § 496.

Validity of unrecorded leases, see Landlord and Tenant § 12.

Failure to record as badge of fraudulent transfer, see Fraudulent Conveyances § 4.

Effect of mortgagor securing credit because of failure of mortgagee to record, see Fraudulent Conveyances ¶ 12.

Effect of unrecorded deeds and mortgages as against lien of execution duly filed or brought to notice, see Executions § 34.

Effect of failure to record, see Comp. L. 1915, § 11721.

¶ 456. Withholding conveyances of real estate from record does not tend to show fraud.—Blish v. Collins, 68 Mich. 542.

¶ 457. For failure to record an assignment of an instalment of a purchase-money mortgage, which mortgage—but for such assignment—would on reconveyance to the vendor have been merged in the fee, the assignee's claim was postponed in favor of a mortgage taken, without knowledge of such assignment, in lieu of two other mortgages, one of which preceded while the other followed the purchase-money mortgage.—Pritchard v. Kalamazoo College, 82 Mich. 587.

¶ 458. The privilege of having any lot released upon a given payment on a mortgage which covers a number of lots does not entitle an unrecorded purchaser of a lot as against purchasers of the remaining lots to have the mortgage foreclosure set aside after

a delay of four years.—Gray v. H. M. Loud & Sons Lumber Co., 128 Mich. 427.

¶ 459. The recording law does not render an unrecorded deed void as to intervening creditors who have not acquired a lien while the deed remained off the record.—Campbell v. Remaly, 112 Mich. 214.

§ 78. Burden of proof, presumptions and evidence as to notice and priority.

Presumption favoring record title, see post § 79.
General law of evidence, see Evidence.
Evidence to rebut deed record showing want of title, see also Fraud ¶ 323.

¶ 460. Where a purchaser under a second mortgage seeks relief against one who holds under a first mortgage, on the ground that the first was not filed or recorded until after the second, he must establish the case made by his bill or he cannot have relief.—Hoffman v. McMorran, 52 Mich. 318.

¶ 461. Where a party claims priority under the recording laws he must show a compliance with their provisions in order to entitle him to such priority.—Thompson v. Mack, H. 150.

¶ 462. In a foreclosure suit the evidence was examined and held to show that a deed which purported to bear date and to have been acknowledged and recorded earlier than complainant's mortgage was in fact made and recorded later.—Shelden v. Warner, 45 Mich. 638.

¶ 463. A debtor gave a mortgage for the debt, the bona fides of which was not disputed, and it was at once placed on record. Subsequently it was found that another party had a mortgage from the same mortgagor on the same land, purporting to be given and recorded first. This mortgage had no debt to support it, unless it was one owing to a firm of which the mortgagee was a member, and for which other mortgages for more than its amount were in existence. The register of deeds testified that it was left with him by the mortgagor with directions not to place it upon record until further directions were given, and that he never received any such directions, but his clerk recorded it without orders. Held, that the spreading it upon the record book, under such circumstances, was not a recording which entitled it to priority.—Brigham v. Brown, 44 Mich. 59.

§ 79. ——Presumptions favoring record title.

Presumption of validity and sufficiency of record, see also ante § 64.
General law of evidence, see Evidence.

¶ 464. A record title is presumptively the better title, and creates a cloud upon the unrecorded title.—King v. Carpenter, 37 Mich. 363.

¶ 465. The first deed recorded is presumptively the best; and the presumptions in favor of the holder of the legal title of record cannot be defeated without proof of an earlier right based on superior equities.—First Nat. Bank v. McAllister, 46 Mich. 397.

D. DISCHARGES AND RELEASES OF RECORD.

§ 80. In general.

Forged or fraudulent discharges, see post § 81.
Necessity and office of record and instruments recordable in general, see ante II, A.
Sufficiency of record in general, see ante II, B.
Destruction or mutilation of record in general, see ante II, B.
Constructive notice from record in general, see ante II, C.
Effect of illegal or unauthorized records, see post II, E.
Rules as to actual notice, see ante I, A.
Notice implied from possession or other facts calling for inquiry, see ante I, B.
General doctrine of bona fide purchaser, see ante I, C.
Necessity for recordation of discharge of mortgage to protect subsequent purchaser or mortgagee, see ante ¶ 291.

¶ 466. Where a mortgage had been discharged of record by mistake, an abstract of title showing such discharge did not protect a subsequent purchaser who, when he bought, was informed by the mortgagor that the mortgage was still outstanding and was held by a person named.—Ferguson v. Glassford, 68 Mich. 36.

¶ 467. Purchasers or incumbrancers who become such after the discharge of a mortgage is recorded are entitled to the same protection that the recording laws afford to subsequent purchasers or incumbrancers in good faith as against unrecorded conveyances; they can be affected only by actual notice, or notice of such facts as should put them on inquiry.—Ferguson v. Glassford, 68 Mich. 36.

¶ 468. A mortgage executed to S. and F. recited that it covered six notes of even date therewith, payable to the mortgagees; but in fact the sixth note was made to one T. A discharge of the mortgage executed by S. and F. was destroyed before recording, and afterwards a certificate of discharge was obtained on the mortgagor's petition under How. St. § 5705, and was recorded. Held, that the interest under the first mortgage of a transferee of the sixth note was subject to a second mortgage taken by one who had no knowledge of the facts except as disclosed by the record.—Moran v. Roberge, 84 Mich. 600.

¶ 469. Where a son has bought land from his father, the mere fact of the relationship

does not show that he should not claim the rights of a bona fide purchaser against reinstatement of an inadvertently discharged mortgage given by his father to a third person.—Sheldon v. Holmes, 58 Mich. 138.

¶ 470. A good faith purchaser of premises was entitled to protection against foreclosure of a mortgage which had been assigned as collateral security and "discharged" of record by entry in the margin of the mortgage, although the testimony conclusively showed that the discharge related to the assignment and not to the mortgage.—Lowry v. Bennett, 119 Mich. 301.

§ 81. Forged or fraudulent discharges.

Effect of recording forged instruments in general, see post § 84.
Effect of illegal or unauthorized record, see post II, E.
Recordation of forged instrument as an uttering, see Crimes ¶ 341.

¶ 471. A forged discharge on the record of a mortgage gives no rights to one who takes a second mortgage on the strength thereof, unless the prior mortgagee has been negligent.—Keller v. Hannah, 52 Mich. 535.

E. EFFECT OF ILLEGAL OR UNAUTHORIZED RECORD.

§ 82. In general.

See also ante ¶ 38.
Unauthorized memoranda and additions to record, see post § 83.
Effect of recording forged instruments, see post § 84.
Mistaken recordation or errors or defects in registry, see ante §§ 57-59.
Effect of mistakes in description of property in record, see ante § 58.
Effect of actual knowledge of existence of void instrument, see ante § 7.
Effect of fraudulent statements in record, see ante ¶ 433.
Necessity, purpose and office of record in general, see ante II, A.
Sufficiency of record in general, see ante II, B.
Constructive notice from the record, see ante II, C.
Admissibility of illegally recorded deeds, see Evidence § 496.

¶ 472. The registry of an instrument not required by law to be recorded is notice to no one; so held of a mortgage given by one who held under a bond for a deed.—Wing v. McDowell, W. 175.

¶ 473. The record of a deed that is not by law entitled to be recorded is notice to no one.—Dutton v. Ives, 5 Mich. 515; Galpin v. Abbott, 6 Mich. 17.

¶ 474. Record of a void deed—such as that of a husband to his wife before the act of 1855—is not notice to any one of any possible equities between the parties to the deed.—Loomis v. Brush, 36 Mich. 40.

¶ 475. Land was conveyed which was subject to a mortgage, the seller taking back a mortgage to secure a negotiable note for part of the purchase price, and giving the purchaser an agreement to pay off and discharge the first mortgage, and, in case of his failure to do so, that the purchaser might pay it, and have the amount applied on the mortgage given by him. This agreement was witnessed, acknowledged and recorded. Held that, as such instrument was not the subject of record, an assignee of the second mortgage who received the same for a valuable consideration, before it was due, and without actual notice of this agreement, was not affected thereby.—Dutton v. Ives, 5 Mich. 515.

¶ 476. Where a mortgage is given, manifestly as a cover for the benefit of the mortgagor, and the latter is sent with it to the registry, where he gives directions for leaving it off the record, the mortgagee will be bound by these directions, and will not be at liberty to rely, as against them, upon a false certificate of recording which he obtains.—Brigham v. Brown, 44 Mich. 59.

¶ 477. An entry which the register is not authorized or required to make is not evidence, though actually made by him.—Ives v. Kimball, 1 Mich. 308; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 478. The record in one county of a certified copy of the record in another county of a deed is not evidence of such deed.—Shotwell v. Harrison, 22 Mich. 410.

¶ 479. In the absence of a statute authorizing it, a certified copy of a record, in the office of the secretary of state, of a state patent, is not primary evidence.—Bradley v. Silsbee, 33 Mich. 328.

¶ 480. An unauthorized record of a plat is not evidence of the validity and execution of the plat.—City of Grand Rapids v. Hastings, 36 Mich. 122.

¶ 481. A book of plats, found in the office of the register of deeds, purporting to be plats of the various townships of the county, with the names of purchasers of sections and parts of sections marked thereon, is not evidence, as no law requires it to be kept in the registry.—Smith v. Lawrence, 12 Mich. 431.

¶ 482. Though in fact recorded, an unacknowledged deed cannot be proved by the record.—People v. Marion, 29 Mich. 31.

¶ 483. In the absence of a statute authorizing it the record of a deed is not primary evidence of the existence and genuineness of the original.—Brown v. Cady, 11 Mich. 535; Bradley v. Silsbee, 33 Mich. 328.

§ 83. Unauthorized memoranda and additions to record.

Alterations, interlineations and corrections on face of record as affecting the sufficiency of record, see ante § 62.

Destruction, mutilation or loss of record, see ante § 63.

¶ 484. In the certified copy of the record of a mortgage there were no marks opposite the signatures indicating seals; but there was a certificate of the register of deeds that the words "not sealed" were entered in the record opposite the names in the handwriting of his predecessor. Held, that such certificate was not legal evidence. The register is bound to record all instruments properly executed, but he cannot make any notes or memoranda in the record not authorized by law.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 485. Where it appeared that, under a law permitting the registry of only sealed instruments, the proper officer had recorded in the appropriate place an instrument in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the conveyance was sealed, and where the conclusion, attestation clause and acknowledgment all spoke of it as under seal, it was presumed that the original was sealed. It was further held that, whether or not it was the duty of the register under the law as it then stood (in 1830) to put something of his own upon the record to indicate that the paper be recorded was sealed, his omission to do so would not overcome the presumption that the instrument itself was sealed.—Starkweather v. Martin, 28 Mich. 471.

§ 84. Effect of recording forged instruments.

Recordation of forged or fraudulent discharge, see also ante § 81.

¶ 486. Good faith does not give one who holds under a forged deed or mortgage any rights against the person whose name has been forged, or his heirs.—Austin v. Dean, 40 Mich. 386; Camp v. Carpenter, 52 Mich. 375; McGinn v. Tobey, 62 Mich. 252.

¶ 487. The record of a forged deed does not afford protection to subsequent purchasers or incumbrancers and the question of their good faith is immaterial, as those relying upon the records for the authenticity and validity of a deed do not stand in as favorable a position as good-faith holders of negotiable paper.—McGinn v. Tobey, 62 Mich. 252.

¶ 488. A mortgage obtained through fraud or forgery by the mortgagee's agent without negligence on the mortgagor's part cannot become good in any one's hands.—Laprad v. Sherwood, 79 Mich. 520.

¶ 489. A forged mortgage cannot be valid, even in the hands of a bona fide holder, unless, indeed, the latter came into possession of it under circumstances which establish an equity in his favor against the party apparently liable upon it.—Camp v. Carpenter, 52 Mich. 375.

¶ 490. Innocent purchasers under a forged deed are in no better position as to title than if they had purchased with notice.—Crawford v. Hoeft, 58 Mich. 1.

¶ 491. Nothing but real negligence or fault can make a person liable for a wrong use of his signature.—First Nat. Bank of Sturgis v. Deal, 55 Mich. 592.

NOTICES.

TREATS of legal notices other than process or writs and of formal private notices. It excludes notice in the sense of actual or constructive cognizance of a particular fact, notice in that sense being treated in various topics which are pointed out and distinguished in the cross-references below.

Analysis.

§ 1. In general; form and requisites.
§ 2. Necessity and occasion for notice.
§ 3. Mode of delivery, service, or communication.
§ 4. ——Substituted service.
§ 5. Acceptance or understanding by person notified.
§ 6. Notice through representative.
§ 7. Time for and length of notice.
§ 8. Proof of service or publication.

Notice of Particular Facts—
Of revocation of agency, see Agency § 16.
Of custom or usage, see Customs § 2.
Of danger or defect as basis for negligence in failing to make safe, see Negligence, I; Master and Servant,

III; Highways, XII, B; Railroads, VIII.
As element in fraud, see Fraud § 9.
As an element in estoppel by misrepresentation, see Estoppel § 30.
Effect of foreign record as notice, see also Conflict of Laws § 6.

Notice of Meeting, Motion, or Proceeding—
Essentials of due process or jurisdiction, see Constitutional Law § 128; Courts § 40.
Of motions, see Motions and Orders.
Of appeal, see Appeal, VI, B.
In appellate procedure, see Appeal §§ 70, 74, 109, 131.
Of motions on appeal, and time of notice requisite, see Appeal § 167.
Of application for appeal from justice's court, see Justices of the Peace § 195.
Of trial on appeal from justice's court, see Justices of the Peace § 227.
To dissolve attachment, see Attachment § 120.
For withdrawal and substitution of attorneys, see Attorneys § 12.
To place cause on calendar, see Calendar §§ 2-5.
For taxation of costs, see Costs §§ 70, 130.
To take depositions and of filing of deposition, see Depositions §§ 5, 6, 22.
Of application for preliminary injunction, see Injunction § 120.
Of application to modify or vacate judgment, see Judgments § 63.
To parties to appear before arbitrators, see Arbitration § 9.
In drain proceedings, see Drains §§ 16-18, 28-32, 52, 66, 84.
Of fence viewers' proceedings, see Fences § 7.
In proceedings to lay out, establish, alter, or vacate highways, see Highways §§ 30, 73, 122, 131.
In proceedings to remove obstructions from highways, see Highways § 188 et seq.
Of sale under chattel mortgage, see Chattel Mortgages § 129.
Of sale of property by trustee in bankruptcy, see Bankruptcy § 6.
Of levy and sale on execution, see Executions §§ 34, 44, 56, 103.
Of judicial sale, see also Judicial Sales § 2.
Of elections, see Elections § 3.
Of meetings of creditors of bankrupt, see Bankruptcy § 5.
Of meetings of corporate directors, see Corporations § 116.
Of meetings of partnership associations, see Joint Stock Companies § 4.
Of meetings of county board, see Counties § 7.
Of meetings of councils, see Municipal Corporations § 36.
Of suspension of subordinate lodge of fraternal association, see Fraternal Associations § 55.
See also specific topics treating of the various proceedings and meetings.

Notice of Claim, Demand, or Title—
Of claim of title to land, see Notice and Record of Title.
Of equities and defenses to bills and notes, see Negotiable Instruments, XIII.
To debtor as part of assignment, see Assignments § 3.
Of election under contract between alternative rights, see Contracts § 231.
Of calls on corporate subscriptions, see Corporations § 51.
Of dues and assessments of benefit society, see Fraternal Associations § 24.
Of nonpayment, dishonor or protest of negotiable paper, see Negotiable Instruments §§ 54, 58.
Of acceptance of guaranty, see Guaranty § 10.
To guarantor of note of its nonpayment, see Guaranty § 17.
To guarantor of principal's default, see Guaranty § 15.
Of principal's default as condition to liability on indemnity, see Indemnity § 7.
Of lis pendens, see Lis Pendens § 2.
Of claim for injuries from highways, see Highways § 266.
Of claim against municipality, see Municipal Corporations, XIV.
Of loss to fraternal society, see Fraternal Associations, VII.
Of priority of liens for mine labor, see Liens § 11.
By mechanic's lien claimants, see Mechanics' Liens, V.
See also specific topics treating of the particular claim, demand or title asserted.

Notice to produce as basis for secondary evidence, see Evidence, IV, B.
Notice to place party in contempt for disobedience of order, see Contempt § 12.

§ 1. In general; form and requisites.

Requisites of particular notices, see specific topics treating of the notice in question or of that to which it is incidental. E. g., for requisites of notice of foreclosure by advertisement and sale under power, see Foreclosure § 26 et seq.; for notice of lis pendens, see Lis Pendens; for notices under tax laws relating to sale and redemption, see Taxes, XI.
Necessity that oral notice be understood by person addressed and that he shall signify understanding, see post § 5.
Mode of service, delivery, or communication, see post §§ 3-6.
Time for notice and length of notice required, see post § 7.
Proof of service or publication, see post § 8.
What constitutes notice to insurance company under policy requiring notice of additional insurance, see Insurance ¶ 738.

Necessity of written notices in legal proceedings, see also Motions and Orders ¶ 1.
Signature of notices in equity, see Equity § 59.

¶ 1. A legal notice must disclose on its face that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice.—Niles v. Ransford, 1 Mich. 338.

¶ 2. In equity that is notice of a right which is sufficient to put parties on inquiry. —Norris v. Showerman, 2 D. 16.

¶ 3. A notice of foreclosure sale by advertisement of real property substantially complies with Comp. L. 1871, §§ 6912, 6913, 6914, 6915, where although otherwise technically correct, the name of the mortgagee is misspelled in several of the publications of the notice, and the notice gives the date of the mortgage once correctly and once incorrectly. —Bacon v. Northwestern Mutual Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 4. As no particular kind of notice and method of service is prescribed in petitions for deficiency executions, the court may prescribe the kind of notice and method of service, and therefore if this is not done, but a copy of the petition and notice is personally served upon the nonresident defendants who appeared in the original case, the omission of the order may be treated as an irregularity which has been waived.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

§ 2. Necessity and occasion for notice.

See the various specific topics treating of subjects whereof a notice may be deemed necessary or incidental. The cross-references following are examples of the plan of classification.
Necessity and sufficiency of notice to produce original document in evidence, see Evidence § 146.
Necessity of notice on suggestion of death abating action, see Abatement § 18.
Notice to quit as basis for summary proceedings, see Forcible Entry §§ 10, 11.
Notices of special defenses in pleading, see Pleading, III.

¶ 5. Actual knowledge, however acquired, dispenses with the necessity for notice of revocation.—Jones v. Shafer Iron Co., 96 Mich. 98.

§ 3. Mode of delivery, service, or communication.

Substituted service, see post § 4.
Manner of serving notice to take depositions, see Depositions § 5.
Service of notice of mechanic's lien claim, see Mechanics' Liens § 28.
Mode of serving process, see Process, II.
Rules of supreme court as to service of papers and notices, see Sup. Ct. Rules 21-26.
Service of papers in circuit court practice, see 1916 C. C. Rules 6-12.

¶ 6. Where a person is entitled to notice, and has not stipulated or consented that it may be transmitted by mail, he is not bound by it if so sent until actually received.—Burhans v. Corey, 17 Mich. 282.

¶ 7. The charter provided that members should be notified of assessments by circular or orally, and that if they did not pay within a fixed time they would forfeit protection through their policy. Held, that such a personal liability could not attach from merely mailing the notice, if it was not actually received.—Castner v. Farmers' Mut. Ins. Co., 50 Mich. 273.

¶ 8. Notice of foreclosure sale under decree does not need to be personal.—Sanford v. Haines, 71 Mich. 116.

¶ 9. Where a court rule provides for personal service of certain papers "or" service by mailing the use of the word "or" in that connection indicates an alternative giving a choice between the methods enumerated.—Palmer-Stevenson Const. Co. v. Mason Circuit Judge, 176 Mich. 326.

¶ 10. Service upon nonresident defendants of a copy of a petition for execution upon deficiency in a mortgage foreclosure case, together with a notice of the hearing is valid where the defendants appeared in the original case by a resident counsel who required and received a copy of the bill but did not answer, and a decree was taken pro confesso.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

§ 4. ——Substituted service.

Requisite statements in affidavit of publisher, see post § 8.
Published notice in substituted service in attachment, see Attachment § 88.
Sufficiency of notice by publication for hearing on petition for administration, see Estates of Decedents ¶¶ 115, 117.
Of notice of appeal from probate, service by mail, see Probate Courts, III.
Substituted service of process, see Process, II, C.
Service by mail, when proper in supreme court practice, see Sup. Ct. Rule 23.

¶ 11. An application for the issue of an execution for deficiency must be served, wherever practicable, on the defendant against whom the relief is sought, and notice must be given him of the time when the application will be presented; if personal service cannot be had, the court may direct substituted service on a showing of the facts. —Ransom v. Sutherland, 46 Mich. 489.

¶ 12. Although the proceeding under Comp. L. 1897, § 517, for execution upon a deficiency in a mortgage foreclosure has been called a "new" proceeding, it has always been considered supplementary and therefore where personal service has been had in the original proceeding, substituted service may be made in the supplementary proceeding.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

¶ 13. Substituted service of a petition for execution for a deficiency decree on a mortgage foreclosure, made in accordance with an order of the court, is sufficient as against a defendant who was personally served with subpoena in the foreclosure proceedings and who appeared therein and made a defense including appeals to the supreme court.—Miller v. McLaughlin, 144 Mich. 298.

§ 5. Acceptance or understanding by person notified.

¶ 14. A person who gives oral notice to another of proposed action which, unless guarded against by the party so notified, may result in his injury, and which notice it is the duty of the first party to give, must be satisfied in some way that the party to whom he addresses his conversation understands him. In such a case it is not necessary that the person so addressed should speak, but he may by bowing his head in answer to the notice, and by doing certain acts which he is requested to do as a part of the notice, so convey to the mind of the one giving the notice information that he understands what is said as to warrant him in going away satisfied that he is understood, and he is not bound to inquire whether the person so notified understands the English language or not, but is only bound to have some information, either by the man's conduct or by his speech, that he is aware of and understands the purport of what has been said to him.—Helbig v. Michigan Cent. R. Co., 85 Mich. 359.

§ 6. Notice through representative.

Notices to agent as binding principal, see Agency, II, E.

Notice to attorney as notice to client, see Attorneys § 25.

By attorney not properly in case, effect of, see Attorneys ¶ 50.

Notice imputed to corporation through officers and agents, see Corporations, XVII, E.

Notice to bank through officer, see Banking § 59.

Notice to insurer by notice to agent, see Insurance, III.

¶ 15. Notice given by an employee of a construction company, which is engaged in doing construction work in a plant operated by another company, of the defective condition of a ladder in the building, to an officer of the construction company, is not notice to the operating company, where such officer sustains no relation to the operating company.—Boner v. Eastern Michigan Power Co., 193 Mich. 629.

§ 7. Time for and length of notice.

Showing as to times of publication in affidavit of publisher, see post § 8.

Reasonableness of time allowed by notice to produce documents in evidence, see Evidence § 146.

Rules of circuit court as to time, see 1916 C. C. Rule 5.

¶ 16. Notice on Friday that summary and final proceedings to lay out a private road will be had on Monday to divest the title to lands is inadequate. If a law providing no particular time of notice can be sustained at all, it can only be by assuming that the time is to be governed by the analogies of similar cases.—People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 17. Where a statute provides for reasonable notice of the taking of a deposition, the court must decide, in a given case, whether the notice required by the statute has been given, and in coming to a conclusion must be governed somewhat by the circumstances surrounding the case.—Drosdowski v. Supreme Council of Order of Chosen Friends, 114 Mich. 178.

§ 8. Proof of service or publication.

Presumptions as to receipt of letters duly mailed, see Evidence § 35.

Copy as primary evidence of notice, see Evidence § 116.

Secondary proof of notices without notice to produce originals, see Evidence § 146.

Conflict of positive and negative evidence as to giving of notice, see Evidence § 605.

Evidence of notice of claim for injuries from defective highways, see Highways § 302.

Proof of notice and service of notice of motion, see Motions and Orders § 2.

Return and proof of service of notice of mechanic's lien claim, see Mechanics' Liens § 29.

Mode of proving publication of notice of execution sale, see Executions § 57.

See also other specific topics wherein the fact of notice may be an issue to be proven, e. g., Negotiable Instruments, XIV.

Statutory provisions as to affidavit of publication, see Jud. Act, chap. XVII, § 36 et seq.; Comp. L. 1915, § 12523 et seq.

Affidavits as to acceptance of service, see 1916 C. C. Rule 14.

¶ 18. Comp. L. 1871, § 5927, How. St., § 7500, in providing that an affidavit by the printer of a newspaper shall be prima facie evidence of publication of a notice required to be published therein, does not exclude other proof; an affidavit by any other person who knows the facts seems sufficient.—Matthews v. Otsego County Sup'rs, 48 Mich. 587.

¶ 19. Sufficient publication of notice of a guardian's sale may be shown by other evidence than the affidavit, which, if defective, then becomes unimportant.—Persinger v. Jubb, 52 Mich. 304.

¶ 20. It is competent to show the fact of publication by introducing the published papers containing the notice or order.—Colton v. Rupert, 60 Mich. 318.

¶ 21. How. St., § 7497, providing for proof of publishing notices of application to any court or judicial officer for any proceeding required by law,—e. g., the appointment of an administrator,—and providing that an affidavit "annexed to a printed copy of such notice taken from the paper in which it was published," etc., may be filed, etc., does not require that the notice shall be cut from the paper; it merely requires identity of the notice annexed with that published.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 22. How. St., § 7497, providing that the affidavit of publication of a notice of an application to a court, etc., shall specify the times when such notice was published, does not require that the day of publication in each week be specified. Affidavits stating a publication once in each week for four successive weeks, and the date of the first publication, held good.—Wilkinson v. Conaty, 65 Mich. 614; Feustmann v. Gott's Estate, 65 Mich. 592.

¶ 23. Under How. St., § 7498, providing that proof of publication of notice of a sale of real estate may be made by affidavit of the printer of the newspaper or of his foreman or principal clerk, an affidavit by the "bookkeeper" of the newspaper is insufficient to prove that notice of guardian's sale was published, but when supported by a positive affidavit it is sufficient under How. St., § 6047 which provides another method of proof.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 24. An affidavit of publication of notice of statutory foreclosure sale made seven or eight years after the sale took place is not presumptive evidence of the facts therein stated.—Mundy v. Monroe, 1 Mich. 68.

¶ 25. Affidavits of the posting of notices of an administrator's sale made and filed in the probate court ten years afterwards are not legal evidence of that fact.—Woods v. Monroe, 17 Mich. 238.

¶ 26. The sworn report of the sale which was made at the time and duly confirmed is evidence of posting required notices.—Woods v. Monroe, 17 Mich. 238.

¶ 27. After a lapse of nearly twenty years the court cannot go outside of the record to ascertain that notices of sale are not posted in the proper ward of a city, especially where the boundaries of the wards are frequently changed by local action or local laws.—Schaale v. Wasey, 70 Mich. 414.

¶ 28. An affidavit of publication of the order of hearing of a guardian's petition for license to sell real estate was verified on the day when an order confirming the sale was entered and was filed the day after. Held, that the vital point was the proper giving of notice, and that it was immaterial when the proof of the fact was introduced.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 29. A protest was sent by mail accompanying the payment of taxes, and a postal card purporting to be from the township treasurer and acknowledging the receipt of the payment "and protest" was introduced in evidence. There was but one protest sent, and no evidence was introduced tending to show that the protest was not received. Held, that the presumption was irresistible that the protest sent was received.—Michigan Land & Iron Co. v. Township of Republic, 65 Mich. 628.

¶ 30. Testimony by a party that he was morally certain he notified the other party by postal card and a copy of a letter which he said he wrote and deposited in the office mail box from which the postman took the mail is incompetent in the absence of any evidence of what the address on the letter was or whether it was postpaid.—Lowry v. Saginaw Specialty Co., 128 Mich. 246.

¶ 31. Evidence, that letters conveying notice were properly addressed to the city's corporation counsel and handed to the sender's office boy for delivery, and that the office boy knew the location of the corporation counsel's office and delivered the letters there, raises a presumption that they were received in the absence of any evidence to the contrary.—Beattie v. City of Detroit, 137 Mich. 319.

NOTORIETY.

Cross-References.

Notoriety—
Element in adverse possession, see Adverse Possession, III, A.
Judicial notice of matters of common knowledge or general notoriety, see Evidence, I; Indictment, VIII, A.

NOVATION.

TREATS of changes in the parties to a contract so that a new contract results. It excludes modification of contract, see Contracts, VIII, and Releases, which see, and Accord and Satisfaction, which see.

Analysis.

§ 1. In general; nature and requisites.
§ 2. Assent of parties.
§ 3. Reinstatement after novation.
§ 4. Actions and procedure and evidence.

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§ 1. In general; nature and requisites.

Evidence as to novation, see post § 4.
Reinstatement of original contract after novation, see post § 3.
What constitutes a novation, see also Garnishment ¶ 273.
Novation by sale of mill property at which servant was employed, see also Contracts ¶ 64.
Payment by novation, see Payment § 14.
Modification and merger of contracts, see Contracts, VIII.
Assumption of mortgage debt by purchaser of the land, see Mortgages § 113 et seq.
Satisfaction of contract by other person's payment or assumption, see Accord and Satisfaction § 3.
Agreements amounting to novation as promises to answer for another with statute of frauds, see Frauds, Statute of § 9.
Authority of corporate manager to agree to novation, see Corporations § 135.
Effect of succession of corporation parties, see Corporations § 213.

¶ 1. Novation exists only where there is an extinguishment of the original debt, the creation of another, and the assent of the three parties to the new contract.—Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422.

¶ 2. The assent of the original debtor is necessary to effect a novation.—Dean v. Ellis, 108 Mich. 240.

¶ 3. The necessary elements to establish novation are: (1) Parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution, based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a new valid one.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 4. To constitute novation the creditor must have consented to the discharge of the original debtor, and must have accepted the promise of the new debtor.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 5. The requisites of a novation are a valid prior obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, and the extinction of the old by the creation of a new obligation; hence the absence of one of the parties at the time of the death of one before he assented prevents its becoming a novation.—Piehl v. Piehl, 138 Mich. 515.

¶ 6. Where one let premises for six months on monthly payments in advance, and before the first month expired the lessee turned over the lease to another, who, at the lessor's request, agreed in writing to comply with the terms of the original lease, but soon after the opening of the second month surrendered possession of the premises on demand of the original lessee, but without notice to the lessor, who thereupon sued him for the rent of the second month, it was held that this was not a case of novation. To have made it such the defendant must have been liable to the lessee for the rent sued for, and must have promised to pay it to the lessor in consideration of such liability, and by the lessee's order or consent, and in discharge of the lessee's obligation.—Meister v. Birney, 24 Mich. 435.

¶ 7. Under an agreement made by a son with his father, in consideration of the latter's revoking his will previously made in his daughter's favor, and of his devising the same property to the son, to pay her $10 a month so long as she shall live, a right of recovery by her cannot be sustained on the ground of novation, as she had no claim against her father's estate which she could enforce, and as it does not appear that she was consulted when her father revoked the gift to her and made over the property to her brother.—Linneman v. Moross' Estate, 98 Mich. 178.

¶ 8. Novation is effected where the vendee of a mortgaged vessel agreed to pay the mortgage and its note as part of price, and to release mortgagor, to which mortgagee assented.—Mulgrew v. Cocharen, 96 Mich. 422, affirmed on rehearing in 98 Mich. 532.

¶ 9. An obligee may accept money or performance of a contract from a third party

without releasing the original obligor.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 10. A. promised B. to pay his (B.'s) debt to C., provided B. would deliver to A. a cow; A. and B. told C. that A. would pay the debt, nothing, however, being said as to the cow, and C. assented; the cow was not delivered. Held, that A.'s engagement was not therefore discharged.—Brown v. Hazen, 11 Mich. 219.

¶ 11. Where A. owes B. for log-driving, and it is agreed between them that C., who has bought from A. most of the logs, shall pay B. for the driving and keep the amount out of the purchase price, a tender by C. to B. would be in behalf of A. and for A.'s use and benefit, but it would not make C. B.'s debtor, or discharge A.—Keystone Lumber & Salt Mfg. Co. v. Jenkinson, 69 Mich. 220.

¶ 12. N. agreed to deliver lumber to W. & D. Both parties to this agreement afterward agreed with B. that payment for the lumber should be made to B. Held, that on N.'s fulfillment of the agreement for delivery, B. could maintain assumpsit under the later agreement for an unpaid balance of the payment due on delivery.—Beebe v. Warner, 51 Mich. 134.

¶ 13. Where A. owes B. and B. owes C., and B. asks A. to pay C., the amount of B.'s debt to A., and C., in consideration of A.'s agreement to do so, releases B., while A. charges B. with the amount to be paid C., the transaction amounts to a novation and is valid and based on sufficient consideration.—Mulcrone v. American Lumber Co., 55 Mich. 622.

¶ 14. A novation arises where A. owes B. and B. owes C., and B. pays C. with an order charged to B. on A.'s books and drawn by A.'s authorized agent; this shifts A.'s indebtedness from B. to C.—Finan v. Babcock, 58 Mich. 301.

¶ 15. A creditor of a corporation's employees accepted in payment a draft on the corporation drawn against the employees' accounts, and the company accepted the draft and charged the amount to its several employees. Held, a novation.—Bank of Montreal v. J. E. Potts Salt & Lumber Co. (In re Becken), 93 Mich. 342.

¶ 16. A logging contractor having failed in the full performance of his contract, by mutual agreement all claim for damages was waived, and the time of performance extended into another winter, the land-owners reserving the right to fix the time of removal of the timber on one of the sections designated in the contract. After this, and before the contractor had commenced work under the new agreement, third persons were induced to take it off his hands, and he was released upon their agreement to perform his agreements. Such action amounted to a new contract with them, based upon the terms of the old contracts, and that there was a sufficient consideration for it.—Rayburn v. Comstock, 80 Mich. 457.

¶ 17. A firm of railway contractors sublet the work, reserving the right to pay off the laborers employed by the subcontractors, who assigned to the contractors all moneys due said laborers. The liability of the contractors to the laborers was limited to the amount so assigned, and to the amount due and payable to the subcontractors. The subcontractors abandoned their contract, and gave time checks to the laborers for the amount due them. The laborers sold their checks, and the contractors arranged with the purchaser, with notice that he was to release the subcontractors, to pay said checks, which were charged up in account against the subcontractors. Held, that a complete novation was effected, and that the contractors could not defend on the ground that they had in fact overpaid the subcontractors.—Gleason v. Fitzgerald, 105 Mich. 516.

¶ 18. Where, under an arrangement between the heirs of a deceased mother, who held a chattel mortgage on the stock of goods of one of her sons as security for her indorsements of his notes, which are held by another son, who has been appointed special administrator of her estate, the goods are turned over to the administrator, and the mortgagor assumes the care of his aged father, and the administrator agrees with the owner of the store in which the business was being carried on to pay the balance due for rent, the arrangement amounts to more than a mere concession or surrender by a mortgagor to a mortgagee, and an action will lie upon the agreement to pay the rent.—Grieb v. Comstock, 99 Mich. 520.

¶ 19. A complete novation held to have been effected where, by an arrangement between a mortgagor and various mortgagees, all the property covered by the mortgages was made to one of the mortgagees who assumed payment of the mortgages, the debtor being discharged from all obligation.—McCann v. Dillabaugh, 117 Mich. 446.

¶ 20. Where a member of a firm agrees, on his individual responsibility, to take up a note due the firm, and the firm does not accept him as debtor in place of the maker and indorser, and does not surrender or waive its claim on those parties, there is no substitution and extinguishment of the original indebtedness, and consequently no novation. Nor does the transfer to such partner of the consideration for his agreement operate as a payment of the note.—Lewis v. Westover, 29 Mich. 14.

¶ 21. Where plaintiff individually leased from defendant certain premises which were subsequently occupied by a partnership composed of himself and another, he remains

personally liable for the rent in the absence of any arrangement releasing him and substituting the partnership; and the fact that defendant purchased goods from the firm and did not pay for them does not make the partnership directly responsible for the rent so as to release plaintiff.—Fryszka v. Prybeski, 139 Mich. 461.

¶ 22. Where a father enters into an oral contract with his married son whereby the latter is to stay on the farm with the parents and work it, and both parties are to live out of the undivided profits, and any cash obtained is to be divided one-third to the father and two-thirds to the son, and the latter is to pay a certain sum to each of the other children upon the father's death, and have the farm and all the personal property, and the father makes his will in accordance with the agreement and the son lives on the farm in accordance with the agreement until his death, and the widow continues to live on the farm and operate it the same as her husband had done for two years, when they all leave the farm and rent it, the widow receiving the rent and the father living with her, after which the father leaves and lives with one of his children and makes a new will by which the widow and the children are to inherit the farm at his death and the other children receive a larger sum each than provided by the first will, their mother having died during the life of the son, the father waives any right of homestead or the right to terminate the contract for want of mutuality after death of the son, and the effect of such waiver is to create a new contract with the widow under the same terms as the original contract with the son.—Lee v. Lee, 199 Mich. 507.

§ 2. Assent of parties.

Assent as necessary element, see ante § 1.
Assent to contracts in general, see Contracts, III.

¶ 23. The consent of a creditor to a novation is not to be implied merely from the performance of the contract or the payment of money by the substitute.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 24. Where a person sells his bank and the new owner assumes all the obligations, a depositor who by his conduct leads the original owner to believe that he has assented to such novation will be estopped to deny such assent where the original owner in reliance on such acts takes no steps to protect himself under his contract with the new owner.—Gillette v. Ivory, 173 Mich. 444.

§ 3. Reinstatement after novation.

Original debt as consideration where original debtor is reinstated after novation, see Contracts ¶ 549.

¶ 25. An indebtedness that has been transferred to a third person may be transferred back to the original debtor, and so long as the parties regain their original standing it is unimportant whether they do so by an explicit second novation or by an actual and intelligent, though informal, abandonment of the first, and resumption of their former rights and duties without express terms.—Compton v. Blair, 27 Mich. 397.

§ 4. Actions and procedure and evidence.

General law of actions on contracts, see Contracts, X; and see also Assumpsit.
Occasion and propriety of common counts on debt, see Assumpsit § 24.

¶ 26. In an action by one brother against another to recover $400 which the defendant had promised the father to pay him, claimed to be a novation of the father's promise, testimony of similar promises to other children is immaterial and should be excluded.—Piehl v. Piehl, 138 Mich. 515.

¶ 27. What was said and done at the time of making a parol novation must determine whether there was a contract of novation, and testimony as to subsequent statements of a creditor that he looked to the new debtor and not to the original are incompetent.—Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422.

¶ 28. The contract of novation is to be determined by the written document when in writing, and by the declarations of the parties when resting in parol; and a creditor cannot create such a contract by his subsequent statements that he looked to the new debtor, and not to the original.—Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422.

¶ 29. The elements of novation must be established, not necessarily by direct evidence, but by evidence of such facts and circumstances as logically lead one to the conclusion that a new contract has been made.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 30. Evidence that a debtor offered to pay the debt to the assignee of the contract, provided the time of payment should be extended, does not make out a case of novation which makes it necessary to sue in the name of the assignee.—Tefft v. McNoah, 9 Mich. 201.

¶ 31. Testimony that three days after giving a note secured by mortgage on a vessel the mortgagor and the transferee of the vessel agreed that in consideration of the transfer certain claims, including the mortgage debt, should be paid by the transferee, and that a few days later the mortgagee in conversation with the mortgagor and her transferee agreed to accept the transferee as the debtor who was to pay, and that the mortgagee never thereafter until he

brought suit mentioned it as a debt of the mortgagor or looked to her for it, is sufficient to go to the jury on the question of a novation.—Mulgrew v. Cocharen, 96 Mich. 422.

¶ 32. Where there was no evidence of a mutual understanding that the original debtor who bought materials was to be discharged and the owner substituted as the person alone responsible for the debt, novation is not made out.—Fuller & Rice Lumber & Mfg. Co. v. Houseman, 117 Mich. 553.

¶ 33. There was sufficient proof of a novation to go to the jury where the original contract was made between a partner and his copartner by which the latter was bought out on an agreement that he was to be held harmless from debts and by which his wife, a creditor of the firm, was secured by a deed to her of certain realty with a contract back for those and other lands, and where the evidence was that, upon the continuing partner's later becoming embarrassed and unable to pay other loans and mortgages, he made to such other mortgagee through her agent a deed of certain lands reciting "said lands are sold subject to all contracts given by (the grantor) and to all incumbrances," the further evidence tending to show that in taking the deed in his own name the agent was acting for the principal.—Bullock v. Tompkins' Estate, 125 Mich. 17.

¶ 34. In an action by one brother against another to recover a sum of money which the father had requested paid to the plaintiff, a novation is not made out by testimony that the father left the defendant a sum of money with the request that he pay his brother $400 and testimony that the father owed the plaintiff $400, where the plaintiff did not know of or accept or consent to the alleged novation until after the father's death.—Piehl v. Piehl, 138 Mich. 515.

¶ 35. A new partnership is not liable for the debts of the old firm where there is no evidence in the record to show a promise and an acceptance of the new firm as debtor by the creditor.—Darling v. Rutherford, 125 Mich. 70.

¶ 36. In an action for breach of contract for the sale of stamp machines, evidence that the contract was assigned without consent but that payments were made thereunder, held not to establish a novation.—Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266.

¶ 37. Defendant sold its business to a third party, which assumed the obligations of a contract between plaintiff and defendant. Plaintiff accepted payments of money from said third party, but there was no evidence that the plaintiff ever agreed to substitute said third party for the defendant. Held, the court properly ruled that no novation took place and properly refused to submit such question to the jury.—Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

¶ 38. Where one engaged in the business of renting theatrical costumes to theaters and theatrical companies furnishes costumes to the manager of a theater for the use of a theatrical company under the same management, and is paid by checks of the theater company, and the theatrical company is subsequently taken over by a newly-incorporated company with the same manager as the former company, and costumes are used by the new company, and bills are paid by the manager of the theater as formerly, it is a question for the jury, in actions to recover for the rental of costumes and for the value of costumes not returned against the theater company as to whether the plaintiff impliedly extended credit to the new company and accepted it as his debtor.—Weingarden v. Folly Theater Co., 189 Mich. 220.

¶ 39. Where a new member of a firm has covenanted, as between himself and a retiring partner, to pay the latter's share of the partnership liabilities, and the new firm has made payments on a certain claim, and the retiring partner has assigned to the claimant all claim he might have against such new member on the agreement between them, these facts, in an action by the claimant against the new firm, would warrant a jury in finding that claimant had accepted the new firm as her debtor in place of the old and had consented to the substitution which the several partners had agreed on among themselves.—Osborn v. Osborn, 36 Mich. 48.

¶ 40. A mortgagor of chattels, having effected a sale of the mortgaged property for an amount exceeding his debt to the mortgagee, executed a bill of sale to the latter, upon an understanding among all three that the purchaser should pay the mortgagee for the property in instalments, and should become the absolute owner upon full payment of the purchase price. A creditor of the mortgagor brought an action against the mortgagee, contending that, by an arrangement made at the same time between plaintiff creditor, defendant, and the mortgagor, defendant assumed the mortgagor's debt to plaintiff, who thereupon released the mortgagor from further liability; and evidence was introduced in support of that contention. It appeared, however, that, by the terms of the arrangement, defendant was to apply the first five payments made by the purchaser upon the indebtedness to himself, after which the amounts paid were to be applied upon plaintiff's claim. After making two payments, the purchaser surrendered the property to defendant. Held, that the question whether the arrangement between the parties amounted to a novation was properly submitted to the jury.—Brown v. Neidhold, 108 Mich. 485.

NOVEL QUESTIONS to NUGATORY CONSTRUCTION.

Cross-References.

Novel Questions—
Consideration on review, see Appeal § 261 et seq.
Right to deny or award costs, see Costs §§ 29, 90.

Noxious Conditions—
As nuisances, see Nuisances, I.
Nude Pacts—
Rule of mutuality in contracts, see Contracts § 2.
Mutuality in assent, see Contracts, III.
Necessity of mutual consideration, see Contracts §§ 97, 105.
Nugatory Construction—
See Contracts § 147 et seq.; Deeds § 10; Statutes, V; Wills, VI, A.

NUISANCES.

TREATS of the general law relating to the tort or crime of nuisance and the remedies for the redress or prevention of nuisances. It excludes wrongs by mere negligence (see Negligence; Waters; Highways, XI) and cases which, though expressed in terms of nuisance, primarily turn on the relative rights of the public, individuals, and private owners along roads and streams (see Navigable Waters, II; Highways, X, XI; Waters). It also excludes the procedural law of actions on the case (see Trespass), injunction suits (see Injunctions), and prosecutions for crime (see Indictment), except in so far as such matters are peculiarly within the remedial law for nuisances.

Analysis.

I. Nature and elements, kinds, and liability.

§ 1. Definition and nature in general.
§ 2. Acts permitted or prohibited by public authority.
§ 3. Obstruction or interference with public ways or property
§ 4. Dangerous buildings.
§ 5. Disorderly houses and assemblages.
§ 6. Fences, overlooking windows, and other adjoining structures.
§ 7. Noises, odors, fumes, vibrations, and the like.
§ 8. Burial places, morgues, and undertaking establishments.
§ 9. Obstruction and pollution of waters and flooding.
§ 10. Percolating liquids or oils.
§ 11. Right to complain; estoppel and prescription.
§ 12. ——Public nuisance or breach of duty towards public.
§ 13. ——Nuisance antedating complainant's rights.
§ 14. Persons liable.
§ 15. Good faith or care of person maintaining nuisance.

II. Abatement by act of injured party or public.

§ 16. In general.
§ 17. Injunction against abatement.

III. Actions and suits for relief or for damages.

§ 18. In general; actions at law.
§ 19. ——Pleading, issues, and variance.
§ 20. ——Evidence, trial, and recovery.
§ 21. Injunction suits.
§ 22. ——Grounds and occasions.
§ 23. ——Persons entitled to invoke remedy and parties.
§ 24. ——Bills and answers.
§ 25. ——Hearing, decision, and proper relief.

IV. Crimes and prosecutions.

§ 26. In general.
§ 27. Indictment or information or penal action.
§ 28. Evidence.
§ 29. Questions of law and fact.
§ 30. Sentence and judgment.

I. NATURE AND ELEMENTS, KINDS, AND LIABILITY.

Power of legislature to legalize acts otherwise nuisances, see Constitutional Law § 100.
Construction of sanitary and police ordinances, see Municipal Corporations § 51.
Municipal power to declare and define nuisances, see Municipal Corporations § 80.
Power to regulate garbage collection and disposal, see Municipal Corporations § 81.
Power of municipality to declare building a nuisance when not in compliance with fire regulations, see Municipal Corporations ¶ 339.
Reasonableness of smoke ordinance, see Municipal Corporations ¶ 243.
Liability of tenant for nuisances on leased premises, see Landlord and Tenant § 178.
Actionable obstruction of easements, see Easements § 38.
Animals in highway as nuisance, see Animals ¶ 13.
Rights of adjoining owners, see generally Adjoining Owners.
Negligence in maintaining attractive nuisance, see Negligence § 8.
Effect of legalizing bridge on private claim for prior damages, see Bridges ¶ 78.
Powers of health officers to abate unwholesome conditions, see Health §§ 4, 9.
Racing of horses or other animals as nuisances, see Comp. L. 1915, § 15114.

§ 1. Definition and nature in general.

Good faith or care of person maintaining the nuisance, see post § 15.

¶ 1. To constitute a nuisance there must be the element of a wrongful, continuing, impending danger to the lives, limbs or health of the public, or to the legitimate property or personal rights of private persons peculiarly subject to the danger.—Kilts v. Board Sup'rs Kent Co., 162 Mich. 646.

¶ 2. A nuisance involves not only a defect, but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same.—Kilts v. Board Sup'rs Kent Co., 162 Mich. 646.

¶ 3. A private nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.—Whittemore v. Baxter Laundry Co., 181 Mich. 564.

¶ 4. Any unwarranted, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, constitutes a nuisance.—Whittemore v. Baxter Laundry Co., 181 Mich. 564.

¶ 5. A nuisance may result not only from the doing of a wrongful act injurious to others, but also by omitting to perform some duty.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 6. A public nuisance must be something that subjects the public to inconvenience or annoyance.—People v. Carpenter, 1 Mich. 273; Clark v. Lake St. Clair & New Up-River Ice Co., 24 Mich. 508; Attorney-General v. Evart Booming Co., 34 Mich. 462.

¶ 7. The question of nuisance or no nuisance is one depending on the particular facts.—People v. Carpenter, 1 Mich. 273; Crippen v. People, 8 Mich. 117; Clark v. Lake St. Clair & New Up-River Ice Co., 24 Mich. 508; The City of Erie v. Canfield, 27 Mich. 479.

¶ 8. However lawful a business may be in itself and however suitable the location, it cannot be carried on so as to directly damage the property of others, in the absence, at least, of anything conferring any prescriptive right; yet a resident of a trading or manufacturing neighborhood must submit to such ordinary personal annoyances and discomforts as are fairly incidental to legitimate trading and manufacturing carried on in a reasonable way.—Robinson v. Baugh, 31 Mich. 290.

§ 2. Acts permitted or prohibited by public authority.

Disorderly houses and assemblages, see post § 5.
Incorporation and authorization of river improvements as a legalization of pre-existing works done without permission, see Navigable Waters ¶ 97.

¶ 9. Nothing can be a nuisance which the sovereign authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all.—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

¶ 10. What the state authorizes it cannot prosecute as a nuisance.—Chope v. D. & H. Plank Road Co., 37 Mich. 195.

¶ 11. That which is permitted by competent authority is not a nuisance.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62.

¶ 12. A city is not liable for a nuisance brought within a street by widening it.—McCutcheon v. Village of Homer, 43 Mich. 483.

¶ 13. The toll-gate of a plank-road company, or a new gate erected in place of a former one removed by the company, is not made a public nuisance by the mere extension of city limits, so as to bring such gate within the city.—City of Detroit v. Detroit & E. Plank Road Co., 12 Mich. 333; Chope v. Detroit & H. Plank Road Co., 37 Mich. 195.

¶ 14. The legislature has complete control over the highways of the state, and what is done in and upon them by lawful authority cannot be considered a nuisance, and consequential injuries resulting from what is so done are damnum absque injuria.—City of Detroit v. Grand Trunk Ry. of Canada, 163 Mich. 229.

¶ 15. Permission from a municipal council to make a basement staircase opening in a sidewalk would of itself rebut any presumption that such an opening was a nuisance.—Everett v. City of Marquette, 53 Mich. 450.

¶ 16. An unauthorized casting of waters upon lands which have not been condemned, even though done by public authority, may create a nuisance which is remediable.—Township of Merritt v. Harp, 131 Mich. 174.

¶ 17. Municipal authorities will not be presumed to have granted authority to create a nuisance and the burden of proving such authority is upon one claiming thereunder.—Kaiser v. Detroit & N. W. Ry., 131 Mich. 506.

¶ 18. The fact that the erection of a certain kind of building is prohibited by ordinance does not make it a nuisance.—Village of St. Johns v. McFarlan, 33 Mich. 72.

¶ 19. The erection of a wooden building within the limits of a city or village is not per se a nuisance, even though prohibited by ordinance.—Village of St. Johns v. McFarlan, 33 Mich. 72.

Growth or spread of noxious vegetation or roots, see note, 1 N. C. C. A. 772-786.

§ 3. Obstruction or interference with public ways or property.

[Note. An obstruction in or an encroachment on a highway which interferes with the public uses is ordinarily a public nuisance and may be a private one as well. See Highways, XI; Navigable Waters, II. It has seemed better and more serviceable to treat in the topics just cited all cases of tortious interference with highways, whether or not they amount to technical nuisances, and to treat in this topic the general law of nuisances and the remedies appropriate to them, which do not depend on and are not peculiar to highways. For like reasons unlawful or tortious interference with or misuse of the flow of waters not navigable is treated in Waters, II, IV.]

Nuisance created by change in street by city, see ante ¶ 12.

Staircase opening in sidewalk as nuisance when permitted by city, see ante ¶ 15.

Abatement by act of injured party, see post § 16.

Stairways erected on street, see also post ¶ 57.

Persons entitled to have nuisance abated, see post § 23.

Injunction to remove passageway over alley, see post ¶ 107.

Jury questions as to whether the obstruction constitutes a nuisance, see post § 25.

Jury questions as to reasonableness of time to remove obstructions, see post ¶ 94.

Criminal prosecutions for obstructing public ways, see post § 26.

Animals in highway as nuisance, see also Animals ¶ 13.

Actionable obstruction of easements, see Easements § 38.

Easements for sewerage and disposal of sewage, see Easements.

Right of drainage in general, see Drains, I; Waters, II.

Right of abutters to close up blind way, see also Highways § 162.

Right of abutter to use soil and products of highway, see Highways § 163.

Coasting in street as nuisance, see Highways § 177.

¶ 20. A platform built in a public alley at the rear of a store for convenience in transferring goods is not necessarily a nuisance.—Bagley v. People, 43 Mich. 355.

¶ 21. A wooden awning over a sidewalk in front of a store is not per se a public nuisance.—Hawkins v. Sanders, 45 Mich. 491.

¶ 22. A purpresture—whereby is meant an enclosure by a private person of a part of that which belongs to the public and which ought to be open and free to the enjoyment of the public—is not necessarily a public nuisance, for it may exist without inconveniencing the public.—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

§ 4. Dangerous buildings.

See also ante ¶ 19; post ¶ 102.

Power of municipality to declare building a nuisance when not in compliance with fire regulations, see Municipal Corporations ¶ 339.

¶ 23. The erection of a wooden building within municipal fire-limits is not of itself a nuisance.—Village of St. Johns v. McFarlan, 33 Mich. 72.

¶ 24. A building so defectively constructed as to be dangerous is a nuisance, and the doctrine of independent contractors does not apply.—Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405.

§ 5. Disorderly houses and assemblages.

Criminal prosecutions for maintenance of house of ill-fame, see post § 26.

Houses of prostitution as nuisances, see Comp. L. 1915, § 7781 et seq.

¶ 25. A saloon and dance hall conducted in an unlawful, indecent, and obscene manner, is a private nuisance to persons owning property in proximity thereto.—Detroit Realty Co. v. Barnett, 156 Mich. 385.

§ 6. Fences, overlooking windows, and other adjoining structures.

Injunction to abate projecting cornice, see post ¶¶ 99, 103.

Injunction to abate fence as nuisance, see also post ¶ 104.

Injunction to prevent construction of garage, see post ¶ 108.

Rights of adjoining owners generally, see Adjoining Owners.

¶ 26. A spite fence to shut out a neighbor's light is a nuisance.—Burke v. Smith, 69 Mich. 380, affirming decision below by equal division.

¶ 27. A fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's windows is a nuisance and will be abated by injunction.—Flaherty v. Moran, 81 Mich. 52.

¶ 28. An unsightly fence more than six feet high, maliciously erected along the boundary of premises occupied for residence purposes in the residence part of a city, may be restrained as a nuisance.—Kirkwood v. Finegan, 95 Mich. 543.

¶ 29. Whether a fence erected maliciously and with the sole purpose of shutting out the light and air from a neighbor's windows can be enjoined as a nuisance, quære; the court being equally divided.—Burke v. Smith, 69 Mich. 380.

¶ 30. A board fence eleven feet high, which shuts out the light from the rooms of an adjoining proprietor, prevents a circulation of air, and renders his house damp and unhealthy, and which serves no useful purpose, is a nuisance.—Peek v. Roe, 110 Mich. 52.

¶ 31. Bay windows extending two or three feet into the street and covering the whole lower story of a building are a nuisance which specially affect and injure the occupant of an adjoining building and give him the right to maintain a suit to have them abated.—Forbes v. City of Detroit, 139 Mich. 280.

¶ 32. A coal and wood house, erected so near the premises of another as to darken his windows, does not constitute a nuisance, although it be so located from malicious motives.—Kuzniak v. Kozminski, 107 Mich. 444.

¶ 33. The erection and use by defendant of a high platform on his own premises overlooking another's base ball ground to which an admission fee is charged will not be restrained as a nuisance.—Detroit Base Ball Club v. Deppert, 61 Mich. 63.

¶ 34. Courts cannot limit the distance up or down to which a man may enjoy his property, and if one builds higher than his neighbor he subjects himself to no liability unless he interferes with the rights of others.—Detroit Base Ball Club v. Deppert, 61 Mich. 63.

§ 7. Noises, odors, fumes, vibrations, and the like.

See also post ¶¶ 66, 90.

Prosecutions for smoke nuisance created by ferryboat, see post ¶ 138.

Reasonableness of smoke ordinance, see Municipal Corporations ¶ 243.

Garbage as nuisance, see also Municipal Corporations ¶¶ 344, 345.

¶ 35. The business of forging was conducted on a large scale in cheap wooden buildings in the neighborhood of costly residences. The residents were injured in their persons and property by the smoke and soot from the forge; their houses were jarred by the concussion of the heavy steam-hammers, which disturbed the peace and affected the health of the neighborhood, and in some instances damaged the foundations of the houses. Held to be a clear case for relief by injunction against a nuisance.—Robinson v. Baugh, 31 Mich. 290.

¶ 36. The operation day and night of a crane used in loading and unloading cars at a railroad terminal, which is made necessary by the demand of the public upon the facilities of the railroad, does not constitute a public nuisance.—People v. Wabash Ry. Co., 197 Mich. 404.

¶ 37. Noise made by hogs kept in confinement for purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as justifies equity in destroying defendant's business to abate such noise.—Ballentine v. Webb, 84 Mich. 38.

¶ 38. It is an irreparable injury to create intolerable smells near the homestead of a neighbor, or undermine his house by excavations, or cut him off from the street by buildings or ditches, or otherwise destroy the comfortable, peaceful and quiet occupation of his homestead; also to break up his business, destroy its good-will, and inflict damages that cannot be measured because the elements of reasonable certainty are wanting in computing them. A nuisance may threaten

irreparable injury even to unoccupied land where it is devoted to some special use or where the person causing the nuisance is irresponsible.—Edwards v. Allouez Min. Co., 38 Mich. 46.

¶ 39. A rendering works for the reduction of offal and meat refuse with the feeding of hogs carried on in connection therewith, so conducted that a large part of the offal is partly decomposed when received and then rendered in open kettles and a stench created in a growing part of a city, is a nuisance subject to injunction.—City of Grand Rapids v. Weiden, 97 Mich. 82.

¶ 40. The operation of a machine and blacksmith shop devoted to boat repairing, situated in a neighborhood otherwise devoted to costly residences, will be enjoined where such shop was erected against previous caution and offers of large sums to abandon the project, and after the character of the locality as a residence district had been established, and where smoke, soot, and disagreeable odors therefrom, and from the boats coming thereto for repairs, penetrate the adjacent houses, rendering them uncomfortable and unwholesome.—McMorran v. Fitzgerald, 106 Mich. 649.

¶ 41. If an asphalt plant cannot be operated without injuring the health, etc., of nearby inhabitants through the escape of fumes, gases and dust, it should be enjoined in toto.—Northwood v. Barber Asphalt Paving Co., 126 Mich. 284.

¶ 42. The erection and maintenance of a barn in which are stabled a large number of horses on premises adjacent to those used for residence purposes does not constitute a permanent nuisance.—Theisen v. Pittmans & Dean Co., 195 Mich. 500.

Injury to plants and trees by fumes or gases, see note, 1 N. C. C. A. 697-703.

§ 8. Burial places, morgues, and undertaking establishments.

General law as to cemeteries, see Cemeteries.

¶ 43. The location of a burying ground by a township board of health in the neighborhood of complainant's well held not to be a private nuisance.—Upjohn v. Richland Tp. Board of Health, 46 Mich. 542.

¶ 44. The maintenance of an undertaking establishment and morgue in a strictly residential section of a large city, while not a nuisance per se, may be enjoined where it will cause depression to the normal person, lowering his vitality, rendering him more susceptible to disease, and deprive his home of the comfort, repose and enjoyment to which he is entitled, and he will sustain substantial financial loss, due to the depreciation of the value of his property, and there is a strong probability that he will be disturbed by noxious odors in the summer months when the windows are open.—Saier v. Joy, 198 Mich. 295.

§ 9. Obstruction and pollution of waters and flooding.

See also post ¶ 106.

Notice to remove dam as condition precedent, see post § 18.

Decree compelling lowering of dam, see post ¶ 126.

Criminal prosecutions for maintenance of dams, see post § 26.

Sufficiency of information to charge that dam creates a nuisance, see post ¶ 140.

Unwarranted interference with or disturbance of water rights, see Waters.

Obstructions and interferences with use of navigable waters, see Navigable Waters § 10.

Anchoring house boat and contaminating waters which flow down to park and bathing place, see Navigable Waters ¶ 38.

Artesian wells as nuisances, see Comp. L. 1915, § 7374.

Easements for sewerage and disposal of sewage, see Easements.

Right of drainage in general, see Drains, I; Waters, II.

§ 10. Percolating liquids or oils.

¶ 45. The percolation of deleterious matter, from the premises of the party who suffers it, through the soil, upon the lands of an adjacent owner, to the injury of the latter, is an actionable nuisance.—Brady v. Detroit Steel & Spring Co., 102 Mich. 277.

¶ 46. In an action for damage done by oil kept upon defendant's land 500 feet from plaintiff's bakery, which oil leaked through the soil into a public sewer, and injured plaintiff's products by reason of gases that escaped through a manhole close to the bakery, and through the sewer connections into and upon plaintiff's premises, it was held, that in view of a city ordinance prohibiting the deposit of any refuse, drippings, or nauseous liquid or other substance from distributing pipes or gas conductors into any sewer, it could not be said that the sewer was constructed by the city to carry away the oil, or that such use was invited or permitted; that the nuisance the ordinance aimed to prevent did not depend upon the intent of the party causing it, and that the fact that the deposit of the oil was negligent or even accidental, did not render lawful such use of the sewer.—Brady v. Detroit Steel & Spring Co., 102 Mich. 277.

Pollution of percolating or well waters by waste matter stored or cast on neighboring premises, see note, 2 N. C. C. A. 646-651.

§ 11. Right to complain; estoppel and prescription.

Persons liable for nuisance, see post § 14.

Persons entitled to maintain injunction to abate nuisance, see post § 23.

Right of injured party or public to abate nuisance without judicial action, see post II.
General law of estoppel, see Estoppel.
Recognition of right as estoppel to complain of misuse of right, see also Estoppel ¶ 225.
Petition for location of bridge as making estoppel to claim damages consequent on location, see Estoppel ¶ 96.

¶ 47. Where a nuisance is caused by the mode of conducting a business, it is no defense to a bill filed to enjoin it that some of the complainants have establishments in the same vicinity to which similar objections lie. —Robinson v. Baugh, 31 Mich. 290.

¶ 48. One cannot sue another for damages from a nuisance which both have united in committing.—McGinnis v. Carrier, 39 Mich. 111.

¶ 49. One engaged in running logs sued a company, whose business was to stop the logs by a boom until assorted, for obstructing navigation. Held, that he could not maintain his action in which he himself might properly be made a codefendant for causing the obstruction.—McGinnis v. Carrier, 39 Mich. 111.

¶ 50. Complainants in a bill to enjoin a nuisance caused by one's mode of carrying on the forging business were held not estopped by acquiescence where the grievance complained of existed only about two years, and that which gave greatest offense only about one year, before the bill was filed, and complaints of the injurious character of the business were made to the common council some months previously, and to the defendant himself at an early day.—Robinson v. Baugh, 31 Mich. 290.

¶ 51. Parties seeking to have nuisance enjoined are not estopped as by acquiescence when the grievance complained of has only been in existence two years, and that which gave greatest offense only one year, during which time complaints have been made.—Robinson v. Baugh, 31 Mich. 290.

¶ 52. Action taken by a board of supervisors permitting the erection of a dam across a navigable stream is no notice of the petitioners' intention to avail themselves of it for the purpose of flooding another's land, so as to impute acquiescence in such a nuisance.—Stone v. Roscommon Lumber Co., 59 Mich. 24.

¶ 53. Where one raises no objection to the maintenance of telegraph and telephone poles and wires upon his land, but erects a building by the side of them, and was deriving some benefit from them by allowing his tenant to use one of the wires for business purposes, and so tacitly assents to the maintenance of the nuisance for years without complaint, he cannot recover from the company owning the wires for loss by fire that might have been prevented had not the wires hindered the firemen in their work of extinguishing the flames.—Chaffee v. Telephone & Telegraph Construction Co., 77 Mich. 625.

¶ 54. The fact that a lot owner consented to the building of a boat house at the foot of a street will not estop him from abating it as a nuisance when he later finds it necessary to use his lot but impossible to reach it because of the structure.—People v. Severance, 125 Mich. 556.

¶ 55. A private nuisance may be legalized by prescription.—Felton v. Wedthoff, 185 Mich. 72.

§ 12. ——Public nuisance or breach of duty towards public.

Criminal prosecutions for nuisances, see post IV.

¶ 56. Polluting the waters of an ancient stream, thus rendering them unfit to drink, is not a public nuisance unless the stream is one where the public has rights.—Messersmidt v. People, 46 Mich. 437.

¶ 57. Inasmuch as a permanent stairway erected on the public street and used as an entrance to a private building is a nuisance, an adjoining landowner may bring a bill to restrain the erection of such stairway, especially where its erection would obstruct the view of such owner.—McCormick v. Weaver, 144 Mich. 6.

¶ 58. Action by a private person to abate a public nuisance cannot be maintained unless such nuisance causes special damage to him separate and apart from that done to the public.—McKee v. City of Grand Rapids, 137 Mich. 200.

¶ 59. A riparian owner in front of whose premises a water-logged vessel has been allowed to sink, suffers such peculiar damage as entitles him to maintain a bill to abate the nuisance, since his ownership for many purposes extends to and includes the place of the wreck.—Board of Water Com'rs of Detroit v. City of Detroit, 117 Mich. 458.

¶ 60. Where a vessel possessed by the city of Detroit under a lease to the board of health is allowed to become water-logged and to sink in the river in front of the water board's premises, such latter board has the same right of redress for the nuisance that an individual would have.—Board of Water Com'rs of Detroit v. City of Detroit, 117 Mich. 458.

¶ 61. A private citizen cannot maintain an action for abatement of a nuisance caused by interrupting the navigation of a navigable stream, unless he suffers damage peculiar to himself and different from that suffered by the public generally.—Lepire v. Klenk, 169 Mich. 243.

¶ 62. An individual can sue for the special injury resulting to himself from defendant's neglect to perform a public duty; so held of an action against a railway company for the personal damage caused by leaving its cars standing across a highway for a longer time than is allowed by statute (How. St., § 3323, subd. 5).—Patterson v. Detroit, L. & N. R. Co., 56 Mich. 172.

¶ 63. Remedy by action at law or in equity for filling the channel of a river and obstructing the flow is barred by the statute of limitations and also by laches where 31 years have passed since the act occurred.—McKee v. City of Grand Rapids, 137 Mich. 200.

§ 13. ——Nuisance antedating complainant's rights.

See also post ¶ 100.

¶ 64. One who has taken up his residence in a portion of the city mainly appropriated to business purposes cannot complain of the establishment, or obtain an injunction to restrain the carrying on of any new business near him, provided it is not in itself objectionable as compared with those already established, and is carried on in a proper manner.—Gilbert v. Showerman, 23 Mich. 448.

¶ 65. Where after the establishment of a manufacturing business the adjacent vacant land is utilized by the owners for residence purposes to whom its continuance becomes a nuisance, the business must give way to the rights of the public, and those prosecuting it must devise some means to avoid the nuisance or must remove or discontinue such business.—People v. Detroit White Lead Works, 82 Mich. 471.

¶ 66. The continuance in the midst of a populous community of a business which constantly produces odors, smoke and soot of such a noxious character, and to such an extent as to produce headache, nausea, vomiting and other pains and aches injurious to health, and to taint the food of the inhabitants, is a nuisance.—People v. Detroit White Lead Works, 82 Mich. 471.

¶ 67. Where people establish their homes in the vicinity of an asylum already established which constitutes a nuisance they are not in a position to appeal to a court of equity to demand that the institution be abandoned.—Barth v. Christian Psychopathic Hospital Ass'n, 196 Mich. 642.

§ 14. Persons liable.

Responsibility of municipality for acts of officers, see Municipal Corporations § 189.

Liability of municipality for nuisances created by sewers and drains, see also Municipal Corporations § 131.

Liability of city for nuisances maintained by abutting owners, see Highways § 255.

Liability of abutting owners for nuisances rendering street unsafe, see Highways § 256 et seq.

Liability of tenant for nuisance on leased premises, see Landlord and Tenant § 178.

Persons liable for artesian well nuisance, see Comp. L. 1915, § 7374.

¶ 68. Any one who upholds and sustains a private nuisance, to another's injury, is answerable for the injury done.—Caldwell v. Gale, 11 Mich. 77.

¶ 69. One is not liable for an injury occasioned by a nuisance on premises in his possession, unless his possession gives him the legal control of the premises.—Fisher v. Thirkell, 21 Mich. 1.

¶ 70. A vessel which, after being partly burned, is allowed to become water-logged and to sink in the Detroit river, is a nuisance ascribable to the possessor.—Board of Water Com'rs of Detroit v. City of Detroit, 117 Mich. 458.

¶ 71. Where a vessel leased by the board of health of Detroit and used as a hospital, is partly burned, and, while still in the city's actual possession, is allowed to become water-logged and to sink in front of complainant's premises, the city and not the owner is responsible for the nuisance.—Board of Water Com'rs of Detroit v. City of Detroit, 117 Mich. 458.

¶ 72. Evidence that both of the defendants to a bill to restrain the maintenance of a fence at such a height as to constitute a nuisance own an interest in the premises upon which the fence is maintained, that one of them lives thereon, and that the other, in reply to a communication requesting a reduction in the height of the fence, stated, "Whenever you get ready to move on our works we shall be ready to receive you," is sufficient to show that both are responsible for its maintenance.—Peek v. Roe, 110 Mich. 52.

§ 15. Good faith or care of person maintaining nuisance.

¶ 73. In nuisance the good faith of defendant is immaterial where only actual damages are sought.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 74. Exercise of reasonable care in creating or maintaining a nuisance is not an absolute defense to an action for an injury occasioned by such nuisance.—Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405.

¶ 75. The storage in steel tanks sunk beneath the surface of the ground, of upwards of 20,000 gallons of gasoline in a residential district, within a few feet of the complainant's home, constitutes a private nuisance, notwithstanding every known precaution to safeguard it has been adopted.—

Whittemore v. Baxter Laundry Co., 181 Mich. 564.

II. ABATEMENT BY ACT OF INJURED PARTY OR PUBLIC.

§ 16. In general.

Disability of city to determine as a fact that sidewalk opening is a nuisance, see also Municipal Corporations ¶ 404.

Powers of health officers to abate unwholesome conditions, see Health §§ 4, 9.

Right to protect oneself from a nuisance occasioned by dogs, see Animals §§ 19, 20.

Provisions for destruction of noxious weeds, see Comp. L. 1915, § 4598.

Provisions as to abatement of nuisances by summer resort associations, see Comp. L. 1915, § 10069.

Right to kill dogs used in hunting deer, see Comp. L. 1915, § 7494.

¶ 76. Any person injured by a nuisance to the extent that he may obtain an action at law therefor, may remove so much of the nuisance as is necessary to secure to himself immunity from damage therefrom.—People v. Severance, 125 Mich. 556.

¶ 77. The power to abate a nuisance is limited to the removal of that in which the nuisance consists.—Welch v. Stowell, 2 D. 332.

¶ 78. Neither individuals nor the common council of a city have a right to abate the nuisance occasioned by the occupation of a building as a house of ill-fame, by demolishing the building. The nuisance is not the building itself but the use to which it is put. —Welch v. Stowell, 2 D. 332.

¶ 79. Where the charter only allows the city council to prevent future erections and locations of such establishments as slaughterhouses, the council has no right to put an end to any existing business of the kind, so long as it is not a nuisance in fact.—Wreford v. People, 14 Mich. 41.

¶ 80. A city council authorized to compel the owners and occupants of slaughterhouses, etc., to cleanse and abate whenever necessary for the health, etc., of the inhabitants of the city, can exercise such power only in abating legal nuisances, and cannot interfere with what is not a nuisance in fact. —Wreford v. People, 14 Mich. 41.

¶ 81. A public nuisance cannot be lawfully abated by a private person not directly injured or individually annoyed by it, and if in a public highway he can only interfere with it as far as is necessary to exercise his right of passing along the highway, and then without wanton violence.—Clark v. Lake St. Clair & Up-River Ice Co., 24 Mich. 508.

¶ 82. Where the alleged nuisance arises from the use of things innocent in themselves, the case does not call for their destruction in order to effect an abatement.—Messersmidt v. People, 46 Mich. 437.

¶ 83. An unauthorized obstruction across a public street may be abated by any citizen desiring to travel along the street if he can do so without a breach of the peace.—Pontiac & L. Plank-Road Co. v. Hilton, 69 Mich. 115.

¶ 84. A tree's branches overhanging a railroad company's right of way and constituting a nuisance may be removed by the company without notice where the owner of the tree knows that the company claims the branches are a nuisance by reason of its request and an offer to pay him for permitting them to trim to the line, which he refuses.—Hickey v. Michigan Cent. R. Co., 96 Mich. 498.

¶ 85. Notice that trees overhanging the line of the right of way of a railroad are a nuisance and that the railroad company desires that it be abated, is sufficiently shown by its offer to pay for the privilege of trimming to the line, and no further notice is required before it may abate the nuisance itself.—Hickey v. Michigan Cent. R. Co., 96 Mich. 498.

§ 17. Injunction against abatement.

Injunctions to abate nuisance, see post § 21.

General law of injunctions, see Injunctions.

¶ 86. Injunction lies to restrain a city from destroying a structure as a nuisance before it has been condemned as illegal.—Everett v. City of Marquette, 53 Mich. 450.

III. ACTIONS AND SUITS FOR RELIEF OR FOR DAMAGES.

§ 18. In general; actions at law.

Prescription and estoppel to complain of nuisance, see ante § 11.

Persons liable for nuisance, see ante § 14.

Abatement of nuisance by act of the injured party or the public, see ante II.

Criminal prosecutions, see post IV.

Ejectment as remedy for removal of street obstructions, see also Highways § 186.

Penal actions for highway obstructions, see Highways § 193.

Actionable obstructions of easements, see Easements § 38.

Parties to actions for injury to easements, see Easements § 41.

Measure of damages for obstruction of ways or easements, see Damages § 105.

Measure of damages for flooding or interfering with waters, see Damages § 106.

Avoidable damages, see Damages § 22.

Right of action for nuisance for damages presumptively included in condemnation proceedings, see Eminent Domain ¶ 501.

¶ 87. The question discussed whether, where one erects a dam on his own land,

which causes the land of another to be flowed, and then conveys the land on which the dam is situated, a suit can be brought against his grantee for the nuisance before he has been served with notice of it, and requested to remove it.—Caldwell v. Gale, 11 Mich. 77.

¶ 88. If notice to remove a dam be necessary, and has once been given by the owner of the land flowed, it will inure for the benefit of his grantee, or of any one claiming title through or under him.—Caldwell v. Gale, 11 Mich. 77.

§ 19. ——Pleading, issues, and variance.

Bills in equity for injunction against nuisance, see post § 24.

General law as to pleading, issues and variance, see Pleading.

Measure and elements of damages, and pleading, evidence and instructions on damages, see Damages.

Pleading the damages from nuisance, see Damages § 250.

¶ 89. In an action by a tenant against his landlord, a declaration which alleges that before leasing the premises the landlord constructed an open well, which subsequently he caused to be filled with rubbish and refuse matter, and that said premises extended over such well and concealed the same, and from such well offensive and poisonous stenches emanated and permeated all such premises, thereby becoming and continuing to be a nuisance upon the land to plaintiff's injury, the existence and cause of which were unknown to plaintiff but were known to and concealed from him by defendant, discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the premises amounting to nuisances known to defendant and concealed from plaintiff.—Kern v. Myll, 80 Mich. 525.

¶ 90. The declaration, in an action by the owner of a marble shop for injury to certain monuments standing in his yard, alleged that the injury was caused by the gathering upon the smokestack, which defendant had caused to be erected on its premises for use in connection with an electric lighting apparatus, and the iron guys which supported said smokestack, of large quantities of iron rust, or carbonate of iron, which became naturally mixed with water and ice, smoke, soot, creosote, impure water, acids, and other ingredients or substances naturally collecting on said smokestack and guys, which mixture was naturally by the wind blown upon the monuments. Held, that the declaration apprised defendant that the injury was suffered by the blowing of rust, soot, and other formations upon, or products of, defendant's chimney, in a moistened condition, upon the monuments, and that plaintiff was not required to ascertain at his peril just what the constituent elements of the mixture were.—Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87.

§ 20. ——Evidence, trial, and recovery.

Burden of proving authority to create a nuisance, see also ante ¶ 17.

General law as to evidence, see Evidence.

Judgment for abatement in actions for private nuisance as addition to judgment for damages and costs, and warrant for abatement on such judgment, stay of such warrant, and collection of cost of abatement, see Jud. Act, chap. XX, §§ 43-46; Comp. L. 1915, §§ 12779-12782.

Parties entitled to or liable for costs in law action, see Costs § 15.

¶ 91. In a suit by the owner of a marble shop to recover damages for injury to monuments, which he had left out of doors, by the blowing thereon of soot and other substances from defendant's premises, the admission of evidence of a custom among marble dealers to leave their work thus exposed is nonprejudicial error, as plaintiff had the legal right to leave his monuments out of doors if he chose.—Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87.

¶ 92. The proofs failed to show any such construction or continuance of a nuisance, or knowledge and concealment of a condition amounting to a nuisance, as was alleged in the declaration; where, after an old well had been filled up, the premises were continuously occupied for ten years without complaints being made by the tenants, it also appearing that when water was found in the well the landlord refilled it.—Kern v. Myll, 94 Mich. 477.

¶ 93. In an action against several defendants for damages for flooding plaintiff's land by the construction of drains where a defendant testifies that he put culverts in the highway and constructed drains which were connected with the drains alleged to have caused the injury, it cannot be said, as a matter of law, that there is no evidence to connect him with the injury.—Breen v. Hyde, 130 Mich. 1.

¶ 94. It is for the court to say what is a reasonable time for the removal of obstructions placed in the streets before they become nuisances from the beginning.—Bowen v. Detroit City R. Co., 54 Mich. 496.

¶ 95. In an action by an individual for a public nuisance, recovery can be had only for such damage as was peculiar to plaintiff, and as was the natural and proximate consequence of the nuisance.—Powers v. Irish, 23 Mich. 429.

§ 21. Injunction suits.

Injunctions against abatement of nuisance, see ante § 17.

Discretion in granting injunction, see post § 25.

General law as to injunctions, see Injunctions.
Compelling abatement as a "deprivation" of property, see Constitutional Law ¶ 603.
What delay in suing is excused by pending litigation, see Equity § 51.
Disinclination of chancery to entertain bill for removal of highway obstruction, see Highways § 185.
Acquittal in prosecution for maintaining a nuisance as res adjudicata in civil proceeding to abate the nuisance, see Former Adjudication ¶ 66.
Statutory jurisdiction of chancery, see Jud. Act, chap. VI, § 4; Comp. L. 1915, § 12302.

¶ 96. The statutory provision (R. S. 1846, p. 509, § 7965) as to the jurisdiction of chancery in cases of nuisance was not intended to extend or enlarge that jurisdiction.—Norris v. Hill, 1 Mich. 202.

¶ 97. Nuisances may be stayed or prevented by injunction, and the complainant will not be first required to establish his right at law, unless doubtful and in dispute.—White v. Forbes, W. 112.

¶ 98. In cases of nuisance, Comp. L. 1871, § 6377, How. St. § 7965, confers jurisdiction in equity where there is not a plain, adequate and complete remedy at law, and gives power to grant injunctions to stay or prevent the nuisance, but it is not essential that a trial at law should precede the filing of the injunction bill. If the court of equity deems a finding by jury needful, it may, in its discretion, direct one, but it is not bound to do so.—Robinson v. Baugh, 31 Mich. 290.

¶ 99. A bill in equity will lie against complainant's neighbor for building and maintaining a cornice that projects over complainant's boundary line to the permanent injury and depreciation of his property. And this is so though a remedy be given by statute (How. St., ch. 273), for the abatement of a private nuisance where the party complaining thereof has recovered therefor in an action on the case.—Wilmarth v. Woodcock, 58 Mich. 482.

¶ 100. A dam had existed for sixty years on property of defendant, who also owned the land covered by the mill-pond. There was no showing how long the complainants had held the land claimed to be affected, except the allegation that they had held the same for several years prior to the filing of the bill. Held, that as complainants seeking to enjoin it as a nuisance, had probably bought when the dam was in existence, and knowing its features and influences, they were not entitled to the same equitable considerations that would prevail had defendant created the alleged nuisance after they had acquired and settled upon their respective premises, and that they should seek their remedy at law where defendant could have a jury trial.—Ronayne v. Loranger, 66 Mich. 373.

¶ 101. Parties complaining of a nuisance are not entitled to a decree which would interfere with defendant's business on the ground that the existence of such business depreciates the value of their property; as to such injury, if any, they have an adequate remedy at law.—Ballentine v. Webb, 84 Mich. 38.

§ 22. ——Grounds and occasions.

Particular matters constituting nuisances, see ante I.
Injunction against city to remove electric light plant built in street after bill filed to prevent it, see also Municipal Corporations ¶ 573.
Relief from flooding by increased drain, see Drains § 111.
Provisions as to abating houses of prostitution, see Comp. L. 1915, § 7782 et seq.

¶ 102. The increased risk of fire and consequent danger to adjoining property from the erection of a wooden building in a thickly settled portion of a city or village does not warrant the enjoining of such erection.—Village of St. Johns v. McFarlan, 33 Mich. 72.

¶ 103. A bill in equity was filed to compel the removal of an unsightly cornice which defendant had built upon his house so as to project into plaintiff's lot. At the time defendant bought his lot plaintiff's fence was on the line asserted by the bill, and it was pointed out to defendant as the line claimed to be the true boundary, but claiming another boundary he disregarded it and built without litigating at law. Held, that the bill would lie.—Wilmarth v. Woodcock, 66 Mich. 331.

¶ 104. Injunction will issue to abate as a nuisance a fence 10 feet high erected on defendant's side of a division line, where it appears that the adjoining property owner had commenced the erection of a double house having one wall about four feet from such division line, and having its front wall much nearer the street than defendant's house; and where defendant's wife thereupon threatened the wife of complainant that "we will build a fence * * * twelve feet high," and where she superintended the building of such fence, her husband providing and paying for the material; even though he denied being a party to such proceeding.—Flaherty v. Moran, 81 Mich. 52.

¶ 105. A bill against a city to abate a nuisance will not be granted where the only relief which could be granted is impracticable and of doubtful propriety.—McKee v. City of Grand Rapids, 137 Mich. 200.

¶ 106. Equity will not compel a city to divert water from one side of a river to the

injury of the inhabitants on that side, to the other to abate a nuisance to the health of the inhabitants on the latter, where there is another sure and practicable way which will cause no damage to either.—McKee v. City of Grand Rapids, 137 Mich. 200.

¶ 107. Equity will not enjoin the construction of a passageway over an alley and compel the removal of one already erected at the suit of an adjoining owner on the ground that the structure tends to retain in the alley the odors expelled from the kitchen in the defendant's hotel where the odors may be abated and the destruction of the passageway would result in irreparable damage to the defendant's business.—Washington Lodge, No. 54, I. O. O. F. v. Frelinghuysen, 138 Mich. 350.

¶ 108. An injunction will not issue at the instance of adjoining property owners to restrain the erection of a building, on the ground that defendants intend to use the building as a garage, and that the same will constitute a nuisance, where the property in question is subject to no restrictions as to its use, and it does not appear that the erection of the building itself will violate any of complainant's rights.—Siegel v. Wayne Circuit Judge, 155 Mich. 459.

¶ 109. Equity has jurisdiction to abate a saloon if it is a private nuisance, although it is also a breach of the criminal law.—Detroit Realty Co. v. Barnett, 156 Mich. 385.

¶ 110. In a proceeding to abate a nuisance by requiring the City of Detroit to enlarge a sewer into which the Village of Highland Park is entitled to cast sewage, the city cannot object that it was not shown that the adjoining property owners of an intervening township through which the connecting sewer passed, had not consented to its construction.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 111. The conducting of a saloon within four hundred feet from the entrance of a church, in violation of § 31, Act No. 291, Pub. Acts 1909, § 5091, How. St., 2nd Ed., will be enjoined, and the surrender and cancellation of the license required.—George v. Travis, 185 Mich. 597.

¶ 112. The intended establishment of an insane asylum in a residential section of a city held to be destructive of the comfort, the well-being and the property rights of the residents in such section, entitling them to file a suit in equity to restrain such establishment as an intended nuisance.—Barth v. Christian Psychopathic Hospital Ass'n, 196 Mich. 642.

§ 23. ——Persons entitled to invoke remedy and parties.

Persons entitled to complain of nuisance, see also ante §§ 11, 12.

Right of highway commissioner as person specially interested, see also Highways ¶ 654.

City or lot owners as proper plaintiffs to prevent obstruction of streets after plat is withdrawn, see Highways ¶ 657.

¶ 113. Ownership of a homestead locally affected by a nuisance injurious to health is such a special interest as will give one a right to complain of the nuisance as a special grievance to him, and to obtain equitable interference.—Treat v. Bates, 27 Mich. 390.

¶ 114. A wooden building encroached six inches on a private alley for more than twenty years. The owner attempted to veneer it with brick, whereby it would encroach three inches more. It did not appear that the encroachment would materially injure the right of way. Held, that the adjacent owner was not entitled to remedy by injunction.—Hall v. Rood, 40 Mich. 46.

¶ 115. An information in equity at the attorney-general's instance must necessarily be based upon a public grievance; a careless or reckless exercise by one party of a public and general right, to the prejudice of another desiring to make use of the same right, and not affecting the general public, is a private injury and not a public wrong, and will not sustain an information in behalf of the state.—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

¶ 116. The attorney general has no authority, unless in extraordinary cases, to proceed at his own instance, as relator for the state, to sue a private person by information in chancery to abate a mill-dam on the ground of its being hurtful to health; such a case should be prosecuted, if at all, by the public, and submitted to a jury.—Attorney General v. Hane, 50 Mich. 447.

¶ 117. Where a city emptying its sewage into a river creates a nuisance to the public, or riparian proprietors below the city, the continuance or creation of that nuisance may be restrained by injunction and the attorney general is a proper complainant.—Attorney General ex rel. Township of Wyoming v. City of Grand Rapids, 175 Mich. 503.

¶ 118. Parties owning lands in severalty may join in a bill to restrain defendant from flooding such land by an excessive dam.—Turner v. Hart, 71 Mich. 128.

§ 24. ——Bills and answers.

Averments in bill as to amount in controversy, see Equity § 84.

Allegation of amount of damages as rendering bill one for legal relief, see also Equity ¶ 319.

Multifariousness of bill for distinct causes, see Equity § 75.

¶ 119. The allegation in a bill to abate the private nuisance of an encroachment on complainant's premises, that defendant has claimed ownership of a strip thereof, is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction, if the bill states with certainty the actual boundary and complainant's ownership on one side.—Wilmarth v. Woodcock, 58 Mich. 482.

§ 25. ——Hearing, decision, and proper relief.

Discretion of court as to calling jury, see also ante ¶ 98.

Judgment in criminal prosecutions for maintaining nuisance, see post § 27.

Order for abatement as final judgment reviewable on error, see Appeal § 32, ¶ 119.

Adequacy of award of damages in lieu of injunction, see also Damages ¶¶ 865, 866.

Allowance of damages for prospective harm for flowing land in lieu of injunction, see also Damages ¶ 148.

Principles on which equity will decree compensation, see Equity § 217.

Provisions as to judgment of abatement, and enforcement thereof, see Jud. Act, chap. XX, § 43; Comp. L. 1915, § 12779.

¶ 120. Whether an obstruction in a public street constitutes a nuisance is a question of fact and not of law.—McCormick v. Weaver, 144 Mich. 6.

¶ 121. Before any judgment of abatement is given there should be a finding of a present state of things, showing not only the appropriateness but the necessity of such a judgment.—Messersmidt v. People, 46 Mich. 437.

¶ 122. The abatement by chancery decree of a mill-dam so far as it exceeds a proper height is not a matter of right but of equitable discretion, and must depend upon the circumstances of the case.—Miller v. Cornwell, 71 Mich. 270.

¶ 123. Relief in chancery against the maintenance of a private nuisance is not granted as a matter of course when redress can be had at law; the extent of the injury, the comparative values of the properties affected, and other considerations according to the circumstances, will be duly weighed and relief afforded or withheld as equity requires.—Turner v. Hart, 71 Mich. 128.

¶ 124. Where the partial abatement of a dam would prevent the overflow of the land of one who complained of it as a nuisance, but its entire abatement was necessary to abate a public nuisance affecting his homestead, a decree for such complete abatement was affirmed.—Treat v. Bates, 27 Mich. 390.

¶ 125. Where a building projects four and one-half inches into a street, but is not shown to impede public travel, disfigure the streets or interfere with business on the street equity will not decree the wall to be torn down because of such small encroachment. The relief should not be disproportionate to the injury done.—City of Big Rapids v. Comstock, 65 Mich. 78.

¶ 126. The lowering of a dam to a height which would produce the former maximum level was decreed in an injunction suit, where it appeared that such reduction would depreciate defendants' mill property $75,000 (one-half its value), but its retention would destroy 300 acres of plaintiffs' land worth $15,000, and where it appeared that the mill was operated fairly well at the former level and that there are auxiliary steam plants for times of low water, and that the reduction will cause no diminution in the amount of power formerly realized.—Turner v. Hart, 71 Mich. 128.

¶ 127. A decree enjoining defendant from so conducting his business (that of a slaughter-house) as to render it offensive is defective because it gives no rule of conduct which the law has not before prescribed; the decree should specifically point out the things required to be done and refrained from in order to abate the nuisance found to exist.—Ballentine v. Webb, 84 Mich. 38.

¶ 128. Where a rendering works conducted in a growing part of a city is a nuisance and probably would be such no matter how the methods were changed, even if large expense was bestowed thereon, a decree was entered restraining prosecution of the business at that place after six months, with precautionary regulations in the meantime.—City of Grand Rapids v. Welden, 97 Mich. 82.

¶ 129. Where a village casts its sewage into a sewer of an adjoining city, which subsequently becomes inadequate, a court of chancery may require the abatement of the resulting nuisance jointly maintained by the municipalities, by a decree against them requiring the enlargement of the sewer, since such sewer cannot be regarded as the private property of the city.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 130. Where the proofs showed a wrongful flowage of complainant's land, but that no general unhealthiness was caused, and that to enjoin the flowage would practically abate defendant's dam and would injure defendant disproportionately to complainant's grievance, relief was confined to an allowance of damages.—Fox v. Holcomb, 32 Mich. 494.

¶ 131. Equity has jurisdiction to entertain a bill for an injunction to restrain the flooding of complainant's land, and for damages thereto from such flooding, and an accounting for three years next preceding

the filing of the bill, since equity having once acquired jurisdiction, will retain it to give full relief and finally dispose of the controversy.—Pluchak v. Crawford, 137 Mich. 509.

¶ 132. Where in an action to enjoin the maintenance of a mill dam at an unlawful height it appears that damages will fully compensate for the injury, such will be awarded as more appropriate than a decree to lower the dam.—Reason v. Peters, 148 Mich. 532.

IV. CRIMES AND PROSECUTIONS.

§ 26. In general.

Penal actions for highway obstructions, see Highways § 193.
Indictable overhanging or projecting portions of buildings in alleys, see also Highways ¶¶ 628, 629.
Keeping or storing of explosives and inflammable substances as misdemeanor, see Comp. L. 1915, § 9111.
Racing of horses or other animals as nuisances, see Comp. L. 1915, § 15114.

¶ 133. The state cannot prosecute as a nuisance that which it itself has authorized.—Chope v. D. & H. Plank Road Co., 37 Mich. 195.

¶ 134. A person is not punishable criminally for maintaining a dam whereby no greater nuisance is created, and of no different character, than would have existed without it.—Beach v. People, 11 Mich. 106.

¶ 135. A house of ill-fame is a public nuisance, and, therefore, indictable.—Welch v. Stowell, 2 D. 332; Slaughter v. People, 2 D. 334.

¶ 136. To make the obstruction of a way an indictable offense it must injuriously affect some right in which the public, in their aggregate capacity, have a common interest, as distinguished from a mere individual or private right. If it affect only the rights of an individual, or of a definite number of persons, less than the whole, in their individual capacity, no indictment lies.—People v. Jackson, 7 Mich. 432; and see Tillman v. People, 12 Mich. 401.

¶ 137. When the obstruction of a way can prejudice only the rights of owners or occupants of adjoining lots, they have their remedy by private action; if it affect only the rights of the inhabitants of a city, or the rights of a city in its corporate capacity, it may be a proper subject for the local police of the city, to be regulated by ordinances and by-laws; but in neither case would it be the proper subject of an indictment.—People v. Jackson, 7 Mich. 432; and see Tillman v. People, 12 Mich. 401.

¶ 138. The owner of a ferryboat may not escape liability for the creation of a common-law nuisance, if his acts warrant prosecution therefor, because of the fact that the supreme court has decided that the smoke nuisance ordinance of the City of Detroit, §§ 1 and 6, prohibiting the issuance of dense smoke from the smokestacks of ferryboats is unreasonable, because there is no known device utilizable in marine practice to prevent such emission.—People v. Detroit, Belle Isle & Windsor Ferry Co., 187 Mich. 177.

¶ 139. A corporation is subject to prosecution for creating and maintaining a nuisance, as are its officers, who need not have been actively engaged in work upon the premises, the same being carried on by employees.—People v. Detroit White Lead Works, 82 Mich. 471.

§ 27. Indictment or information or penal action.

Indictment as proper procedure for suppression of houses of ill-fame, see Indictment § 3.

¶ 140. An information charging that a dam creates a nuisance must be precise in its allegations, and clear in its statements of consequences, to justify destroying the dam to remove the nuisance.—Shepard v. People, 40 Mich. 487.

¶ 141. Judgment for the abatement of a nuisance should not be rendered unless there is a specific finding of a present state of things showing its necessity. And an information which does not allege that it is a continuing nuisance will not support such a judgment.—Messersmidt v. People, 46 Mich. 437.

¶ 142. Where a common nuisance is alleged by a criminal charge, facts enough to support the allegation must be stated.—Messersmidt v. People, 46 Mich. 437.

¶ 143. A charge that defendant polluted an ancient stream, thereby rendering the water unfit to drink, "to the common nuisance of the people," must show that the stream is one in which the public has rights.—Messersmidt v. People, 46 Mich. 437.

¶ 144. The penalty for obstructing a highway cannot be enforced by indictment or information.—Pettinger v. People, 20 Mich. 336.

§ 28. Evidence.

¶ 145. In a prosecution for violating a smoke ordinance (Rev. Ord. City of Detroit, 1890, ch. 67, § 2, p. 165), it was held from the evidence that the manner in which defendants conducted their business, producing smoke and soot, was a nuisance in fact.—People v. Lewis, 86 Mich. 273.

¶ 146. Two distinct facts must be proved to sustain an indictment for a nuisance, viz., the nuisance, and defendant's connection

with it in a way to make him criminally liable.—Crippin v. People, 8 Mich. 117.

¶ 147. Evidence in an action under §§ 1 and 6 of the smoke nuisance ordinance of the City of Detroit against a ferryboat company operating on the Detroit River, held insufficient to establish that there was any device for elimination of smoke from bituminous coal that could be successfully installed in marine practice.—People v. Detroit, Belle Isle & Windsor Ferry Co., 187 Mich. 177.

¶ 148. On a prosecution of a railroad company for maintaining a nuisance consisting of a crane for loading and unloading cars which made a loud and continuous noise, evidence held sufficient to show that the neighborhood was not residential in character, but was a railroad terminal.—People v. Wabash Ry. Co., 197 Mich. 404.

¶ 149. On the trial of an indictment for causing a nuisance by a mill-dam, the question whether the stream as dammed is as healthy to the neighborhood as it would be if the mill pond were drawn down, the river channel ditched, the water drained from the low lands, and the whole converted into a beautiful meadow, is not admissible as a test of nuisance.—Beach v. People, 11 Mich. 106.

§ 29. Questions of law and fact.

¶ 150. The question of nuisance or no nuisance is one of fact to be found by the jury. —Crippen v. People, 8 Mich. 117.

¶ 151. Whether an obstruction in a street or highway is or is not a nuisance is a question of fact to be found by a jury, and not a question of law; every such obstruction is not a nuisance.—People v. Carpenter, 1 Mich. 273.

¶ 152. The obstruction of an alley is rarely a question of law; a roof twelve or fifteen feet above it is not necessarily an obstruction, nor is anything that does not interfere with its accustomed use.—Beecher v. People, 38 Mich. 289.

¶ 153. A flight of stairs, fifteen feet high and three feet eight inches wide, was erected within the limits of Woodward avenue, in the city of Detroit, leading from the ground to the second story of a building standing on the line of the street adjacent to the stairs. Held, that though this was an obstruction not authorized by the acts of the governor and judges, or by the ordinances of the city, yet whether it was an annoyance to the public so as to constitute a nuisance was for the jury to decide.—People v. Carpenter, 1 Mich. 273.

§ 30. Sentence and judgment.

Acquittal in prosecution for maintaining nuisance as res judicata in civil proceeding to abate the nuisance, see Former Adjudication ¶¶ 194, 195.

¶ 154. Where an information for nuisance alleges that it arises from the use of things innocent in themselves, the case does not call for their destruction in order to effect an abatement, but for the discontinuance of the objectionable method of using them.—Messersmidt v. People, 46 Mich. 437.

¶ 155. The order of removal of a nuisance cannot precede, but must be exercised at, the time of imposing punishment by fine or imprisonment, and form part of the same judgment; and where no such punishment had been imposed an order to remove the nuisance was held erroneous.—Crippen v. People, 8 Mich. 117.

¶ 156. The court on an indictment and conviction for a public nuisance is not obliged to order a removal of the nuisance.—Crippen v. People, 8 Mich. 117.

¶ 157. Property can be destroyed for the abatement of a nuisance—as here, a mill-dam —only so far as is determined to be necessary therefor. And the fact that property is decreed to be a nuisance does not oblige the court to order its destruction.—Shepard v. People, 40 Mich. 487.

NULLA BONA to NURSING.

Cross-References.

Nulla Bona—
- Return to execution, see Executions, IX.
- Return as prerequisite to creditor's suit or bill in aid, see Creditors' Suits § 12 et seq.

Nunc pro Tunc—
- Judgment entries, see Judgments, III, V.
- Default entries, see Defaults § 14.
- Entry of orders nunc pro tunc, see Motions and Orders § 6.
- Allowance of procedure out of due and regular time, see specific topics treating of the proceeding in question.
- Amendments of attachment proceedings, see Attachments § 104.

Nuncupative Wills—
- See Wills, IV.

Nurses, Nursing—
- Registration of nurses, see Medicine and Surgery § 7.
- Expenses of nursing as element of damages, see Damages § 136 et seq.
- Claim against estate for expenses of last sickness, see Estates of Decedents § 150.

OATHS.

TREATS of nature, requisites and administration of oaths and affirmations; excludes Affidavits and Acknowledgments, which topics see. For officers empowered to administer oaths, see Notaries Public; Justices of the Peace, I; Courts, I; Judges. Verification of pleadings, claims and legal papers is treated in the specific topic concerned, e. g., Equity, VII; Divorce, IV; Municipal Corporations, XIV.

Analysis.

§ 1. In general.
§ 2. Persons authorized to administer.

§ 1. In general.

Of public officers, see Officers, IV.
Of arbitrators, see Arbitration § 8.
Nature, requisites, and sufficiency of affidavits in general, see Affidavits.
Notaries public and their office, powers, and functions, see Notaries Public.
Other officers empowered to administer oaths, see Justices of the Peace, I; Courts, I; Judges.
Oath to attachment affidavit, see Attachment § 34.
Oath to verify petition to dissolve attachment, see Attachment § 119.
Sufficiency and necessity of oath to sustain prosecution for perjury, see Crimes §§ 115, 116.
Swearing to affidavit for appeal from justice's court, see Justices of the Peace § 196.
Guardian's oath on making sale, see Guardianship § 42.
Oath to bill for preliminary injunction, see Injunctions § 119.
Necessity of oath to execute submission to arbitration, and effect of unnecessary oath, see Arbitration § 5.
Verifications of informations, see Indictment § 10.
Verifications to bills and answers, see Equity §§ 67-70.
Sworn statement or claim under mechanics' lien law, see Mechanics' Liens, V.
Of governor, see Comp. L. 1915, § 183.
Of auditor general, see Comp. L. 1915, § 183.
Of attorney general, see Comp. L. 1915, § 183.
Of county officers, see Comp. L. 1915, § 2505.
Of village officers, see Comp. L. 1915, §§ 2575, 2576, 2580.

¶ 1. A deposition does not need a separate jurat if the commissioner who took it certifies that the deponent was duly sworn.—Van Sickle v. Gibson, 40 Mich. 170.

¶ 2. A jurat to a statement of claim for a mechanic's lien, which is sworn to before a notary public, who also acted as attorney in preparing the statement, is not void under Comp. L. 1897, § 2640, How., 2nd Ed., § 1286, forbidding attorneys and counsellors from administering oaths in causes in which they may be professionally engaged, where such attorney is not an attorney of record in the action to foreclose the lien, and he was never professionally engaged in any cause connected with such proceeding.—Zilz v. Wilcox, 190 Mich. 486.

§ 2. Persons authorized to administer.

Officers empowered to administer oaths, see also Notaries Public; Justices of the Peace, I; Courts, I; Judges.
Before whom affidavit may be made, see Affidavits § 2.
Power of circuit clerk to administer, see also Courts § 6.
Authority to administer oath to bail or sureties, see Jud. Act, chap. XX, § 2; Comp. L. 1915, § 12738.

¶ 3. Before the passage of Laws 1877, Act No. 6 (How. St. § 637), it was not unlawful for a mortgagee's attorney to administer oaths in a foreclosure proceeding under a power in the mortgage to sell.—Snyder v. Hemingway, 47 Mich. 549.

¶ 4. Where the deputy county treasurer was, by statute, empowered, in the treasurer's absence from his office, to "perform all the duties of the treasurer," the oath which the statute required to be taken before the treasurer by the collector of taxes on returning delinquent lands might, in such absence, be taken before the deputy (see How. St. § 571).—Malony v. Mahar, 2 D. 432; Malonny v. Mahar, 1 Mich. 26.

OBITER DICTA to OFFICE.

Cross-References.

Obiter Dicta—
Value and weight as precedents, see Courts § 20.
Objections—
See generally the topic treating of the proceeding or practice of which the objection is an incident or of that to which the objection is taken.
Making objections and exceptions for purposes of trial and appeal, see Saving Questions; Trial, V; Indictment, IX, B, XIV.
Immaterial or harmless objections, see Harmless Error; Indictment, XV.
Demurrers and other objections to plead-

ings, see Pleading; Indictment, I, D, V; Equity, VII, C.
To writs and process, see Attachment, IX; Executions, X; Process, III.
To questions, answers, and evidence, see Trial, V; Indictment, IX, B.
To depositions or to questions thereat, see Depositions.
To referee's reports or to proceedings before referee or master, see Reference, III, V.

Obligation of Contract—
Constitutional provisions against impairment, see Constitutional Law, VI.

Obligations—
Contract obligations, see Contracts; Bonds; Negotiable Instruments; Non-negotiable Paper.
Implied contracts, see Implied Contracts.
Security for obligations, see Mortgages; Chattel Mortgages; Pledges; Guaranty; Suretyship.

Obliteration of Writings—
See Alteration of Instruments § 9; Records; Wills, IV, C.

Obscenity—
As crime, see Crimes, II; Indictment.
Imputing obscenity as defamation, see Libel, II.
Nuisances of obscene nature, see Nuisances § 5.

Obstructing Justice—
As crime, see Crimes, II; Indictment.
As contempt, see Contempt.

Obstruction of Easements—
See Easements § 38 et seq.

Obstruction of Highways—
See Highways, XI; Navigable Waters § 10.

Obstruction of Waters—
See Waters, V.

Obvious Dangers—
Duty of care and negligence, see Negligence; Highways, XII; Master and Servant, III; Railroads, VIII; Street Railways, IV; Carriers, IV, E.

Occupancy—
Of land as adverse possession, see Adverse Possession.
Of land as tenancy, see Landlord and Tenant.
Of land as entry under license, see Licenses to Enter.
Of buildings under or against terms of insurance, see Insurance, VIII, XII.

Occupations—
Regulation and police power, see Constitutional Law; Municipal Corporations, IX.
Licensing and taxation, see Licenses; Taxes.
Insurance on life or against accident affected by occupation of insured, see Insurance; Fraternal Associations.
Capacity of corporation to engage in specific occupations, see Corporations § 70 et seq.
Disparagement of person in his occupation as actionable defamation, see Libel, II.
See also Attorneys; Medicine and Surgery; Bailments; Inns; Warehousing; Carriers.

Occupying Claimants—
Rights of improver of another's real property in occupancy thereof under claim of right, see Ejectment, VI; Implied Contracts, II; Quieting Title, III.
Doctrine of accession of the improvements to the land, see Accession § 5.

Odd Fellows—
See Associations; Corporations.

Odors—
As nuisances, see Nuisances § 7.

Offal—
Public health regulations and control, see Health.
Garbage disposal in cities, see Municipal Corporations, IX.
Nuisances from offal, see Nuisances, I.

Offensive Conditions and Occupations—
As nuisances, see Nuisances, I.

Offer and Acceptance—
See Contracts, III.

Offer of Compromise—
As admission against interest, see Evidence § 394 et seq.; Indictment, VIII, B, 6, 7.

Offer of Equity—
Necessity of doing equity or offering it in the bill, see Equity § 4.

Offer of Judgment—
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Offer of Proof—
See Trial, V; Indictment, IX, B.
Necessity of offer to make and save question for error or appeal, see Saving Questions.

Office—
Public offices, see Officers.
Corporate offices or place of business, see Corporations § 20; Process, II, B.
Executorial, administrative or trust offices, see Estates of Decedents; Guardianship; Trusts.
Inquests and office found, see Escheats § 2.

OFFICERS AND PUBLIC EMPLOYEES.

TREATS of the general law of public officers and employees of the public, excluding the general law of Elections, which see, the constitutional division of official powers and the constitutional limitations and guaranties (see Constitutional Law), also excluding matters peculiar to certain specific offices, e. g., Courts; Judges; Justices of the Peace; Sheriffs and Constables; Municipal Corporations, XV; Counties, VII; Townships, V; Schools, III. The law relating to officers, agents, and servants of private corporations and persons is to be found in Agency; Corporations, XVII; Master and Servant.

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[Note. In cases relating to the law of officers where the decided point seemed to turn on a distinctive charter provision or a principle of law peculiar to municipal corporations, the theory of classification was to place the case in Municipal Corporations, XV. All those which appeared to be of any general applicability and not peculiar to municipal officers have been classified in Officers.]

I. STATUS AND DISTINCTIONS; CONSTITUTIONAL AND STATUTORY CREATION.

§ 1. Definition and nature of office.

Who are public officers, see post § 2.
Distinction from public employee, see post § 3.
State of local nature of office, see post § 4.
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Existence and status of de facto officers, see post §§ 6, 7.
The office of sheriff, see Sheriffs, I.
Officers of corporations, see Corporations, XVII.
Fire and police departments of municipalities, see Municipal Corporations § 181.
Power of city to provide offices and office buildings, see Municipal Corporations §§ 24, 103.

¶ 1. An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be attached to it, the performance of which will be the consideration for its being conferred upon the particular individual who for the time being will be the officer.—People ex rel. Throop v. Langdon, 40 Mich. 673.

¶ 2. The term "officer," in Const. art. 18, § 1, applies to the occupant of an office that has some permanence, and is not created by a temporary nomination for a transient purpose.—Underwood v. McDuffee, 15 Mich. 361; Shurbun v. Hooper, 40 Mich. 503.

¶ 3. While a private person may have a valuable interest in an office, office is in this state a public trust in which the public interest is paramount.—Frey v. Michie, 68 Mich. 323.

§ 2. Who are public officers.

Distinction from public employee, see post § 3.

Right to office and how enforced or tried, see post III.

Court officers, see Courts, I.

Office of judge, see Judges; Justices of the Peace, I.

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Officers of schools and colleges, see Schools, III.

Officers of municipal corporation, see Municipal Corporations, XV.

¶ 4. The chief of police of West Bay City is a public officer.—Ellis v. Lennon, 86 Mich. 468.

¶ 5. Referees of causes in the circuit court are not officers required to take the constitutional oath.—Underwood v. McDuffee, 15 Mich. 361.

¶ 6. The superintendent of fisheries is not an officer within the meaning of the constitution and laws of the state, but is an employee of the state board of fish commissioners and is removable at their pleasure.—Portman v. State Board of Fish Com'rs, 50 Mich. 258.

¶ 7. Commissioners on claims against decedents' estates are not "officers" who must take the constitutional oath.—Shurbun v. Hooper, 40 Mich. 503.

¶ 8. Attorneys are not included in the term "officers" in Local Acts of 1889, No. 388, § 27, fixing fees of jurors and "all officers who shall render any services" in a condemnation for a boulevard.—Hester v. Commissioners of Parks of Detroit, 84 Mich. 450.

¶ 9. While an attorney is recognized as a responsible and necessary officer of the court in the conduct of its business, exercising by legislative authority a privilege or franchise in that particular, he is not a public officer in the constitutional or statutory sense of the term.—Sloman v. Bender, 189 Mich. 258.

¶ 10. A special officer for justices' courts and a county physician are not the holders of such offices as the courts concern themselves about in quo warranto. And a file-clerk of the county records and the chief janitor of the county buildings are employees, not officers, of the county.—Trainor v. Board of Auditors of Wayne County, 89 Mich. 162.

¶ 11. The Board of Road Commissioners of Wayne County, appointed by the county clerk and the mayor of Detroit under Pub. Acts 1905, No. 146, not being provisional appointments, were illegally appointed, and the fact that they were recognized as officers by the Board of Supervisors does not constitute them de jure officers. Such board therefore had no right to disburse funds raised by a tax levied by them.—Board of Road Com'rs Wayne County v. Board of Auditors Wayne County, 148 Mich. 255.

¶ 12. School officers are executive officers within Art. XVI, § 2, of the Constitution, providing that all officers, executive and judicial, except those exempted by law, shall, before entering upon the duties of their offices, take the prescribed oath.—People ex rel. Simmons v. Anderson, 198 Mich. 38.

¶ 13. A stockkeeper who is appointed by a common council in accordance with the recommendation of the mayor of a city and who has charge of a city yard where tools, road scrapers, plows, brick and all material are located, and fenced in and enclosed by gates, has a key to such yard and a little building therein in which some stuff is kept under cover, lets city employees in with material and out with material and tools, and keeps the globes for street lights in such building which are delivered to him by the man who takes care of the lights, is not a public officer, but an employee.—Jones v. City of Battle Creek, 193 Mich. 1.

§ 3. Distinction from public employee.

¶ 14. An officer is distinguished from an employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to account for misfeasance or nonfeasance, and usually, though not necessarily, in the tenure of his position.—People ex rel. Throop v. Langdon, 40 Mich. 673.

¶ 15. The fact that an oath of office has been taken does not prove that the person taking it is an officer rather than a clerk; nor does the fact that one is independent of his superior officer in the tenure of his position make him an officer also.—People ex rel. Throop v. Langdon, 40 Mich. 673.

¶ 16. The title "clerk" is properly that of an employee; and the chief clerk in the office of the assessor of the city of Detroit is not an officer, though the tenure of his position is independent of the assessor.—People ex rel. Throop v. Langdon, 40 Mich. 673.

§ 4. State or local nature of office.

Right to hold both state and county office at same time, see post ¶ 49.

Local or general nature of officer, see also Constitutional Law § 74.

State or local character of office of judge of Superior Court of Grand Rapids, see Municipal Courts § 2.

Notaries public as state officers, see Notaries Public ¶¶ 1, 2.

Board of health as agency of state or city, see Health § 4.

Freeholders' charter commissioners as local officers, see Municipal Corporations § 19.

State or municipal character of officers of Detroit House of Correction, see also Municipal Corporations ¶ 546.

¶ 17. The office of mayor of a city whose charter makes the mayor a conservator of the peace and a member of the board of health, and empowers him to administer oaths, and hear complaints and annul or suspend licenses for violations of the city ordinances or any other law of the state, is, therefore, an office under the state.—Attorney General v. Common Council of Detroit, 112 Mich. 145.

¶ 18. The superintendent, captain and lieutenant of police of the city of Grand Rapids are not "city officers."—Burroughs v. Eastman, 93 Mich. 433.

¶ 19. A special commissioner named by statute to lay out a state road is not a county officer, though required, for purposes of record, to render an account of his proceedings to the board of supervisors; and funds held for him by a county treasurer are not county funds.—County of Alcona v. White, 54 Mich. 503.

§ 5. Creation, existence, and change of offices, and control over offices.

Existence and status of de facto officers, see post § 6.
Resignation of one office to accept another, see post § 13.
Nature, scope and exercise of appointing power, see post §§ 15-17.
Right to office and how enforced, see post III.
Existence and creation of municipal offices, see also Municipal Corporations § 162.
Power of municipality or councils over offices and officers, see Municipal Corporations § 164.

§ 6. Existence and status of de facto officers.

See also post ¶ 237.
Persons holding over after expiration of term, see post § 7.
Qualifications of de facto officer, see post ¶ 87.
Presumptions and evidence as to existence of de facto office, see post ¶¶ 116, 118.
Effect of payment of de facto officer on right of de jure officer to compensation, see post ¶ 452.
Validity of registration by de facto registering officers, see Elections ¶ 60.

¶ 20. Where no officer de jure is provided for, there can be no officer de facto.—Carleton v. People, 10 Mich. 250.

¶ 21. The rule that there cannot be an officer de facto where there is no office to fill is modified as to offices created by the legislature so long as the statute creating them has not been declared unconstitutional.—Donough v. Dewey, 82 Mich. 309.

¶ 22. Those are not officers de facto who, in consequence of ceasing to be residents, have vacated their offices.—People v. Village of Highland Park, 88 Mich. 653.

¶ 23. Inspectors of election and registration appointed by less than a quorum of the council assuming to act after an adjournment, and who acted as inspectors, were de facto officers so far as they acted.—Dingwall v. Common Council of Detroit, 82 Mich. 568.

¶ 24. Where county drain commissioners assume to act as such they are at least officers de facto, even though they were supervisors when they were appointed.—Zabel v. Harshman, 68 Mich. 273.

¶ 25. One who, according to the journal, had been admitted to a seat in the state senate by a sufficient vote, and who thereafter acted as a member of the senate, was held to be a senator de facto, and his acts as such could not be collaterally attacked.—Auditor General v. Menominee County Sup'rs, 89 Mich. 552.

¶ 26. Aldermen retained in office by statute consolidating two cities—their wards being unchanged territorially—held to be at least de facto officers while acting as aldermen of the new city.—Carlisle v. City of Saginaw, 84 Mich. 134.

¶ 27. Officers of the poor appointed by the Wayne County Auditors under a practical construction of the statutes, followed for many years, are de facto officers.—Frey v. Michie, 68 Mich. 323.

¶ 28. A candidate cannot be regarded as a de facto officer in possession where, there being a dispute between him and the former incumbent, also a candidate, and both being certified as elected, he forcibly entered the office room then occupied by the former incumbent and took such possession without any process of law and against the other's consent.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 29. The county of Muskegon was organized by setting off certain townships from existing counties. The act for that purpose was passed February 4, 1859, and provided for an election of county officers "at the annual township election to be held in April next," which officers were to enter upon the discharge of their duties "on the first day of June next." But the act not having been ordered to take immediate effect, did not take effect under the constitution until May 16, 1859. An election was nevertheless held for county officers in April, 1859, and the persons who were chosen qualified and entered upon the discharge of the duties of county officers at the time specified. Quære (the court being equally divided), whether, even if the election in April, 1859, was unconstitutional, the persons elected were not de facto county officers.—Carleton v. People, 10 Mich. 249; Rice v. Ruddiman, 10 Mich. 125.

¶ 30. Local Acts of 1889, No. 455, consolidating the cities of East Saginaw and Saginaw into one municipality, to be known

as the "City of Saginaw," provided that the aldermen of the two cities whose terms of office had not expired at the time of such consolidation should serve out their unexpired term in their respective wards, which were unchanged territorially. Held, that said aldermen, while acting as aldermen of the city of Saginaw, are at least de facto such officers as they represent themselves to be, and that their acts are valid.—Carlisle v. City of Saginaw, 84 Mich. 134.

§ 7. ——Persons holding over after expiration of term.

Holding over in general, see post § 35.

¶ 31. There can be no holding over de facto, whether a successor is chosen or not, where the statute under which an officer is appointed to fill a vacancy in an elective office provides that the person so appointed shall hold only until a certain date after appointment.—Edison v. Almy, 66 Mich. 329.

¶ 32. Where a lawfully appointed officer still claims the office and refuses to yield to a subsequent appointee, the latter cannot be regarded as a de facto officer.—Hallgren v. Campbell, 82 Mich. 255.

¶ 33. A candidate for a city office is a de facto officer where he is in possession of the office by virtue of a holding over and under a declaration of election by the common council sitting as a board of canvassers, even though there is a bona fide dispute as to the title of such office.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

II. ELIGIBILITY AND QUALIFICATIONS; MODE OF CHOOSING OR APPOINTING.

§ 8. Eligibility and qualifications in general.

Disqualifications as to particular acts, see post § 9.
Status of "elector" as requisite, see post § 10.
Existing office or incumbency as obstacle, see post §§ 11-13.
Membership in appointing board or body, see post § 14.
Nature, scope and exercise of appointing power, see post §§ 15-17.
Filling vacancies, see post § 18.
Estoppel to deny or question appointing authority, see post § 19.
Grounds and charges for removal, see post §§ 46-48.
Constitutional eligibility for and right to take office, see Constitutional Law § 264.
Party affiliations as test for office, see also Constitutional Law § 264.
Eligibility and election of judges, see Judges § 1.
Disabilities and disqualifications of judges, see Judges II, III.
Right of supervisor to membership in board, see Counties §§ 49, 50.
Eligibility and qualifications for member of charter commission, see Municipal Corporations § 19.
Disqualification of councilman by interest affecting right to vote, see Municipal Corporations § 41.
Eligibility of noncitizen for appointment to city office, see Municipal Corporations § 165.
Eligibility and qualifications for municipal offices, see Municipal Corporations § 165.

¶ 34. Particular political opinions cannot be made a condition to holding office.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 35. The power of the people to elect, or of the appointing power to appoint, any citizen to office, is not restricted by his previous character, habits, or official misdemeanors.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 36. The phrase "office or public trust," in the constitutional prohibition against tests, includes every important function of government, and covers boards of registration commissioners. And the term "test" does not apply to those special qualifications that are required for particular offices.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 37. It cannot be presumed that a de facto public officer has neglected to make any necessary qualification.—First Nat. Bank v. St. Joseph Township, 46 Mich. 526.

¶ 38. The office of county clerk is wholly ministerial, and when the statute provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, his choice is not confined to any race, sex, color, or age; and a woman may be appointed.—Wilson v. Genessee Circuit Judge, 87 Mich. 493.

§ 9. Disqualifications as to particular acts.

Disqualification of municipal officers to act, see Municipal Corporations § 177.

¶ 39. Interested member of public board can join in administrative acts that are public such as proceedings to change school district boundaries.—Clement v. Everest, 29 Mich. 19.

§ 10. Status of "elector" as requisite.

¶ 40. Under the Michigan Constitution, providing in art. 10, § 8, that in each county a county clerk shall be chosen by the electors thereof, no one but an elector can be chosen to the office, but it does not follow that only an elector may be appointed a deputy in his office.—Wilson v. Genessee Circuit Judge, 87 Mich. 493.

¶ 41. The common-law rule is that a woman cannot hold a general office, in the absence of express constitutional or statutory authority conferring upon her such rights, and when the law is silent respecting

qualifications to office it must be understood that electors are eligible but no others. Const. art. 10, § 8 provides for the choosing of a prosecuting attorney in each organized county, by the electors thereof, at certain times, and art. 7, § 1, provides who shall be electors, and since there is no express provision of the constitution or law of the state conferring upon a woman the right to hold the office of prosecuting attorney, such a woman is not eligible to hold the office.—Attorney General v. Abbott, 121 Mich. 540.

¶ 42. A county clerk may appoint a woman as deputy clerk.—Wilson v. Genessee Circuit Judge, 87 Mich. 493.

§ 11. Existing office or incumbency as obstacle.

Compatibility of offices, see post § 12.
Effect of resignation, see post § 13.
Election of incumbent county clerk as supervisor, see also Counties ¶ 204.
Constitutional ineligibility of senators and representatives to other offices, or of other officers to be senators or representatives, see Const. art. V, §§ 6, 7.

¶ 43. Inasmuch as both are state offices, section 7, art. 5 of the Constitution renders a member of the legislature ineligible to the office of judge of the Recorder's Court of the City of Detroit.—Murtha v. Lindsay, 187 Mich. 79.

¶ 44. Any officer, municipal or other, upon whom are imposed duties relating to affairs of the state at large, as contradistinguished from those purely local in their character, is an officer under the state, within the meaning of Const., art. 5, § 15, providing that no person "holding office under the United States or this state shall execute the office of governor."—Attorney General v. Common Council of Detroit, 112 Mich. 145.

¶ 45. A member of the legislature of 1907, which enacted the law providing for the constitutional convention of 1907 (Pub. L., 1907, Act No. 272), is ineligible as a delegate to such convention, since election as such delegate is a "civil appointment," within the meaning of Const. art. 4, § 18, prohibiting the civil appointment during his term of office of a member of the legislature.—Fyfe v. Kent County Clerk, 149 Mich. 349.

¶ 46. A city assessor is not ineligible for the office of member of the board of State Tax Commissioners because there is a possibility of his assessments being reviewed by the board, nor is the fact that he still holds the former office at the time of bringing quo warranto against his predecessor any bar, as by acceptance of the latter office, he will ipso facto vacate the office of city assessor.—Attorney General ex rel. Dust v. Oakman, 126 Mich. 717.

¶ 47. Two offices—e. g., mayoralty of a city and governorship of the state—are rendered incompatible, precluding one person from holding both, by a valid legislative provision vesting in the incumbent of one the power of removal over the other, even though the contingency upon which the power is to be exercised is remote.—Attorney General ex rel. Moreland v. Common Council of Detroit, 112 Mich. 145.

¶ 48. Section 6 of article 5 of the State Constitution, providing that no person holding any office under the United States or this state, or any county office, with certain exceptions, shall be eligible to a seat in the legislature, does not preclude one who has been chosen to the legislature from being a candidate for a county office; however, the election to the county office would vacate ipso facto the office of representative, if the offices are incompatible.—Lodge v. Wayne County Clerk, 155 Mich. 426.

§ 12. ——Compatibility of offices.

State or local nature of office, see ante § 4.
Acceptance of incompatible office as abandonment or vacation, see post § 40.

¶ 49. Section 7 of article 5 of the State Constitution, providing that a member of the legislature shall not receive any civil appointment from any state authority during the term for which he is elected, does not render a member of the legislature ineligible as a candidate for the office of county auditor, for the electors of the county, in choosing such an officer, whose functions are local and confined to the county, are not acting as a state authority.—Lodge v. Wayne County Clerk, 155 Mich. 426.

¶ 50. Constitution, art. 10, § 5, which provides that a sheriff shall hold no other office, does not disqualify a township supervisor from being deputy-sheriff.—People v. Gosch, 82 Mich. 22.

¶ 51. Whether the offices of county clerk and township supervisor are so incompatible as to preclude one person from holding both at the same time, quære.—Northway v. Sheridan, 111 Mich. 18.

§ 13. ——Effect of resignation.

Resignation in general, see post §§ 37, 38.

¶ 52. Where the incumbent of a certain office is prohibited by statute from being elected or appointed to any other office during the term for which he was elected, he does not become eligible by resigning during such term.—Ellis v. Lennon, 86 Mich. 468.

¶ 53. Under the charter of West Bay City, which provides that no alderman shall be elected or appointed to any other office in the city during the term for which he was elected, and that no member of the common council shall, during a like period, be appointed to or be competent to hold any office of which emoluments are paid from the city

treasury, an alderman cannot, by resigning his office prior to the expiration of the term for which he was elected, render himself eligible to be appointed chief of police.—Ellis v. Lennon, 86 Mich. 468.

¶ 54. A judge who has resigned, but whose resignation has not taken effect, cannot take part in a prosecution in his own court before another judge whom he has called in to take his place.—Bashford v. People, 24 Mich. 244.

§ 14. Membership in appointing board or body.

See also post ¶ 67.

¶ 55. Where a board is empowered to appoint certain officers whose action it is its duty to supervise, it cannot appoint such officers from its own membership, and it seems that a resignation from the board, subsequent to such appointment, would not enable the member to act as such officer.—Kinyon v. Duchene, 21 Mich. 498.

§ 15. Nature, scope, and exercise of appointing power.

See also ante ¶ 35 and post ¶ 426.
Incomplete or illegal appointments, see post § 16.
Necessity and sufficiency of ratification, see post § 17.
Estoppel to deny or question appointing authority, see post § 19.
Appointment of successor as implied removal, see post § 45.
Power to appoint deputies, see post § 55.
Power of legislature and the right of local self-government in respect to officers, see Constitutional Law, II, C.
Mode of selecting city members of board of supervisors, validity of local appointment, see Counties § 50.
Appointment or election of first county officers, see Counties § 2.
Time for elections, see Elections § 2.

¶ 56. The power of appointment to office is a franchise.—Frey v. Michie, 68 Mich. 323.

¶ 57. The several counties composing a judicial circuit should act affirmatively, through their respective boards of supervisors, as a basis for the appointment of a stenographer for the circuit; otherwise the law authorizing such appointments is not operative in every part of it. But, in the absence of evidence to the contrary, such action may be fairly presumed where a stenographer's commission has been issued.—Goodale v. Marquette County Sup'rs, 45 Mich. 47.

¶ 58. It seems that the Wayne county auditors have the power of appointing county superintendents of the poor.—Frey v. Michie, 68 Mich. 323; Vrooman v. Michie, 69 Mich. 42.

¶ 59. The provision in Local Acts 1901, No. 284, for the appointment by the governor of a local municipal officer for one year and after that, or sooner if a vacancy occurs, to be appointed by the mayor, is not a provisional appointment, since the provision that the mayor may appoint in case of an earlier vacancy shows that there was no exigency calling for such an appointment.—Moreland v. Millen, 126 Mich. 381.

¶ 60. Under How. St., § 483, giving a county board of supervisors the power "to cause to be erected the necessary buildings for poorhouses, jails, clerk's offices and other county buildings, and to prescribe the time and manner of erecting the same," a board of supervisors, which enters into a contract for the construction of a county court house, has the right to appoint a building committee composed of four of its members and a citizen of the county with the right of supervision of the execution of the contract in its business details and requirements, since the delegation of power relates to purely ministerial and executive duties, the discharge of which does not call for the exercise of reason and discretion.—Cass County v. Gibson, 107 Fed. 368.

¶ 60a. A relator whose claim to the office in question depends upon an appointment from a certain board cannot controvert respondent's title on the ground that the appointing power was never vested in the board.—Frey v. Michie, 68 Mich. 323.

§ 16. ——Incomplete or illegal appointments.

Casting off tie votes, see Elections § 52.

¶ 61. A purpose to make an appointment which has never been carried out cannot sustain official action by the person intended.—Bench v. Otis, 25 Mich. 29.

¶ 62. Under Act No. 319, Pub. Acts 1909, prescribing the qualifications for membership on the board of registration of nurses, the appointment by the governor of a person lacking any of the specified qualifications is void.—People ex rel. Attorney General v. Galbraith, 163 Mich. 47.

¶ 63. Local Acts 1901, No. 284, containing a void provision for an appointment by the governor of a provisional superintendent of public works and for the abolishment of the board of public works, is valid as to the other portions of the act; and the vacancy created in the office of superintendent by the invalidity of the governor's appointment may be filled by the mayor, the old abolished board holding until then.—Moreland v. Millen, 126 Mich. 381.

§ 17. ——Necessity and sufficiency of ratification.

¶ 64. A motion to reconsider a vote "by which the Senate advised and consented to the nomination" to fill a vacancy in the board of state tax commissioners made on the same day, and a subsequent refusal to con-

firm the appointment is effective to defeat the appointment.—Attorney General ex rel. Dust v. Oakman, 126 Mich. 717.

¶ 65. Services of a clerk having been rendered with the consent and approval of the board of state tax commissioners, it is unnecessary to determine whether they could delegate the power to hire the clerk; having ratified his action they may be said to have employed him.—Warner v. Board of State Auditors, 128 Mich. 500.

§ 18. Filling vacancies.

Duration of appointments to fill vacancies, see post § 34.
Duration of vacancy appointment of judge, see also Judges § 2.
Elections to fill vacancies, see Elections § 2.
Holding over of city officers, see Municipal Corporations § 174.
Vacancies in militia offices, see Military § 2.
Vacancies and vacancy appointments in municipal offices, see Municipal Corporations § 175 et seq.
Filling vacancies in office of sheriff, see Sheriffs, I.
Duty to fill office upon resignation, see Comp. L. 1915, § 240.
Vacancies which may be filled by governor, see Comp. L. 1915, § 254 et seq.
Mode of filling vacancies in office, see Pub. Acts 1917, No. 203, chap. IV.

¶ 66. Whenever a vacancy occurs in the office of drain commissioner of a township, it is the duty of the township board to fill it by appointment. (Laws 1885, Act No. 227.) —People ex rel. Bennett v. Benfield, 80 Mich. 265.

¶ 67. Where a board has power to fill a vacancy in its number, its action in admitting, upon a declaration of election, a person chosen at a special election, legally seats such person, even though the election itself gives him no right.—Pariseau v. Board of Education of Escanaba, 96 Mich. 302.

¶ 68. The city council of Grand Rapids can fill an office held by its appointment where there is no one holding for a regular term.—Saunders v. City of Grand Rapids, 46 Mich. 467.

¶ 69. The superior court of Grand Rapids is a court of record within the meaning of sec. 20, Art. VII, of the Constitution, declaring that the governor shall by appointment fill vacancies in the office of judge of any court of record.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

¶ 70. Sections 35 and 36 of the charter of the city of Grand Rapids (Act No. 593, Local Acts 1905) do not permit vacancies in the office of judge of the superior court to be filled by the common council.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

¶ 71. How. St., § 7091g, as amended March 6, 1893 (Local Acts 1893, No. 253), provides that the clerk of the justices' courts of Detroit shall have power to appoint one or more deputies when the necessity therefor shall be certified by the justices, and that said clerk may revoke said appointment at pleasure. The justices certified that seven deputy clerks were necessary, and the clerk appointed that number, but afterwards revoked the appointment of two of them, and appointed two others in their stead, whereupon the justices certified that there was no necessity for filling the vacancies, as the business of the courts had decreased. Held, that the clerk's appointments to fill vacancies were not invalidated by such certificate.—Seabury v. Board of Auditors of Wayne County, 96 Mich. 46.

¶ 72. Where a vacancy existed in the office of recorder of Detroit, and a circuit judge was performing the duties under designation by the common council, and no election had been ordered by the council to fill the vacancy, the electors of the city could not fill it at the regular city election (1865).—People ex rel. Moore v. Witherell, 14 Mich. 48.

§ 19. Estoppel to deny or question appointing authority.

Estoppel to question or attack title to office, see post § 23.

¶ 73. One who by the governor's appointment has acted as member of a commission to represent the state at an exposition cannot assert that the governor had no authority to appoint such a commission—especially after the legislature has recognized such action.—People v. Swineford, 77 Mich. 573.

III. RIGHT TO OFFICE AND HOW ENFORCED OR TRIED.

§ 20. Right to office in general.

Prima facie right conferred by finding of canvassers, see post § 21.
Possession of indicia of title, see post § 22.
Estoppel to question or attack title to office, see post § 23.
Settlement out of court by agreement or arbitration, see post § 24.
Remedy to determine right to office, see post § 25.
Collateral question of or attack on right to office, see post §§ 26-29.
Presumptions and proof of right, see post § 30.
Right to compensation and emoluments during unlawful suspension or exclusion from the office, see post § 96.
Assumption, term and duration of office in general, see post IV.
Right to compensation and emoluments in general, see post VIII.
Election of officers in general, see Elections.
Election or appointment of municipal officers, see Municipal Corporations § 166 et seq.
Rights in office under due process clause, see Constitutional Law § 140.

Power to make cities judges of their own officers' titles to office, see Constitutional Law § 191.
Apportionment of state into representative districts, see Constitutional Law §§ 258-260.
Apportionment acts affecting voting districts, see Elections § 7.
Incoming or outgoing board as body to judge of elections of councilmen, see Municipal Corporations § 167.
Councils as judges of election and qualification of members, see Municipal Corporations § 167; Elections.

¶ 74. Title to an elective office can only be conferred by the people by an election thereto, and it is only by and through an election that the people can act with respect to such an office; and title to an office for a specific term cannot be confirmed by a failure to elect.—Attorney General v. Trombly, 89 Mich. 50.

¶ 75. Persons in the actual and unobstructed exercise of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves.—Jhons v. People, 25 Mich. 499.

¶ 76. A bona fide claimant for a city office in the possession of a de facto officer is not justified in attempting to take possession of such office by violence.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 77. A board of supervisors has no authority to determine the right to a seat in the board when an election thereto is contested; that is a matter for judicial cognizance.—Robinson v. Cheboygan Board Sup'rs, 49 Mich. 321.

§ 21. ——Prima facie right conferred by finding of canvassers.

Presumptions and proof of right in general, see post § 30.

¶ 78. The determination by the board of county canvassers as to the persons elected confers upon the person in whose favor it is made the prima facie right to the office until his right is rejected by a voluntary surrender, or by a judicial determination against him.—People ex rel. Benoit v. Miller, 16 Mich. 56.

¶ 79. The finding on the subject by the board of county canvassers is prima facie sufficient to authorize a recognition by the various authorities of the person declared elected.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146; Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 80. Public proclamation by the inspectors of election, after canvassing the votes, that a specified person has been elected, is sufficient prima facie evidence of his right to the books and papers of the office to warrant an order to the former incumbent to show cause why he should not surrender them to his successor.—Curran v. Norris, 58 Mich. 512.

§ 22. ——Possession of indicia of title.

Replevin or proceedings for books or papers of office, see post § 27.

¶ 81. A person actually obtaining an office with the legal indicia of title is a legal officer until ousted, so far as to render his official acts as valid as if his title were not disputed.—Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 82. Comp. L. 1897, chap. 272, §§ 9843-9851, providing that officers elected or appointed by proper authority should at once receive from their predecessors in office the books and papers appertaining thereto, is not adapted to a determination of the rights of contestants to an office, but was appropriate for ascertaining whether a petitioner claiming the office of a school trustee was prima facie such an officer as to entitle him to the books and papers of such office.—Murta v. Carr, 140 Mich. 606.

§ 23. Estoppel to question or attack title to office.

Estoppel to deny or question appointing authority, see ante § 19.
General principles of estoppel, see Estoppel.

¶ 83. A candidate for office, who is not present when illegal votes are cast, is not estopped from attacking his opponent's title, on the ground that he did not personally challenge the voters.—People v. Hanna, 98 Mich. 515.

¶ 84. When an equal division of votes for an office (register of deeds) appears, and lots are drawn as provided by Comp. L. 1871, § 136, How. St. § 188, the losing party is not precluded from contesting the validity of the election.—Keeler v. Robertson, 27 Mich. 116.

¶ 85. Where, after resigning office, one takes part in a caucus for the nomination of his successor, and acquiesces in the election held to fill the vacancy, he is estopped from claiming that his resignation was sent to the wrong body, and that the election was void.—Pariseau v. Board of Education of Escanaba, 96 Mich. 302.

§ 24. Settlement out of court by agreement or arbitration.

¶ 86. The filing of an information to test the right to a public office is conclusive between the parties that the relator is not acting as the officer and that the respondent is; but it is not competent for them to settle between themselves which should hold the office, none having that right who has not been lawfully chosen; and that, if controverted, must be settled by public authority.—Tallmadge Township School Dist. No. 8 v. Root, 61 Mich. 378.

§ 25. Remedy by quo warranto or otherwise.

See also ante ¶ 77.

Application and leave to institute quo warranto, see Quo Warranto, II.

Parties and pleadings in quo warranto, see Quo Warranto, III.

Trial and judgment in quo warranto, see Quo Warranto, IV.

Propriety and occasion for quo warranto, see Quo Warranto, I.

Measure of damages for exclusion from office, see Damages § 134.

¶ 87. Quo warranto and not mandamus is the proper remedy to determine disputed questions of title to and possession of public office, when such office is already filled by an actual incumbent exercising the functions of the office de facto and under color of right. —Ashwell v. Bullock, 122 Mich. 620.

¶ 88. One wishing to raise the claim that, notwithstanding his suspension and removal, he was the de jure street commissioner of a city should proceed by quo warranto.—Hartwig v. Mayor and Common Council of Manistee, 134 Mich. 615.

¶ 89. In the case of an alleged intrusion upon an office, the court in an action of quo warranto has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it.—Attorney General ex rel. Selby v. MacDonald, 164 Mich. 590.

§ 26. Collateral question of or attack on right to office.

Effect of expiration of office to abate action or writ against officer, see Abatement § 5; Mandamus § 133.

Habeas corpus as means of trying rightful incumbency of justice of the peace, see Habeas Corpus ¶ 16.

Replevin or proceedings for books or papers of office, see post § 27.

Mandamus to determine right to office, see post § 28.

Injunction as remedy, see post § 29.

¶ 90. The title to office cannot be tried collaterally.—Jhons v. People, 25 Mich. 499; Frey v. Michie, 68 Mich. 323.

¶ 91. The right to office of a person in actual possession cannot be questioned collaterally.—Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 92. The official acts of a de facto officer cannot be collaterally attacked.—Connine v. Smith, 190 Mich. 631.

¶ 93. The title of an incumbent to a public office cannot be collaterally questioned.—North v. City of Battle Creek, 185 Mich. 592.

¶ 94. The right of a person to hold a public office cannot be determined in an action by the incumbent or a third person to recover the salary thereof.—North v. City of Battle Creek, 185 Mich. 592.

¶ 95. Where it is not disputed that a person is an officer de facto, the court will not consider in a collateral proceeding whether he is or is not an officer de jure.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416; Moiles v. Watson, 60 Mich. 415.

¶ 96. The actual legal right of one in possession of an office cannot be tried in a collateral proceeding between third persons. —Facey v. Fuller, 13 Mich. 527; Druse v. Wheeler, 22 Mich. 439.

¶ 97. Where county drain commissioners assume to act as such they are at least officers de facto, even though they were supervisors when they were appointed; and their action within the scope of the authority conferred upon county drain commissioners cannot be attacked collaterally.—Zabel v. Harshman, 68 Mich. 273.

¶ 98. Where at the time of administering an oath and taking an affidavit a person was and long previous thereto had been openly and without objection performing the duties of deputy clerk, the regularity of his appointment to office could not be questioned by attacking in a collateral proceeding the validity of such affidavit.—Tower v. Welker, 93 Mich. 332.

¶ 99. The action of de facto county drain commissioners cannot be attacked collaterally within the scope of the authority conferred upon county drain commissioners.—Zabel v. Harshman, 68 Mich. 273.

¶ 100. In a trial for perjury, evidence that the oath was administered in open court by one who was acting as deputy clerk is sufficient proof of his official character. In a collateral proceeding it is enough that he was shown to be an officer de facto.—Keator v. People, 32 Mich. 484.

¶ 101. One's title to the office of judge of the recorder's court of a city cannot be tried in a collateral proceeding by certiorari upon a judgment given by him as such recorder, there being no claim that any other person is the duly elected and qualified recorder.—People v. Gobles, 67 Mich. 475.

¶ 102. A tax will not be held illegal in a proceeding for the sale of land therefor, on the ground that the deputy township treasurer, who made the return, was not a resident of the township, where the township treasurer was a resident, and the deputy was in fact appointed, and was an officer de facto. —Auditor General v. Longyear, 110 Mich. 223.

¶ 103. In an action brought by one who has purchased of an agent, appointed by the commissioner of the land office, timber which

had been taken by a trespasser from state lands, neither the trespasser nor one claiming under him can dispute the validity of the agent's appointment.—Ballou v. O'Brien, 20 Mich. 304.

§ 27. ——Replevin or proceedings for books or papers of office.

Possession of indicia of title to office, see ante § 22.
Mandamus to turn over books and record and incidentally to try title to office, see Mandamus § 20.
General law of replevin, see Replevin.

¶ 104. The legality of the appointment of an officer (a city street commissioner) cannot be questioned in replevin for books and tools belonging to the office brought by one claiming a subsequent appointment.—Hallgren v. Campbell, 82 Mich. 255.

¶ 105. The statutory proceeding for compelling a public officer to surrender the books and papers of his office to his successor (How. St., ch. 295) is summary and does not apply for determining the latter's right to the office, but only for ascertaining whether he has been declared by the proper authority to have been elected or appointed.—Curran v. Norris, 58 Mich. 512.

§ 28. ——Mandamus to determine right to office.

General principles of mandamus, see Mandamus.
Impropriety of mandamus to try title to office, see Mandamus § 20.
Mandamus to protect rights in office, see Mandamus §§ 84, 86.
Mandamus to compel duties relating to elections and certification of result, see Mandamus §§ 82-84.
Mandamus to compel keeping offices at proper place, see Mandamus ¶ 521.
Mandamus to turn over books and records and incidentally to try title to office, see Mandamus § 20.

¶ 106. Since, under Pub. Acts 1907, Act No. 329, § 1, a discharged Union soldier is not entitled to an appointment to office unless he possesses the other requisite qualifications, a discharged soldier is not entitled to mandamus to compel his appointment to the office of city attorney where the appointing power is vested in the mayor of the city, and he has determined that relator is not qualified.—Patterson v. Boron, 153 Mich. 313.

§ 29. ——Injunction as remedy.

General law of injunction, see Injunctions.
Enjoining acts of public officers, see also Injunctions, II, D.

¶ 107. The question between contending claimants to the rights and powers of a municipal office, and the question between municipal corporations claiming to be invested with authority over the same subject and denying each other's lawful existence, are not questions of equitable cognizance by bill to restrain assumption of office, the statute having provided a specific and adequate remedy at law by an information in the nature of a quo warranto.—Detroit v. Board of Public Works, 23 Mich. 546.

¶ 108. The propriety of an injunction restraining a claimant to a city office, declared elected by a new city council, who has executed and filed his official bond and oath of office, from interfering with a candidate to succeed himself to such office in the full discharge of the duties of the office, where such candidate was declared elected by the old city council and has executed and filed his official bond and oath of office, must finally rest upon whether the action of the new council is final and conclusive, which is a question of law having to do with the construction of the city charter; but though injunction will not ordinarily issue in favor of a complainant who does not make a prima facie case of clear legal right, yet where one of such claimants was in possession as a de facto officer an injunction against forcible intrusion by the other will be sustained as a proper exercise of judicial discretion.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 109. Equity has the right to protect an officer de facto in his incumbency by a temporary injunction until such time as the right of office shall be tried at law.—Stenglein v. Saginaw Circuit Judge, 128 Mich. 440.

¶ 110. The court has the power to protect by injunction a de facto officer in his custody of the office until his right to the title to the office should be tested in a proper forum by the defendant, where in the opinion of the judge the bill of such officer makes a prima facie case; and it was not an abuse of discretion for the judge to refuse to enter upon the question of the right to the office.—Blain v. Chippewa Circuit Judge, 145 Mich. 59.

¶ 111. In granting a temporary injunction against a claimant interfering with the present incumbent of a public office, the question is not who is entitled to the office but whether there is a bona fide controversy over the office.—Stenglein v. Saginaw Circuit Judge, 128 Mich. 440.

¶ 112. As How. St. § 2643 provides for a board of assessors to levy special assessments in cities incorporated under the general law, an ordinance providing for the creation of such a board, under section 2427, is unnecessary; and where the common council has assumed under section 2643 to appoint assessors, whether the persons so named were or were not officers de jure will not be considered in a suit to restrain the collection of a special assessment made by them.—Boehme v. City of Monroe, 106 Mich. 401.

§ 30. Presumptions and proof of right.

Prima facie right conferred by finding of canvassers, see ante § 21.
Presumptions and evidence as to tenure, see post § 36.
General law of evidence, see Evidence.
Best and secondary evidence of official character of person, see Evidence § 126.
Judicial notice of officers and their character, see Indictment § 128.

¶ 113. In a collateral proceeding one's official character is sufficiently shown by a resolution of appointment which recites his predecessor's resignation, and by proof that he proceeded to the discharge of his duties without his right being questioned.—Bird v. Perkins, 33 Mich. 28.

¶ 114. The actual legal right of one in possession of an office cannot be tried in a collateral proceeding between third persons, and in such proceeding mere proof of user is sufficient to show his official action valid. —Tower v. Welker, 93 Mich. 332.

¶ 115. In collateral proceedings between third persons the mere proof of user by any one who knows the fact of the legal right of one in possession will be sufficient to show his official action valid.—Facey v. Fuller, 13 Mich. 527.

¶ 116. It cannot be presumed that a de facto official has neglected to make any necessary qualification.—First Nat. Bank v. St. Joseph Township, 46 Mich. 526.

¶ 117. The absence of any record in the town books showing that the assessors were sworn does not furnish prima facie evidence that they were not sworn.—Sibley v. Smith, 2 Mich. 486.

¶ 118. One of three superintendents of the poor having been a party to a controversy out of which grew the attempted removal of the other two by the supervisors, and the appointment of others in their places, his recognition of the new appointees as his colleagues or cosuperintendents would be of little force to make out that they were officers de facto.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

IV. ASSUMPTION, TERM AND DURATION OF OFFICE OR EMPLOYMENT.

§ 31. Assumption in general, oath and qualifying acts.

Tenure and duration of office, see post § 32.
Length of term or right to office, see post § 33.
Duration of appointments to fill vacancies, see post § 34.
Holding over in general, see post § 35.
Presumptions and evidence as to tenure, see post § 36.
Requirement of oath as distinguishing officer from public employee, see ante ¶ 15.
Right to office and how enforced, see ante III.
Official bonds, see post VII.
Constitutional oath of office, see Const. art. XVI, § 2.
Oath of governor, see Comp. L. 1915, § 183.
Oath of attorney general, see Comp. L. 1915, § 183.
Oath of auditor general, see Comp. L. 1915, § 183.
Oath of county officers, see Comp. L. 1915, § 2505.
Oath of village officers, see Comp. L. 1915, §§ 2575, 2576, 2580.

¶ 119. A county officer who is kept out of office by a person holding a certificate of election is not required by the statutes to file his oath and bond until his title is established.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146; People ex rel. Benoit v. Miller, 16 Mich. 56.

¶ 120. Laws 1885, Act No. 227, provides that before entering upon the duties of his office and within ten days after his election or appointment, a township drain commissioner shall take and subscribe the oath of office prescribed by the constitution of this state, and file the same with the township clerk.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

§ 32. Tenure and duration of office.

See also post ¶ 165.
Length of term or right to office, see post § 33.
Nature of tenure between time of sending resignation and date set therein to be effective, see post ¶ 140.
Nature of tenure of office as distinguishing officer from public employee, see ante ¶ 15.
Term of office in militia, see Military ¶ 4.
Constitutional term, validity of attempted changes, see Constitutional Law § 270.
Term and tenure of sheriffs, see Sheriffs, I.
Term and duration of municipal offices, see Municipal Corporations § 174.
Provisions of the constitution as to commencement of term, see Const. art. XVI, § 1.
Tenure of recess appointments of governor, see Comp. L. 1915, § 257.

¶ 121. A public office is not a contract relation; and the legislature, when not restrained by the constitution, may abolish or modify at will official tenures and profits.—Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 122. The terms of the circuit judges and regents of the university, elected in the ninth and tenth judicial circuits, under the act of January 29, 1858, commenced as soon as they had been duly declared elected.—People v. Garlock, 5 Mich. 284.

¶ 123. If the state or other power sees fit to excuse failure of a township officer's sureties to justify in his official bond by granting the officer his commission, the defects of his title are cured, and it is a title de jure, having relation back to the time of his election or appointment.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

§ 33. Length of term or right to office.

Duration of appointments to fill vacancies, see post § 34.

¶ 124. In the absence of statutory prohibition, express or implied, a public officer holds over until his successor is elected and qualified.—Messenger v. Teagan, 106 Mich. 654.

¶ 125. Where the statute prescribes the duration of an official term, it is not competent for the appointing power to restrict the term to a shorter period in making the appointment.—Stadler v. City of Detroit, 13 Mich. 346.

§ 34. Duration of appointments to fill vacancies.

Filling vacancies generally, see ante § 18.
Validity of legislative provision for interim appointments or extensions, see Constitutional Law § 75.

¶ 126. The governor cannot, by any provision in the commission appointing a probate judge to fill a vacancy, limit the appointment, or make its continuance depend upon his pleasure.—People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 127. Even if it is assumed that the appointment to office to fill a vacancy as provided by Const. art. VII, § 11, is temporary, yet if the appointment is lawful the appointee may continue to perform the duties of the office until the electors fill the vacancy.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 128. A person appointed by the governor to fill a vacancy in the office of probate judge holds until a successor is elected and qualified.—People v. Palmer, 91 Mich. 283.

¶ 129. Where the governor appoints a person to fill a vacancy in a county office, such appointment is not confirmed for the unexpired term by the failure of the electors of the county to elect for such office at a subsequent election.—Attorney General v. Trombly, 89 Mich. 50.

¶ 130. An appointment by the governor under Const. art. 6, § 14, to fill a vacancy in the office of probate judge, is not merely for the residue of the term in which the vacancy occurred; the appointee holds until the place is filled by a new election.—People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 131. Where by a city charter a justice of the peace appointed to fill a vacancy can hold only until a certain date, his office ends then absolutely, and a judgment thereafter rendered by him is void.—Edison v. Almy, 66 Mich. 329.

¶ 132. The term of the governor's appointee to fill the statutory vacancy in the newly-created office of circuit judge lasts only until the next general election or until his successor is elected and qualified; and this is so although the statute undertakes to fix such term for a longer period.—People ex rel. Attorney General v. Burch, 84 Mich. 408.

¶ 133. Respondent was appointed while the senate was not in session, on December 20, 1910, to fill a vacancy in the Board of Control of the State Prison at Jackson, by a governor whose term expired December 31, 1910. Said appointment was confirmed by the senate January 10, 1911, a new governor having meanwhile succeeded to office. Held, under Comp. L. 1897, § 2081, respondent held office only until the convening of the senate and not until the expiration of the term for which he was appointed.—People ex rel. Attorney General v. Haggerty, 167 Mich. 682; Phillips v. Attorney General, 167 Mich. 687.

§ 35. Holding over in general.

See also ante ¶ 124.
Holding over as giving status of de facto officer, see ante § 7.

¶ 134. The city physicians of Grand Rapids are not authorized by the charter to hold over where their successors are not chosen within a fixed time after their terms expire and a vacancy occurs in the office.—Saunders v. City of Grand Rapids, 46 Mich. 467.

¶ 135. Where the statute provides that an officer shall hold for a specified number of years and until his successor shall be elected and qualified, the death of an officer-elect before his term begins and before he has qualified creates no vacancy that the governor can fill by appointment, but the incumbent holds over until his successor is chosen by a special election.—Lawrence v. Hanley, 84 Mich. 399.

¶ 136. Under How. St. § 511, which provides for three auditors for Wayne county, one to be elected each year and each to hold office for three years "and until his successor shall be elected and qualified," the death of an auditor-elect, before he has qualified or entered on the duties of his office, creates no vacancy that the governor can fill by appointment, but the auditor whose term is about to expire holds over until his successor is chosen by a special election.—Lawrence v. Hanley, 84 Mich. 399.

§ 36. Presumptions and evidence as to tenure.

Presumption on continuance in office, see also Evidence § 40.

Proof of official character by reputation, see also Indictment ¶ 1293.

¶ 137. One who is shown to have been an officer at a certain time must, till the contrary is shown, be presumed to continue such till the expiration of the term for which he is elected.—Kinyon v. Duchene, 21 Mich. 498.

V. RESIGNATION, ABANDONMENT, REMOVAL AND REINSTATEMENT.

§ 37. Resignation in general.

Necessity and sufficiency of acceptance, see post § 38.

Abandonment or vacation of office, see post §§ 39-41.

Removals from office, see post §§ 42-44.

Implied removal; appointment or recognition of successor, see post § 45.

Grounds and charges for removal, see post §§ 46-48.

Petition and proceedings for removal, see post §§ 49, 50.

Remedies against wrongful removal and for reinstatement, see post § 51.

Resignation from existing office as qualification for new office, see ante § 13.

Statutory provisions relative to resignations, see Comp. L. 1915, §§ 239, 240.

¶ 138. While the law concedes the right of resignation, it is its policy to take away all inducements to the vacation of office.—Ellis v. Lennon, 86 Mich. 468.

¶ 139. An officer's resignation is presumptively shown as to third persons where the resolution appointing his successor recites such resignation and where a person of the same name as the former officer signs the other's official bond.—Bird v. Perkins, 33 Mich. 28.

¶ 140. A circuit judge who has sent in his resignation to take effect in five days is during that time still in possession of his office.—Bashford v. People, 24 Mich. 244.

§ 38. ——Necessity and sufficiency of acceptance.

¶ 141. The resignation of a public officer is not complete until it has been accepted by the proper authority.—Clark v. Board of Education of Detroit, 112 Mich. 656.

¶ 142. The tender of a resignation by a supervisor or clerk of a township by filing the same with the clerk is not valid and effectual as a resignation so as to relieve the officer of his official character, without an acceptance by the township board, or an appointment to fill the vacancy.—Edwards v. United States, 103 U. S. 471, 26 L. ed. 314; Thompson v. United States ex rel. Cambria Iron Co., 103 U. S. 480, 26 L. ed. 521.

¶ 143. Where a resignation from office is to the wrong body, but where the proper body, after its clerk—being advised of the vacancy—has published notice of election, declares a successor elected, the resignation is sufficiently accepted.—Pariseau v. Board of Education of Escanaba, 96 Mich. 302.

¶ 144. In Michigan the common-law rule that the resignation of a public officer is not complete until accepted by the proper authority either by a formal declaration or the appointment of a successor is in force; this rule seems to be confirmed by the statutes, so far as their intent can be gathered from their specific intentions, citing Comp. L. 1871, §§ 615, 617, 649, 690, 693, 706.—Edwards v. United States, 103 U. S. 471, 26 L. ed. 314; followed in Clark v. Board of Education of Detroit, 112 Mich. 656.

¶ 145. Comp. L. 1871, § 690, requiring qualification of township officers, of whom an oath is required, except justices of the peace, within ten days, under pain of a penalty, sections 691, 693, providing that resignations of officers elected at township meetings must be in writing, addressed to the township board, who are authorized to make temporary appointments to fill vacancies, section 706, providing that resignations of other officers shall be made to the appointing officer or officers, section 649, prescribing the term of township officers elected at annual meetings of the township, except justices, commissioners of highways, and school inspectors, shall be for the term of one year "and until his successor shall be elected and duly qualified," and section 617, providing that every "office shall become vacant on the happening of either of the following events before the expiration of the term of such office; first, the death of the incumbent; second, his resignation; third, his removal from office," etc., do not change the common-law rule requiring the acceptance of the resignation of a township supervisor to be accepted before it can be regarded as complete.—Edwards v. United States ex rel. Thompson, 103 U. S. 471, 26 L. ed. 314.

§ 39. Abandonment or vacation of office.

By acceptance of incompatible office, see post § 40.

By nonresidence or removal from elective district, see post § 41.

Resignation in general, see ante §§ 37, 38.

Statutory provisions for vacation, see Comp. L. 1915, § 241.

¶ 146. An office is not vacant so long as it is supplied in the manner provided by law with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it.—Baxter v. Latimer, 116 Mich. 356.

¶ 147. Where a new election district is created it cannot be said that there is a vacancy in the office of inspector for such

district, inasmuch as no office or officer has previously existed.—Conely v. Common Council of Detroit, 93 Mich. 446.

¶ 148. There can be no vacancy in an office where no office or officer has previously existed.—Conely v. Common Council of Detroit, 93 Mich. 446.

¶ 149. The intention to abandon a public office may be inferred from acts and conduct evincive thereof.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

¶ 150. A vacancy in office warranting an appointment to fill it may exist by voluntary relinquishment of the office without any judicial ouster or determination of the question.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

¶ 151. Abandonment of office, as found by a jury, is sustained by proof that at the time of an investigation of charges against an incumbent by the common council he precipitately left the state and went to Mexico, staying there for 17 months, that he did not notify his attorney or the city authorities of his intention to leave, that his private papers were all removed from his desk and that on leaving he was somewhat clandestine, having gone to a suburban station to take the train, and that while absent he made no claim to the office; though he returned and explained that he did so when informed that the grand jury was to be called and that he never intended to abandon office and was absent only for his health.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

¶ 152. Failure of the sureties upon an official bond to indorse thereon their sworn justification as to their pecuniary responsibility does not necessarily create a vacancy in the office; such failure being a ground for forfeiture of office only, and not a forfeiture ipso facto.—People ex rel. Bennett v. Benfield, 80 Mich. 285.

§ 40. ——By acceptance of incompatible office.

¶ 153. The fact that the mayor of a city was elected to the office of governor after a public declaration of an intention, if elected, to continue to perform the duties of mayor, and that the evident desire of the majority of voters will be thwarted if he be not allowed to do so, is entitled to no weight in determining whether the former office was vacated by an acceptance of the latter.—Attorney General ex rel. Moreland v. Common Council of Detroit, 112 Mich. 145.

¶ 154. A board of supervisors may be compelled to recognize one elected as a member, though, at the time of his election, he held an office alleged to be incompatible with that of a supervisor, since one who, while occupying one office, accepts another incompatible with the first, ipso facto vacates the first office.—Northway v. Sheridan, 111 Mich. 18.

§ 41. ——By nonresidence or removal from elective district.

Loss of residence as vacating city office, see Municipal Corporations § 176.
Statutory provision for vacation by removal from state or district, see Comp. L. 1915, § 241.

¶ 155. Charter provision vacating office on incumbent's removal from ward applies where removal is caused by legislature's changing boundaries.—Ross v. Barber, 86 Mich. 380.

¶ 156. Village offices become vacant under How. St. § 2787, when, in consequence of a statute detaching territory from the village, their incumbents cease to be residents of the village.—People v. Village of Highland Park, 88 Mich. 653.

¶ 157. On the question whether an officer left the state with intention to abandon his office and whether a vacancy was thus created and filled lawfully by appointment of the respondent, the facts and circumstances of relator's leaving for Mexico where he stayed some months and his acts and conduct in that connection before he went and after he returned are admissible as bearing on his intent, where he claims that his absence was temporary for his health and without abandonment and where respondent claims that he fled in the midst of a trial of charges before the common council.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

¶ 158. On the question whether there was a vacancy in office claimed by relator and which had been filled by appointment of respondent, the issue being that relator had departed from the state with intention to relinquish the office, it was proper to show that proceedings to remove him were pending in the councils on charges of malfeasance and neglect of duty, although the proceedings were irregular and void; since the proceedings were circumstances bearing on the intent of relator in departing.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

§ 42. Removals from office.

State officers, see post § 43.
County officers, see post § 44.
Implied removal by appointment or recognition of successor, see post § 45.
Grounds and charges for removal, see post §§ 46-48.
Petition and proceedings for removal, see post §§ 49, 50.
Remedies against wrongful removal and for reinstatement, see post § 51.
Incompatibility of two offices from power of removal vested in one over the other, see ante ¶ 47.

Proceedings for removal as bearing on intent to abandon office by departure from state, see ante ¶ 158.
Constitutional right to remove and limitations on removals, see Constitutional Law § 271.
Disability of charter commission to remove member, see Municipal Corporations ¶ 67.
Removal of constables, see Sheriffs, I.
Removals of municipal officers, see Municipal Corporations § 170 et seq.
Writ of prohibition to city council sitting as tribunal to remove officer, see Prohibition, Writ of.
Statutory provisions for recall, see Comp. L. 1915, §§ 3988-3994.
Statutory authority for recall provision in municipal charter, see Pub. Acts 1917, No. 40.
Power to remove state and county officers, see Comp. L. 1915, § 243 et seq.
Constitutional provision for impeachments and removals from office, see Const. art. IX.

¶ 159. Power to authorize removal for a cause to be defined by law does not allow removals at discretion and without cause.—People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 160. Removals at will are not in accordance with the policy of the state.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

¶ 161. When an appointed officer offers his bond the common council cannot arbitrarily refuse to approve it upon the illegal action of the appointing power in revoking his appointment.—Speed v. Common Council of Detroit, 97 Mich. 198.

¶ 162. The governor can obtain jurisdiction for the removal of an officer only in the method provided by the statute.—McLaughlin v. Burroughs, 90 Mich. 311.

¶ 163. The right of the governor to exercise the power of removal under How. St. § 653, relating to all city officers, is not superseded as to the mayor of the city of Detroit by the mere fact that the charter of the city provides for the removal of other city officers, but not of the mayor.—Attorney General ex rel. Moreland v. Common Council of Detroit, 112 Mich. 145.

¶ 164. Where the prosecuting attorney of a county refuses to make and attach to a petition for the removal of a public officer the statement required by How. St. § 653, that in his opinion the case demands investigation, such refusal is not reviewable by mandamus to compel him to act.—McLaughlin v. Burroughs, 90 Mich. 311.

¶ 165. All constitutional offices are accepted and held on the condition that the incumbent may be removed by the governor according to the provisions of the Constitution, art. 12, § 8.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

§ 43. ——State officers.

Removal of superintendent of fisheries, see also ante ¶ 6.
Removal of state officers by governor, see Const. art. IX, § 7.

¶ 166. The governor is not disqualified to make charges of neglect against a state officer on his own investigation merely because in exercising the power to remove the officer, if the charges are sustained after a hearing under Const. art. 12, § 8, he will also be judge of the facts.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

¶ 167. The superintendent of fisheries is removable at the pleasure of the state board of fish commissioners.—Portman v. State Board of Fish Com'rs, 50 Mich. 258.

¶ 168. A member of the board of control who has signed the charges is not thereby disqualified from sitting on the hearing of the charges against the warden of the state house of correction.—Fuller v. Attorney General, 98 Mich. 96.

§ 44. ——County officers.

Constitutional provision for removal of county officers, see Const. art. IX, § 8.

¶ 169. To justify the removal of a county officer the records of the board must show all facts necessary to warrant it.—McGregor v. Gladwin County Sup'rs, 67 Mich. 388.

¶ 170. The governor has no power to order an investigation of a county officer except upon specific charges verified by affidavit, nor can he remove such officer, after such investigation, unless upon such a record of the proceedings as will show for what particular act or acts of misconduct he has forfeited his office, and been removed therefrom (How. St. §§ 653, 654).—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 171. Under How. St. § 483, subd. 17, authorizing a board of supervisors to remove any county officer or agent appointed by them when in their opinion he is incompetent to execute the duties of his office, the board of auditors of Wayne county can, without charges, notice or hearing, remove for incompetency any officer or agent employed by it.—Trainor v. Board of Auditors of Wayne County, 89 Mich. 162.

¶ 172. Under How. St. § 483, subd. 17, authorizing a board of supervisors to remove any county officers or agent appointed by them when in their opinion he is incompetent to execute the duties of his office, a board of supervisors can, without charges, notice, or hearing, remove for incompetency

any officer or agent appointed by it.—Trainor v. Board of Auditors of Wayne County, 89 Mich. 162.

¶ 173. The board of supervisors has no general power to remove county officers; Comp. L. 1871, § 477, subd. 14, How. St. § 483, subd. 14, gives the power only for the two causes named—failure to report and neglect to give bond; and not a discretionary power to remove.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

¶ 174. A county physician, a special officer in justices' courts, a chief janitor of county buildings, and a file clerk of county records, appointed by the board of auditors of Wayne county pursuant to How. St. § 5181, which provides that appointees thereunder shall hold their offices for one year from January 1, unless otherwise specially mentioned in the resolution for their appointment, and which gives the board the same power of removal as boards of supervisors possess under the statutes of this state, may be removed for incompetency, with the concurrence of all of the members of the board of auditors, without charges being preferred against them, or an opportunity to be heard thereon.—Trainor v. Board of Auditors of Wayne County, 89 Mich. 162.

§ 45. Implied removal; appointment or recognition of successor.

Appointment of successor as implied acceptance of resignation, see post ¶ 143.

¶ 175. An officer cannot be removed from his office by the body possessing power for that purpose, without an intent on their part to remove him. And where the duration of his term is fixed by statute, and the body possessing the power of removal and appointment makes a new appointment on the mistaken idea that a vacancy exists, such appointment does not have the effect to remove the incumbent.—Stadler v. City of Detroit, 13 Mich. 346.

¶ 176. Supervisors having acted without authority in making the appointment of new officers to fill a supposed vacancy caused by their removal of existing officers, their immediate recognition of the appointment as one to be respected cannot be regarded as of any importance; they merely attributed validity to their own invalid act.—People ex rel. Mead v. Ingham County Treasurer, 36 Mich. 416.

§ 46. Grounds and charges for removal.

Neglect of official duties, see post § 47.
Misconduct in previous term, see post § 48.
Petition and proceedings for removal, see post §§ 49, 50.
Remedies against wrongful removal and for reinstatement, see post § 51.
Charges and hearing on proceedings to remove city officers, see Municipal Corporations §§ 171, 172.
Grounds for removal under statute, see Comp. L. 1915, § 243 et seq.

¶ 177. The misconduct for which an officer may be removed must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 178. Charges that an officer is "wholly incompetent to execute properly the duties of his office," and that he is "guilty of official misconduct," are mere conclusions of fact.—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 179. A charge that a county officer sought to be removed is "an habitual drunkard" is sufficiently explicit to warrant statutory proceedings for his removal from office. —People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 180. A charge that respondent "arrested innocent people without process, and after confining them a short time, without arraignment, allows them to go free," and that he "assaults peaceful citizens, and in one instance inflicted serious injury, dislocating a shoulder," is too general to support proceedings for his removal from a county office.—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 181. It is misfeasance, warranting removal from office, for superintendents of the poor to draw orders on the county treasurer in favor of persons without whose knowledge they themselves draw the money, and compel the payees to take from themselves at exorbitant prices such goods as they see fit to give them; or to use their official power and the poor fund to coerce the recipients of their favor to vote under their dictation; or not to refund to the treasurer money which has been repaid to them by persons to whom they have afforded temporary relief.—Gager v. Chippewa Supervisors, 47 Mich. 167.

¶ 182. Where a park commissioner is given authority to employ and discharge superintendents, engineers, clerks, agents, and subordinates, he must be held responsible in a larger degree for the performance of duties delegated to such appointees than he would be were they appointed by others.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 183. Under Laws 1893, Act No. 118, the board of control of the state house of correction and reformatory at Ionia has power to remove the warden for lack of capacity and diligence without regard to the question of moral turpitude.—Fuller v. Attorney General, 98 Mich. 96.

§ 47. ——Neglect of official duties.

¶ 184. Neglect of an officer, furnishing grounds for removal, may consist in such

acts as occasion inconvenience to the public, although they do not occasion actual financial loss.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 185. Where the secretary of state, state treasurer, and commissioner of the state land office, while acting as members of the board of state canvassers, certify as correct a tabulated statement prepared by their clerks to whom the returns of election were turned over, purporting to show the number of votes cast for and against a constitutional amendment, without comparing or examining the returns from any county, or comparing them with said tabulated statement, and relying solely upon the statements of said clerks that said tabular statement was correct, held, that they were guilty of gross neglect of duty within the meaning of Const., art. 12, § 8, which provides for the removal from office, for such neglect, of certain state officers by the governor.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

¶ 186. Neglect of duty on the part of a public officer is gross, where it is, from the gravity of the case or the frequency of its existence, so serious in its character as to endanger or threaten the public welfare.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 187. The ex-official duties of a state officer as member of the Board of State Canvassers pertain to his official character, and he may be removed for gross neglect thereof as a state officer under Const. art. 12, § 8.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

¶ 188. Charges of gross negligence against a park commissioner, in that he permitted public work to be done in a manner not in accordance with the specifications in the contracts, and failed to have such work properly inspected, if established, are legally sufficient to authorize his removal from office.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 189. The facts that a municipal corporation is fully protected by bonds against loss, that public work had not been finally accepted by a park commissioner charged with neglect in the inspection thereof, that the contractors were bound to make good all defects in work or material, and that the commissioner, according to his testimony, intended to make an accurate, final inspection of the completed work, and to require it to conform in all respects to the contract, are not so inconsistent with charges of gross negligence as to invalidate a finding by the common council of a city that the commissioner was guilty of such negligence.—Bolger v. Detroit Common Council, 153 Mich. 540.

§ 48. ——Misconduct in previous term.

¶ 190. The misconduct of a city treasurer, who is his own successor, committed during the preceding term may be inquired into and furnish ground for his removal.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

§ 49. Petition and proceedings for removal.

Notice and opportunity for defense, see post § 50.

Grounds and charges for removal, see ante §§ 46-48.

Meetings of county board to hear charges for removal of officers, see Counties § 7.

Power of grand jury to investigate official doings, see Grand Jury § 4.

Hearing on proceedings to remove city officers, see Municipal Corporations §§ 171, 172.

Proceedings for removal or dismissal of policemen or firemen on charges, see Municipal Corporations § 172.

Procedure on removal by governor, see Comp. L. 1915, §§ 245-251.

¶ 191. The board of police commissioners does not act as a court, and the formal and technical rules of pleading and practice do not apply to their investigations.—Wellman v. Board of Metropolitan Police, 84 Mich. 558.

¶ 192. In a proceeding to remove a person from a public office, the trial and judgment of removal must relate to the same office specified in the charge or complaint.—Hall v. People, 21 Mich. 456.

¶ 193. The petition (under How. St., § 483, par. 17) for the removal of superintendents of the poor charged them with having audited and allowed their own bills for individual services performed by them, with having issued warrants on the county treasurer in their own favor in excess of the compensation allowed them by the board of supervisors, and of the amounts justly due them, as fixed by the board or the statutes, and with having used the credit of the county in procuring livery rigs for their own use, and with having audited bills for the same, and drawn warrants on the county treasurer for their payment. The charges were amplified by a bill of particulars setting up the amounts of the items claimed to have been improperly allowed, with the date of allowance and the name of the person to whom allowed. Held, that the charges, as thus limited, were sufficiently specific.—Burt v. Iron County Sup'rs, 108 Mich. 523.

¶ 194. It is sufficient if the charges preferred contain specific statements of infractions of the laws or of the rules and regulations which the warden should observe, and specify the facts depended upon to show incompetency or unfitness, and which require a removal from the standpoint of the best interests of the institution; and as the information upon which they must be based is largely within the control of the warden, and can only be obtained by investigation, it is not to be expected that the formality of

criminal pleading should be used, and it is enough if tangible statements of fact are made, sufficient to apprise the warden of the nature of the accusation he is to meet.—Fuller v. Attorney General, 98 Mich. 96.

¶ 195. Under the statute (How. St., § 483, subd. 17), it is not essential to the validity of a removal of superintendents of the poor for incompetency that the action taken should be based upon specific charges.—Burt v. Iron County Sup'rs, 108 Mich. 523.

¶ 196. Where the charges presented to the governor against a county officer are not sufficiently specific, the defect is not cured by service of a bill of particulars five days before the hearing, containing the necessary specifications (How. St. §§ 653, 654).—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 197. To justify a removal from office, the records of the board of supervisors must show all the facts to warrant it. In the case of the removal of a county treasurer for neglecting to give further bonds, the records should show some finding or resolution of the board that the existing bond was insufficient, the requirement of a new bond, notification to the treasurer of that fact, failure on his part to comply, and subsequent proceedings for his removal, of which he should have notice and an opportunity to make defense.—McGregor v. Gladwin County Sup'rs, 37 Mich. 388.

¶ 198. Under Local Acts 1901, Act No. 417, § 4, providing that a park commissioner may be removed by a vote of two-thirds of the members elect of the common council, but only upon written charges, with an opportunity to appear and defend, a legal cause for removal must be shown, and the legal sufficiency of the cause of removal is a question for the court.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 199. The metropolitan police board of Detroit, in a proceeding for the dismissal of a member of the force, has jurisdiction, upon proper charges, to determine whether he is guilty of felony; though the punishment could not go beyond dismissal, nor would the board's determination be binding in any other proceeding.—Wellman v. Board of Metropolitan Police of City of Detroit, 91 Mich. 427.

¶ 200. Where, in proceedings to remove a park commissioner, upon charges of neglect, it appeared that he had frequently been over certain paving work while it was in progress, and that during all that time the contractors were in violation of the specifications putting less than eight inches of concrete back of the curbing, and less than six inches in front of the curbing, it is a fair question whether the commissioner could have remained ignorant of such facts unless he were more than ordinarily negligent.—Bolger v. Detroit Common Council, 153 Mich. 540.

¶ 201. Pub. Acts 1897, No. 205, providing in section 1 for the preferment of discharged Union soldiers and sailors in public departments and upon public works of the state, and in section 2 that no veteran holding an office or employment in the public works of any city shall be removed without his consent except after a full hearing before the mayor, etc., and section 3 imposing a penalty for violation, is penal in character and must be strictly construed and therefore section 2 is not applicable to a clerk in the city attorney's office, who holds office in a public department as distinct from "public works."—Ellis v. Common Council of City of Grand Rapids, 123 Mich. 567.

¶ 201a. Statutes providing for the removal of county officers must be strictly followed, like penal statutes.—People ex rel. Mettevier v. Therrien, 80 Mich. 187.

§ 50. ——Notice and opportunity for defense.

¶ 202. Wherever cause must be assigned for removing an officer, he is entitled to notice and to an opportunity to defend.—Hallgren v. Campbell, 82 Mich. 255.

¶ 203. Before the governor can remove a county officer from office at least eight days' notice shall be given to the accused of the time and place at which the examination of witnesses in relation to such charges will be held (How. St. §§ 653, 654).—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 204. The governor's power of removal under Const., art. 12, § 8, can only be exercised for the specific causes mentioned in the constitution, and upon charges which shall specify the particular acts or neglect relied on to make out the cause alleged; and the respondent must have notice of these charges and specific allegations, and an opportunity for defense. And the governor has judicial power to examine into and pass upon these charges.—Dullam v. Willson, 53 Mich. 392.

¶ 205. The governor's citation to a state officer to appear in answer to charges is not an "official act" within the meaning of Const., art. 5, § 18, requiring "all official acts of the governor, his approval of the laws excepted," to be authenticated by the great seal of the state, especially where the secretary of state, keeper of the seal, is one of the respondents.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

¶ 205a. The governor's citation to a state officer to appear before him to answer charges is not such process as is required by Const., art. 6, § 35, to be styled "In the name of the people of the State of Michigan."—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

¶ 206. A township officer whose bond has been approved without justification of the sureties, and who has entered upon the duties of his office, cannot be removed from office by having such office declared vacant without notice to him and an opportunity to file a new bond.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

¶ 207. Laws 1877, Act No. 165 (How. St., § 483, subd. 17) permits a board of supervisors to remove an officer appointed by it on charges preferred to the board, or its chairman, and after notice of the hearing and a copy of the charges has been delivered to the officer, and full opportunity has been given him to be heard in his defense. Held, that as to time and notice of hearing the board does not act as an ordinary court, but as a public board authorized to use its own time and methods, subject only to the condition that no one shall be removed without charges and reasonable notice, nor without a full opportunity to be heard; and a service on August 7th of a copy of charges and notice of meeting to be held August 18th to investigate them, was held sufficient, though made on the authority of two supervisors without a meeting of the board.—Gager v. Chippewa Supervisors, 47 Mich. 167.

¶ 208. The discretion of the board of metropolitan police of Detroit, exercised in a legal manner, is not reviewable; but every accused member of the force is entitled under the statute to written, verified and specific charges.—Wellman v. Board of Metropolitan Police, 84 Mich. 558.

¶ 209. Laws 1893, Act No. 118, does not require a notice of an order removing the warden of the state house of correction to be served upon him before quo warranto proceedings are instituted against him, and the fact that he was represented by counsel when the order was made must be treated as sufficient notice of said order.—Attorney General v. Parsell, 99 Mich. 381.

¶ 210. Although the intention of a village president to remove an officer was shown by his communication to the council, notice to the officer was essential to make the removal effective.—Kriseler v. LeValley, 122 Mich. 576.

¶ 211. A notice signed by the village clerk stating that at a certain meeting of the council all village offices were declared vacant will not suffice as notice that he was removed by the action of the village president under terms of Comp. L. 1897, § 2729, conferring on him power to remove any officer appointed by him.—Kriseler v. LeValley, 122 Mich. 576.

§ 51. Remedies against wrongful removal and for reinstatement.

Certiorari to review removal, see Certiorari § 20.

¶ 212. A patrolman of the police force of Detroit was tried for "conduct immoral and unbecoming an officer," the only specification under such general charge being a felony, upon which he was acquitted by the police board, which, however, found him guilty of the general charge and dismissed him from the force. Held, that specifications were necessary. Reinstatement ordered.—Wellman v. Board of Metropolitan Police, 84 Mich. 558.

¶ 213. The remedy of a discharged city employee is in the courts where no reasons are assigned for his discharge.—Philbrick v. Dust, 178 Mich. 605.

VI. FUNCTIONS, RIGHTS, AND POWERS, ACCOUNTING, LIABILITIES AND IMMUNITIES.

A. IN GENERAL.

§ 52. Source, nature and scope of powers and rights.

Right to books and papers pertaining to office, see post § 53.
Disability to act in conflict with public duties, see post § 54.
Delegation of powers or functions, see post § 55.
Powers and authority of deputies, see post § 56.
Official boards and joint officers, see post § 57.
Liabilities of officers in general, see post §§ 58-60.
Tort liabilities and immunities; misfeasance, nonfeasance and malfeasance, see post §§ 61-64.
Justification by judicial process or proceeding, see post §§ 65-67.
Power of fixing compensation for services, see post § 92.
Nature, scope and exercise of appointing power, see ante § 15.
Criminal misconduct or delinquency, see post VI, B.
Right of officer to question validity of statute, see Constitutional Law § 28.
Legislative interference with local self-government, see Constitutional Law § 76.
Prosecuting attorney and his functions, see Attorneys §§ 62-66.
Officers appointed by governor to execute federal law as federal officers, see also Courts ¶ 385.
Effect of officials' acts to make estoppel against public, see also Estoppel § 44.
Power of peace officer to arrest for crime, see Arrest, I.
Amendment of appeal bond approved by de facto officer, see Appeal § 87, ¶ 387.
Discretion of State Veterinary Board to determine standing of veterinary school organized under statute, see Animals ¶ 112.
Validity of affidavit taken before de facto officer, see also Affidavits ¶ 7.
Effect of filing in wrong office by incumbent holding offices of register of deeds and county clerk, see also Joint Stock Companies ¶ 7.

Duties, functions and powers of judges as such, see Judges, II.
Office and powers of judges, see Judges.
Libel or slander of public officers, see Libel and Slander § 19.
Validity of registration by de facto registering officers, see Elections ¶ 60.
Functions and powers of grand jury, see Grand Jury §§ 4, 5.
Highway officers and their powers and duties, see Highways, VII.
Applicability of civil service system to health board's employees, see Health ¶ 13.
Power of governor and judges to lay out town of Detroit, see Municipal Corporations § 101.
Mode for official action by municipal officers, see Municipal Corporations §§ 193, 194.
Ratification of acts of municipal officers, see Municipal Corporations § 188.
Authority and functions of municipal officers, see Municipal Corporations § 183 et seq.
Civil service system in cities, see Municipal Corporations § 168.
Functions of school officers, see Schools, III.
Functions, duties and privileges of sheriffs, see Sheriffs, II.
Power and authority of officers to collect taxes, see Taxes, X.
Assessing officers and their functions, see Taxes, V.
Sufficiency of signature of school land certificate by superintendent of public instruction, see Public Lands ¶ 231.

¶ 214. All officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly or from the agents or representatives of the people.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 215. Officers who are created by statute must confine their acts within its provisions and not go beyond the plain letter.—Sibley v. Smith, 2 Mich. 486; James v. Howard, 4 Mich. 446.

¶ 216. One acting as an officer de facto is as to the public an officer de jure.—Thompson v. Couch, 144 Mich. 671.

¶ 217. The constitutional (Const. art. 11, § 1) provision for the annual election in "organized townships" of certain officers, including constables, does not apply to organized or incorporated cities and villages; and policemen may by a city charter be empowered to execute within the city limits any process which by law a constable may serve.—White v. Manistee County Sup'rs, 105 Mich. 608.

¶ 218. Persons dealing with public officials must take notice of their powers.—Schneider v. City of Ann Arbor, 195 Mich. 599.

¶ 218a. A statutory provision prescribing the course of proceeding to be pursued by public officers cannot be treated as directory merely and not mandatory, where that which is required to be done is in the nature of a condition precedent to subsequent action, and not simply a step in the course of the proceedings prescribed with a view to a regular and prompt transaction of the business in the progress of which such step is to be taken.—Hoyt v. City of East Saginaw, 19 Mich. 39.

§ 53. Right to books and papers pertaining to office.

Certiorari to review proceedings to compel surrender of books and papers to successor, see Certiorari § 4.

¶ 219. One who is shown to be entitled to the office of supervisor can compel his predecessor to deliver to him the books and papers pertaining to the office (How. St., § 8539).—Schneider v. McIvor, 58 Mich. 511.

§ 54. Disability to act in conflict with public duties.

Right to delegate powers or functions, see post § 55.
Invalidity of contracts tending to influence official action or duty, see Contracts §§ 53, 54.
Invalidity of contract to use or influence official powers for private benefit, see Contracts § 58.
Purchase at tax sale by county treasurer as inconsistent with his duty, see Taxes, XI, A.

¶ 220. The same person cannot act at the same time in a public and in a private capacity, and in antagonistic interests.—Stevenson v. Bay City, 26 Mich. 44.

¶ 221. Public officers are agents so far as to be within the rule prohibiting agents from acting for themselves and their principals in the same transaction.—People ex rel. Plugger v. Overyssel Township Board, 11 Mich. 222.

¶ 222. A public officer charged with the duty of selling property for the best price cannot himself become the purchaser; as, a county treasurer, who has charge of the sale of lands for delinquent taxes.—Clute v. Barron, 2 Mich. 192.

§ 55. Delegation of powers or functions.

See also post ¶ 426.
Powers of deputies, see post § 56.
Power of city clerk to appoint deputy, see Municipal Corporations ¶ 813.
Municipal vice officers and substitutes, see Municipal Corporations § 178.

¶ 223. Official acts must be performed by an officer, not by a clerk not acting under his direction.—Hall v. Collins, 117 Mich. 617.

¶ 224. The state prison inspectors cannot, by their rules and regulations, impose upon the clerk any duties that will allow him, as such, to do any part of the agent's responsible

work that involves discretion or requires security.—Hulin v. People, 31 Mich. 323.

§ 56. Powers and authority of deputies.

Liability of officers for indemnification of deputy or clerk, see post § 60.
Signature of jurat to affidavit as "deputy" of officer, see also Equity ¶ 216.
Deputy as officer within statutes relating to embezzlements by officers, see Crimes § 69.
Power of deputy to administer oath in taking affidavit, see Affidavits § 2.
Power of deputy clerk to affix seal to deposition, see Depositions ¶ 51.
Signature by deputy clerk as that of the clerk, see also Depositions ¶ 52.
Power of deputy township clerk to act as member of township board when clerk is disqualified, see Highways ¶ 171.
Deputy sheriffs and under-sheriffs, see Sheriffs, V.
Power of deputy city clerk to take affidavit, see Affidavits § 2, ¶ 3.

¶ 225. In general all ministerial duties which a principal officer has a right to perform may be discharged by a deputy.—Tower v. Welker, 93 Mich. 332.

¶ 226. A public officer can define and change the duties of the clerks in his office if no rule of law or custom prevents.—People ex rel. Throop v. Langdon, 40 Mich. 673.

¶ 227. The deputy auditor general may sign a tax-deed in his own name when his superior is absent.—Westbrook v. Miller, 56 Mich. 148; Drennan v. Herzog, 56 Mich. 467; Fells v. Barbour, 58 Mich. 49.

¶ 228. Where a deputy officer executes a deed in the absence of his principal, the proper method is to perform the act in the name of his principal.—Westbrook v. Miller, 56 Mich. 148.

¶ 229. An indorsement or certificate signed by the deputy auditor general upon a county treasurer's bond to account for moneys to be received at tax sales has the same force and validity as if signed by the auditor general.—People v. Johr, 22 Mich. 461.

¶ 230. The deputy of the county clerk need not sign writs in the name of the clerk. Where a writ was signed "W. M., deputy clerk," in the absence of the clerk, it was held sufficient.—Calendar v. Olcott, 1 Mich. 344.

¶ 231. The general statutory provisions requiring a county treasurer to receive and account for county funds, were not intended to cover all of his official duties.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 232. An agent cannot bind his principal in a contract which the agent makes himself, which doctrine extends to public officers.—Baars v. Township of Laketon, 163 Mich. 665.

¶ 233. Where a statute provided that in the absence of the county treasurer from his office the deputy treasurer might perform all his duties, it was held that such deputy might administer an oath which another section of the statute provided might be administered by the county treasurer, or, in his absence, by a justice of the peace.—Malony v. Mahar, 2 D. 432; Malonny v. Maher, 1 Mich. 26.

¶ 234. Since under the Ionia City Charter the city clerk is "authorized and empowered generally to administer oaths and take affidavits," such duties being among those of a township clerk, the deputy clerk may administer oaths and take affidavits in the clerk's absence.—Tower v. Welker, 93 Mich. 332.

§ 57. Official boards and joint officers.

General powers and functions of county boards, see Counties § 9.
Effect of change in personnel of board, see Health ¶ 17.
Meetings, voting and procedure by municipal councils, see Municipal Corporations, IV.
Municipal boards and departments and their relation and status, see Municipal Corporations § 179 et seq.
Regents of University of Michigan, see University of Michigan.
Rules and practice governing official bodies, see Parliamentary Law.
Functions and mode of exercise of them by governor and judges as townsite board under act of Congress, see Public Lands § 13 et seq.

¶ 235. The action of a board of several persons must be determined by their votes as evidenced by their record; their action separately amounts to nothing, and their joint action must be evidenced in some way as the act of a lawful majority; and it requires affirmative action to create a term of time "specified."—Neucombe v. Chesebrough, 33 Mich. 321.

¶ 236. Under How. St., § 2, which provides that "all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers," etc., a decision by a majority of three commissioners appointed in condemnation proceedings, would be binding; and this the present constitution, adopted subsequently to said statute, must be deemed to have in view in using the term "commissioners."—Serrell v. Patterson, 107 Mich. 234.

¶ 237. Where, at the last meeting of a common council, at which, under the law, chairmen of the boards of inspectors and of registration could be appointed, some of the members of the council withdrew, and the rest, though not constituting a quorum, pro-

ceeded to make the appointments, the appointees were de facto officers, and a registration conducted by them was held valid, in order that the electors might not be disfranchised; but the council was required by mandamus to designate immediately, at a lawful meeting, chairmen of the boards of inspectors to take the place of those illegally appointed.—Dingwall v. Common Council of Detroit, 82 Mich. 568.

¶ 238. Where a board's time of meeting is, by statute, made subject to the direction of the members, there can be no doubt of the legality of the meeting when all meet.—Hulin v. People, 31 Mich. 323.

¶ 238a. Several persons empowered as a body will all be presumed to have been present, and to have deliberated upon the act, unless the contrary expressly appears.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error dismissed, 5 How. 343, 12 L. ed. 181.

§ 58. Liabilities of officers in general.

On contracts, see post § 59.
For indemnification of deputy or clerk, see post § 60.
Tort liabilities, see post §§ 61-64.
Justification by judicial process or proceedings, see post §§ 65-67.
Personal liability of health officers for negligence in destroying or damaging property for health or quarantine purposes, see Health ¶ 28.
Liability for failure of health officers to provide nursing and treatment to quarantined sick persons, see Health ¶ 21.
Effect of record and rights thereunder where its insufficiency is fault of public officer, see Notice and Record of Title ¶¶ 353, 360.
Responsibility of municipalities for acts of their officers and employees, see Municipal Corporations §§ 189, 192.
Liabilities incident to office of sheriff, see Sheriffs, IV.
Liability of supervisor for error or defect in assessment of tax, see Taxes, VI, B.
Liability of regents of University of Michigan, see University of Michigan.
Liability of person receiving public money from treasurer to be sued by the public, see also Municipal Corporations § 145.

¶ 239. Damages are not recoverable for the wilful violation of a plain duty by an officer acting in a ministerial capacity, where the party affected has sustained no injury therefrom.—Amperse v. Winslow, 75 Mich. 234.

¶ 240. Failure to perform a public duty is actionable by an individual only when the public duty also involved a duty to himself as an individual, and where he has suffered a special and peculiar injury by reason of its nonperformance.—Moss v. Cummings, 44 Mich. 359.

¶ 241. The wilful violation of a plain duty by an officer acting in a ministerial capacity will not subject him to a suit for damages if the party affected thereby has sustained no injury by such misconduct.—Amperse v. Winslow, 75 Mich. 234.

¶ 242. Acts done by authority of a valid statute and with reasonable care will not support any liability for resulting damage.—Eagle Township Highway Com'rs v. Ely, 54 Mich. 173.

¶ 243. County treasurers are responsible as debtors, and not merely as bailees, for the county funds that come into their hands, and their liability is absolute and not affected by unavoidable loss or accident.—Perley v. County of Muskegon, 32 Mich. 132.

¶ 244. If an officer is required or authorized by law to make deposit in any particular place or with any particular person, he is usually, if not universally, protected from any further responsibility so long as he leaves it there and is not a guarantor of the safety of the deposit; and the ownership and the liability appear to be co-extensive.—Perley v. County of Muskegon, 32 Mich. 132.

¶ 245. A public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties in which the latter have a special and direct interest.—Raynsford v. Phelps, 43 Mich. 342.

¶ 246. A purchaser of drain orders for which the board of supervisors refuse, without just cause, to spread the tax, cannot recover in an action for damages against the drain commissioner who issued the orders, on the ground that the refusal of the board was caused by the malfeasance of the commissioner.—Nash v. Kenyon, 151 Mich. 152.

§ 59. ——On contracts.

School district officers as guarantors on school order, see Guaranty § 2.
Guaranty of repayment of deposit of public funds in private bank, see Guaranty § 4.
Liability of county drain commissioners on contracts for drain construction, see Drains § 94.
Liability of officers contracting for public works for failure to require bond from contractor, see Public Contracts, VII.

¶ 247. Whether the trustees of a school district contracting for the building of a schoolhouse are liable to an action by a material-man injured by their neglect to take from the contractor the bond required by How. St., §§ 8411a-8411c, for the payment for labor performed or materials furnished, quære; but such material-man, having been a surety upon the bond given by the contractor to the school district for the performance of the work, could not sue the trustees for such negligence, his relations to the parties to the contract being such that he

must be held chargeable with notice that no bond for his protection was required by the board.—Owen v. Hill, 67 Mich. 43.

§ 60. ——For indemnification of deputy or clerk.

¶ 248. Where judgment in trover has been obtained against a deputy-marshal for goods which he has taken while acting under specific instructions from the marshal and in reliance on the latter's oral promise to indemnify him, he can maintain a bill against the marshal to obtain protection against such judgment by compelling the latter to indemnify or pay him.—Robinson v. Bennett, 50 Mich. 560.

§ 61. Tort liabilities and immunities; misfeasance, nonfeasance and malfeasance.

Retention of funds, see post § 62.
Quasi-judicial actions and decisions, see post § 63.
Refusal or failure to exercise authority or perform duties, see post § 64.
Justification by judicial process or proceedings, see post §§ 65-67.
Criminal misconduct or delinquency, see post VI, B.
Liability to account for misfeasance or nonfeasance as distinguishing officer from public employee, see ante ¶ 14.
Liability for institution of malicious prosecution, see Malicious Prosecution § 2.
Right of officials to rely on statements, duty to apply official knowledge, see Fraud ¶ 82.
Responsibility for levy upon chattels, subject to chattel mortgage lien, see Chattel Mortgages § 77.
Criminal malfeasance and misfeasance, see Crimes § 114.
Liability of officer for fraudulent or negligent acknowledgment, see Acknowledgments § 24.
Immunity of Bay County Bridge Commission from liability for negligent operation of bridge, see Bridges § 4.
Damages from malfeasance, misfeasance and nonfeasance, see Damages.
Responsibility of county for acts of officers, see Counties § 36.
Immunity from costs, see Costs § 12.
Penalties for misdoing by highway officers, see also Highways § 144.
Garnishment of treasurer in possession of liquor tax money refundable to principal defendant, see Garnishment ¶ 47.
Liability to or immunity from garnishment, see Garnishment § 13.
Liability of road overseer and assistants for torts done in highway labor, see Highways § 144.
Tort liability of officers of the poor, see Poor Persons § 13.
Absolution of public officers from payment of royalties as indemnity for violating patent injunction, where they acted in good faith and derived no personal benefit, see Contempt ¶ 141.
Liability of officers neglecting to require bond on public contract for protection of laborers, material-men, and subcontractors, see Public Contracts, VII.
Constitutional privileges of senators and representatives, see Const. art. V, § 8.

¶ 249. A highway commissioner who, under the impression that it was a part of the highway, enters upon private property and sets out a fire, is answerable for the destruction by fire of the buildings thereon.—Cribbs v. Stiver, 181 Mich. 82.

¶ 250. Superintendents of the poor, being empowered by statute to keep up farms for the employment and support of the county poor, may be held liable, as owners and managers of the farm property, for injuries resulting from their management, such as negligently allowing fires kindled upon the premises to extend to the property of others, or permitting the spread of contagious diseases from the farm stock to other animals, or allowing the stock to trespass upon other lands.—Rowland v. Kalamazoo Poor Superintendents, 49 Mich. 553.

¶ 251. Where an officer in making an arrest for felony, without a warrant, acts in good faith, and after such reasonable investigation as circumstances permit, he is not liable in damages, either actual or otherwise.—Filer v. Smith, 102 Mich. 98.

¶ 252. Declaring a thing to be a nuisance does not make it such, if not such in fact; and an officer removing as such that which is innocent cannot be justified.—Horn v. People, 26 Mich. 221.

Liability of public officers for negligent performances of official duties in connection with assessment or collection of taxes, see note, 11 N. C. C. A. 618-629.
Liability of public officer for negligence in taking of acknowledgment, see note, 11 N. C. C. A. 581-598.
Liability of public officers for negligent acts of subordinate officers under their control, in the performance of their official duties, see note, 11 N. C. C. A. 638-645.

§ 62. ——Retention of funds.

¶ 253. A town treasurer's refusal to pay over public moneys in his hands upon proper demand at the expiration of his term is a conversion.—Township of Monroe v. Whipple, 56 Mich. 516.

§ 63. ——Quasi-judicial actions and decisions.

Official discretion as judicial exercise, see also Constitutional Law § 35.
Nonliability of election officers for rejection of vote as matter of judicial discretion, see Elections § 95.

¶ 254. Officers having quasi-judicial powers are not liable for injury resulting from acts done understandingly and in good faith

within the limits of an authority expressly granted to them.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 255. Where the duties of an officer or board are quasi judicial no action can be predicated upon an erroneous performance.—Bay County v. Brock, 44 Mich. 45.

¶ 256. The officers charged by statute with the approval or disapproval of liquor bonds act judicially within the scope and limit of the authority thus conferred, and cannot be made liable in a civil action for their refusal to approve such a bond, no matter how erroneous their determination may be.—Amperse v. Winslow, 75 Mich. 234.

¶ 257. An assessor of taxes, being a quasi-judicial officer, cannot for errors in the exercise of his judicial duties be held liable in a suit at law.—Meade v. Haines, 81 Mich. 261.

¶ 258. The principle of protection where action is judicial is not confined to courts of record, but applies as well to inferior jurisdictions; the only difference being that authority in a court of general jurisdiction is to be presumed, while the jurisdiction of inferior tribunals must affirmatively appear on the face of their proceedings.—Wall v. Trumbull, 16 Mich. 228.

¶ 259. The rule of protection where the action is judicial does not depend upon whether the tribunal is a court or not, but upon the nature of the duties to be performed.—Wall v. Trumbull, 16 Mich. 228.

¶ 260. A township board acts judicially in auditing claims against the township, and its members are not liable individually for erroneous allowances.—Wall v. Trumbull, 16 Mich. 228.

¶ 261. There can usually be no remedy for a wrong where such remedy would involve the review of lawfully vested discretion. There must generally be an excess of jurisdiction or an act outside of the discretion vested.—Sage v. Laurain, 19 Mich. 137.

¶ 262. No action lies against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, was within the scope of his jurisdiction.—Gordon v. Farrar, 2 D. 411; Wall v. Trumbull, 16 Mich. 228.

¶ 263. A prosecuting attorney who instigates the arrest of a person without a warrant and without probable cause is not entitled to the immunity of a quasi-judicial officer.—Schneider v. Shepherd, 192 Mich. 82.

¶ 264. The action of a member of the common council of a village in refusing to approve liquor bonds cannot be reviewed at the suit of persons claiming to have been injured thereby and seeking damages.—Pawlowski v. Jenks, 115 Mich. 275.

§ 64. ——Refusal or failure to exercise authority or perform duties.

Neglect of filing officer as imputable to chattel mortgagee, see Chattel Mortgages § 33, ¶ 139.

¶ 265. A discretionary power cannot excuse an officer for refusal to exercise his discretion.—Merrill v. Humphrey, 24 Mich. 170.

¶ 266. A public officer is liable for a failure to perform duties of a judicial nature if he neglects them maliciously.—Raynsford v. Phelps, 43 Mich. 342.

¶ 267. The county treasurer as a ministerial officer is compelled to pay an order by the supervisors in favor of a de facto supervisor without questioning the de jure right to hold the office.—Friedman v. Horning, 128 Mich. 606.

¶ 267a. A coroner sued for failure to require a new bond on exception to the one first given in replevin for attached property may —where the judgment in replevin for return was upon default and upon voluntary discontinuance by plaintiff—defend by showing that the property was exempt from attachment.—People ex rel. Fletcher v. Lee, 71 Mich. 493.

§ 65. Justification by judicial process or proceeding.

Process under void law, see post § 66.
Process "not fair on its face" or lacking jurisdiction, see post § 67.
Sufficiency of attachment writ to protect officer executing it, see generally Sheriffs, IV; and see also Attachment § 101.
Justification for illegal arrests, see False Imprisonment §§ 5-14.
Justification of policeman in committing assault as dependent on existence of an offense, see also Assault ¶ 50.
Liability of policemen for making false arrests, see False Imprisonment, I.
Liabilities of sheriffs incident to process, see Sheriffs, IV.
Process affording protection to officer collecting taxes, see Taxes, X, B.

¶ 268. A warrant fair on its face protects an officer making an arrest from liability for false imprisonment.—Brown v. Hadwin, 182 Mich. 491.

¶ 269. A writ of attachment, if valid on its face, though issued upon a defective affidavit, protects the marshal who executes it when he is sued for seizing the property of the attachment debtor.—Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126, reversing 43 Mich. 461.

¶ 270. A search warrant in due and legal form and within the jurisdiction of the magistrate issuing it is a full protection to

the officer executing it.—O'Meara v. Merritt, 128 Mich. 249.

¶ 271. The circuit judge's determination that an affidavit warrants indorsement and issue of capias is judicial and protects all parties.—Johnson v. Morton, 94 Mich. 1.

¶ 272. A commissioner of highways sued in trespass for removing fence claimed to be an encroachment upon a regularly laid section-line highway and so described in the order for removal can justify only by showing that the highway is located upon the section line, and a contrary finding entitles plaintiff to verdict.—Cronenwaite v. Hoffman, 88 Mich. 617.

¶ 273. Pub. Acts 1881, No. 243, chap. 6, providing a remedy for removal of obstructions from highways, does not abrogate the common-law right to abate a nuisance but is cumulative thereto; and though the precise statutory procedure was not followed in removing an obstructive nuisance the highway commissioner is not thereby rendered a trespasser.—Neal v. Gilmore, 141 Mich. 519.

¶ 274. A ministerial officer executing, in good faith and without oppression, a warrant regular upon its face and issued by an officer having jurisdiction of the subject-matter, will be protected by the warrant, and is not required to look beyond it for his authority to serve it.—Ortman v. Greenman, 4 Mich. 291; Dunn v. Gilman, 34 Mich. 256.

¶ 275. A United States marshal justified in obeying any process which appears to be lawfully issued to him, and which apprises him of no legal reason why he should refrain from doing so.—Mathews v. Densmore, 43 Mich. 461, reversed 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126.

¶ 276. An officer is protected by process fair on its face even though he has outside knowledge of illegalities.—Wall v. Trumbull, 16 Mich. 228; Bird v. Perkins, 33 Mich. 28.

¶ 277. That a warrant for the arrest of one for selling liquor in violation of the local option law does not state the name of the purchaser, is not sufficient to notify or fairly apprise an officer that it was issued without authority.—Brown v. Hadwin, 182 Mich. 491.

§ 66. ——Process under void law.

¶ 278. An officer is not protected in what he does under the authority of a superior if the latter acts under an invalid statute.—Swart v. Kimball, 43 Mich. 443.

¶ 279. An officer who executes a warrant of arrest under an unconstitutional ordinance is protected if the warrant is fair on its face.—Brooks v. Mangan, 86 Mich. 576.

¶ 280. A tax-collector must be presumed to have knowledge of the invalidity of an unconstitutional statute under which his warrant instructs him to seize property, and cannot claim that it is fair on its face if it shows that fact.—Mogg v. Hall, 83 Mich. 576.

¶ 281. An invalid writ of attachment does not justify the officer who executes it in seizing property in the possession of mortgagees.—Mathews v. Densmore, 43 Mich. 461, reversed in 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126.

¶ 282. A warrant may be sufficient to protect an officer and the parties responsible for its issue, although it would be void on direct attack.—Brown v. Hadwin, 182 Mich. 491.

¶ 283. If an officer acting under process actually believes a statute to be constitutional which is not, the case must be a very plain one that makes such ignorance of the law culpable.—Hill v. Taylor, 50 Mich. 549.

§ 67. ——Process "not fair on its face" or lacking jurisdiction.

Liability for seizure of property to enforce tax collection on tax-roll and warrant not fair upon their face, see Taxes, X, B.

¶ 284. Process which will protect an officer acting under it, must proceed from a court having jurisdiction to issue it, must be legal in form, and contain nothing on its face to notify or fairly apprise the officer that it was issued without authority.—Brown v. Hadwin, 182 Mich. 491.

¶ 285. A search and seizure warrant issued under section 29, Act No. 107, Pub. Acts 1909 (How. St., 2nd Ed., § 5044), which discloses the insufficiency of the complaint under which it is issued, is not fair on its face.—Bullock v. Ward, 182 Mich. 443.

¶ 286. An officer seizing intoxicating liquor on a search and seizure warrant issued under section 29, Act No. 107, Pub. Acts 1909 (How. St., 2nd Ed., § 5044), showing on its face that the complaint did not comply with the requirements of the section by alleging that the "affiant believes and has good cause to believe that such liquor is there sold" is answerable in damages.—Bullock v. Ward, 182 Mich. 443.

¶ 287. A search and seizure warrant issued under section 29, Act No. 107, Pub. Acts 1909 (How. St., 2nd Ed., § 5044), which on its face shows the insufficiency of the complaint on which it is issued, will not protect an officer in acting thereunder.—Bullock v. Ward, 182 Mich. 443.

¶ 288. Where the jurisdiction of the subject-matter, in the tribunal issuing process, depends upon matter of fact, the existence of which cannot be determined from the law and which is not of public notoriety, a ministerial officer will not be held bound to ascertain it at his peril, unless the law has clearly given him the right to demand the information and

to determine the fact.—People v. Rix, 6 Mich. 144.

¶ 289. A federal marshal who, under a provisional warrant in bankruptcy, seizes property outside of his district is a trespasser and his writ does not protect him.—Carr v. Phillips, 39 Mich. 319.

¶ 290. A federal marshal is not protected in seizing property belonging to one person under a writ directed against others.—Heyman v. Covell, 36 Mich. 157; People ex rel. Mabley v. Detroit Superior Judge, 41 Mich. 31; Carew v. Matthews, 41 Mich. 576; Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126, reversing 43 Mich. 461.

¶ 291. Where property is taken and held by a United States marshal under execution process of a federal court a third person claiming it as owner may prosecute his right to restitution by ancillary proceedings in that court, or he may pursue his remedy against the officer, either personally for the trespass, or upon his bond for the breach of his official duty.—Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, reversing 44 Mich. 332.

¶ 292. A federal marshal who levies an attachment upon the property of a third person is a trespasser, and his writ does not protect him from personal liability for his wrong doing.—Weber v. Henry, 16 Mich. 399.

§ 68. Accountability for moneys received or intrusted.

See also ante ¶ 243, post ¶ 293.

Accountings and bills for accounting, see post § 69.

Settlements by treasurers, see post § 70.

Reception of funds for state purposes as making estoppel to deny that they were state funds, see Estoppel ¶ 198.

Accrual of action against officer for balances reported against him, see also Account Stated ¶ 32.

Accountability of health officer to public for gratuity received above his legal charges, see Health ¶ 34.

Selection and designation of banks of deposit of public money, see Banking §§ 24, 25.

Deposit of public money as trust fund, see Banking § 45.

¶ 293. A county treasurer was responsible for an item for the sale of lands at private sale on credit, for which he never received the money.—County of Montmorency v. Putnam, 135 Mich. 111.

¶ 294. A county treasurer who receives moneys collected on a judgment in an action upon the bond of a predecessor accounts for them precisely as if he had originally collected them from the taxpayers.—Marquette County v. Ward, 50 Mich. 174.

¶ 295. Where an official treasurer is sued by his successor for the funds in his official custody, he cannot base his defense on any question of the regularity of the proceedings whereby the funds came into his possession.—Mason v. Scio Fractional School Dist. No. 1, 34 Mich. 228.

¶ 296. A county treasurer by accepting a check of a taxpayer from a city treasurer in settlement for taxes, and carrying it as cash on his books for upwards of two years, will be chargeable with the amount thereof as cash.—Board of Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 297. A county treasurer who accepts a check of a taxpayer from a city treasurer in settlement for taxes, which under an agreement with the drawer, he carries for two years on his books as cash, is chargeable with the amount thereof, and is estopped from claiming otherwise, in the absence of any showing as to what was realized on such paper.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 298. A county may hold its treasurer and his sureties for losses sustained by the acceptance of checks of a taxpayer from a city treasurer in settlement for taxes, since the county is not required to inquire into the character or collectibility of paper taken by the treasurer.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 299. The county clerk is liable for such entry and jury fees only as are actually paid to him. The entry of a cause on the calendar is prima facie evidence of the payment of the entry fee, which, however, may be rebutted. But the fact that a jury was had in a case affords no presumption that it was called on demand of a party, and a jury fee paid.—People v. Treadway, 17 Mich. 480.

¶ 300. Where a county treasurer accepts a check of a taxpayer from a city treasurer in settlement for taxes, under an understanding with the drawer that it should be carried as cash, both the treasurer and his sureties are liable to the county for the amount of the check, which was never paid, but was carried as cash on the county books for two years.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 301. A township is not estopped by the action of its board in settling with the treasurer from suing him for an additional amount afterwards found to be due and overlooked in the settlement.—Boardman Township v. Flagg, 70 Mich. 372.

¶ 302. A county treasurer who, in settling with the county, has charged himself with certain money as received from his predecessor, when it has not in fact been received, is not estopped, in suing his predecessor for the amount, from claiming that the latter had

not paid it.—Van Ness v. Hadsell, 54 Mich. 560.

§ 69. Accountings and bills for accounting.

Right to accounting as between successive sureties on bonds, see also Accounting Suits ¶¶ 4, 5.
Supervision, investigations and accountings of municipal officers, see Municipal Corporations § 195.
General law as to accounting suits, see Accounting Suits; Equity.

¶ 303. The county treasurer's books are presumed to show the amount due from the treasurer to the county.—State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 304. The official books of a county treasurer are presumed to show at all times the amount due from him to the county.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 305. Where, through the inducements of his predecessor in office, a township treasurer issues a receipt for more money than was received, a bill for an accounting will lie in a suit in equity by such treasurer against the out-going officer, and the receipt will be canceled if it appears that by mistake or fraud it was for too large a sum.—Beaton v. Township of Inland, 149 Mich. 558.

¶ 306. A bill for an accounting will not lie by the treasurer of a township against an out-going treasurer, to whom he has given a receipt for more money than he has received, such receipt being merely evidence of the amount received, and open to contradiction or explanation by parol testimony in a court of law.—Beaton v. Township of Inland, 149 Mich. 558. (Dissenting opinion of Ostrander, J., McAlvay and Grant, JJ., concurring.)

§ 70. Settlements by treasurers.

See also ante ¶¶ 243, 297.
Accountings and bill for accounting, see ante § 69.
Accountability for money received or intrusted in general, see ante § 68.
Liability for retention of funds, see ante § 62.
Evidentiary weight of settlement in action on treasurer's bond, see post ¶ 406.
Power of county to take security from outgoing treasurer for county funds, see also Counties ¶ 168.

¶ 307. Settlements made between county treasurers and the board of supervisors provided for by Comp. L. 1897, § 2479, while open to impeachment, are to be treated as prima facie evidence of the state of the account, either party being at liberty to show fraud, mistake or omission.—County of Montmorency v. Putnam, 122 Mich. 581.

¶ 308. Where instead of exchanging cash or checks, the county treasurer and auditor general exchanged receipts, so that both the state and county received credit for the amount, the treasurer was chargeable with such amount as he had claimed and received allowance for, among his credits in his settlement with the county.—County of Montmorency v. Putnam, 135 Mich. 111.

¶ 309. Money paid by a county treasurer to a village under a mistake of fact may be treated by him as an offset to any money due from him to the village subsequently.—Village of Grosse Pointe v. Treasurer of Wayne County, 85 Mich. 44.

¶ 310. Whether public funds can be transferred by a public treasurer to his successor by giving certificates of deposit, quære.—City of Lansing v. Wood, 57 Mich. 201.

§ 71. Actions by or against officers.

Actions on official bonds, see post §§ 87-91.
Presumptions and evidence, see post § 72.
Proper limitation of action against officer, see Limitations § 18.
State and federal jurisdiction in suits affecting or interfering with federal officers or representatives, see Courts §§ 101-103.
Judgment as bar or estoppel upon public officers, see Former Adjudication ¶ 59.
Mandamus to compel performance of official duties, see Mandamus, III.
Immunities from costs, see Costs § 12.
Summary proceedings against tax collector as due process, see Constitutional Law § 153.
Abatement by expiration of office of party, see Abatement § 5.
Certiorari to review official administrative action, see Certiorari §§ 17-21.
Liability for costs and right to costs in suits by or against officers, see Costs.
Rights of county and townships arising out of compromise with defaulting officer, see Counties ¶ 115.
Liability for costs and mode of enforcing costs allowed, see Costs.
Actions by and against surveyors, see Surveyors.
Actions against county surveyors for failure to lay out boundary correctly, see Surveyors § 2.
Actions by townships against township officers, see Townships, VIII.
Actions by and against sheriffs, see Sheriffs, VI.
Statutory penalties and forfeitures imposed on highway officers, see Comp. L. 1915, § 4458 et seq.

¶ 311. All public officers, even if not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 312. Public officers need not be expressly authorized by statute to bring suit; their capacity to sue is commensurate with their public trusts and duties.—Stevens, Auditor General v. Lake George & M. R. R. Co., 82 Mich. 426.

¶ 313. A public officer designated by statute as the obligee in a bond required from another officer is the proper person to bring suit thereon, and the objection that the declaration should give his individual name as well as his official character must be taken before pleading to the merits.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 314. The person holding the office of treasurer of the state of New Jersey at date of bringing the action is the proper party plaintiff on an assignment of mortgage made to a predecessor in office by name, described as "treasurer of the state of New Jersey" with a habendum "unto the said party of the second part, his successors in office and assigns" for the security of life-insurance policyholders of the mortgagee insurance company as the assignment runs to the office and not to the individual.—Gray v. Waldron, 101 Mich. 612.

¶ 315. A prosecution for adultery can only be instituted by the injured husband or wife, and whatever suspicion an officer may have, he has no right to make of his own motion an arrest for such crime.—Filer v. Smith, 96 Mich. 347.

¶ 316. Omission to sue a municipal officer by his official title is not a substantial objection if his liability is shown.—Hart v. Township of Port Huron, 46 Mich. 428.

¶ 317. Assumpsit on the common counts lies at the suit of a county treasurer against his official predecessor for the amount of county moneys which the plaintiff has accounted for to the county as received from defendant, but which in fact has not been so received.—Van Ness v. Hadsell, 54 Mich. 560.

¶ 317a. One who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned nulla bona, and the tax became a lien on the land, from which the owner of the mortgage had to redeem after foreclosure. Held, that the latter had a right of action at common law against the collector for injury resulting to him in being compelled to redeem from the tax sale.—Raynsford v. Phelps, 43 Mich. 342.

¶ 317b. An individual tax-payer of a school district cannot sue the moderator to recover back his share of a tax which the district was compelled to pay through the moderator's illegal conduct.—Wall v. Eastman, 1 Mich. 268.

§ 72. Presumptions and evidence.

See also ante ¶¶ 304, 307.

Presumptions and evidence in actions on official bonds, see post §§ 90, 91.

Presumption in contempt proceedings that officer acted under federal authority, see also Courts ¶ 386.

Acts and declarations as admissions binding others, see Evidence § 436.

Judicial notice as to public officers and matters relating to them officially, see Evidence § 20.

Presumption of due performance of official duty, see Evidence § 38.

Presumption that recording officer has done his duty, see Notice and Record of Title ¶ 383.

¶ 318. Where the action of the tax collector is made a necessary preliminary to that of the county treasurer, due performance on their part will not be presumed, in the absence of evidence, for the purpose of charging him with having failed to perform duty; the presumption of official regularity applies with equal force to each.—Weimer v. Bunbury, 30 Mich. 201; Houghton County Sup'rs v. Rees, 34 Mich. 481.

¶ 319. In an action by a county treasurer against his predecessor for moneys which the latter should have paid over to him, inquiries into plaintiff's private business or his bank account are impertinent unless there is some offer to show that they bear on the same issue whether the money has been paid over.—Van Ness v. Hadsell, 54 Mich. 560.

¶ 320. In an action against a police officer the opinions given by the secretary of a city board of public works—he not being a lawyer—as to the legal right of the defendant to make a sewer connection, held inadmissible.—Zube v. Weber, 67 Mich. 52.

B. CRIMINAL MISCONDUCT OR DELINQUENCY.

§ 73. In general.

[Note. The nature and elements of the various statutory and common-law crimes are treated in Crimes, II, under an alphabetical arrangement, which see. The cases on indictment or information and prosecution of the crimes are treated in Indictment, which see.]

Tort liabilities, see ante §§ 61-64.

Power of deputy attorney in Wayne county to verify and file informations, see Indictment § 10.

Informations for official malfeasance or misconduct, see Indictment ¶¶ 241-243.

Crime of resisting officer or obstructing justice, see Crimes § 113.

Offense of falsely impersonating officer, see Crimes § 76.

Embezzlements by officers or public employees, see Crimes § 69.

Crime of bribery or of offer or solicitation, see Crimes § 50.

Criminal malfeasance and misfeasance, see Crimes § 114.

Investigation of charges against officer, nonliability of county for costs as on "criminal proceedings," see Counties ¶ 118.

Bribery of city officers, see Crimes § 50.

Embezzlement by city or village officers, see Crimes §§ 69, 71-74.

Corrupt practices act, see Comp. L. 1915, § 3828 et seq.
Statutory penalties and forfeitures imposed on highway officers, see Comp. L. 1915, § 4458 et seq.

VII. OFFICIAL BONDS AND LIABILITY THEREON.

§ 74. In general; statutory provisions.

Formal requisites and sufficiency in general, see post §§ 75-77.
Voluntary bonds not required by law, see post § 78.
Acceptance and approval of bond and sureties, see post §§ 79-80.
Construction, operation and breach of bond, see post § 81.
Measure, items and amount of liability, see post §§ 82-85.
Reductions, credits and defenses of sureties, see post § 86.
Actions on bonds and time to sue, see post § 87.
Parties plaintiff and defendant, see post § 88.
Declaration, pleadings and issues, see post § 89.
Burden of proof and presumptions, see post § 90.
Evidence, see post § 91.
Qualifying acts in general, see ante IV.
General law as to bonds, see Bonds.
Statutory provisions as to bonds of state officers, see Comp. L. 1915, §§ 190, 192-194.
Filing of bonds required of county officers, see Comp. L. 1915, § 2506.
Approval of bonds of county officers, see Comp. L. 1915, § 2512.
Bond of county treasurer, see Comp. L. 1915, §§ 2361, 2362.
Bond of county treasurer to auditor general, see Comp. L. 1915, § 4091.
Bond of township treasurer, see Comp. L. 1915, §§ 2134, 2137-2143.
Bonds of village officers, see Comp. L. 1915, § 2576 et seq.
Bond of township clerk, see Comp. L. 1915, § 2121.
Bond of insurance commissioner, see Pub. Acts 1917, No. 256, part I, chap. I.
Bond of food and drug commissioner, see Pub. Acts 1917, No. 263, § 10.
Increase of bond of county treasurer, see Pub. Acts 1917, No. 324.

¶ 321. Bonds referred to in our statutes as "official" are, it seems, bonds of public officers only.—Bissell v. Durfee, 58 Mich. 237.

¶ 322. The obligations created by an official bond to pay over moneys are not created by the bond, but imposed by law, and the bond is but a collateral security for the performance of a legal obligation.—Spencer v. Perry, 18 Mich. 394.

¶ 323. An officer cannot reasonably be compelled to give a bond going beyond his official duties, as a condition of being allowed to hold his office, but the bond ought properly to be regarded as the measure of official duty.—Perley v. County of Muskegon, 32 Mich. 132.

¶ 324. The bond required by Comp. L. 1857, § 877, How. St. § 1098, to be given by the county treasurer to the auditor general to account for moneys received at tax sales is an official one, which he must give.—People ex rel. Attorney General v. St. Clair County Sup'rs, 30 Mich. 388.

§ 75. Formal requisites and sufficiency in general.

Sufficiency of execution and necessary parties, see post § 76.
Terms, provisions and conditions, see post § 77.
Disability of council to detract from statutory requisites of bond under pretext of adding thereto, see Municipal Corporations ¶ 710.
Recording of bonds by county clerk, see Comp. L. 1915, §§ 2438-2440.

¶ 325. The obligation of an official bond is strictissimi juris and nothing can be taken by construction against the obligors; the sureties do not undertake for anything beyond the letter of their contract and are only liable within its terms.—Detroit Sav. Bank v. Ziegler, 49 Mich. 157.

¶ 326. A bond of the state treasurer with a surety company as surety is valid and should be accepted if the pecuniary responsibility is sufficient.—Steel v. Auditor General, 111 Mich. 381.

¶ 327. The amount and sufficiency of the county treasurer's bond are left by Comp. L. 1871, §§ 477, 512, How. St. §§ 483, 520, to the discretion of the board of supervisors.—McGregor v. Gladwin County Sup'rs, 37 Mich. 388.

¶ 328. A bond which recites that the principal in his position of township treasurer shall make good to the township named as his employer, within 60 days, any loss sustained by the employer by larceny or embezzlement during a specified term is an official bond.—Township of Forest v. American Bonding Co. of Baltimore, 187 Mich. 657.

§ 76. ——Sufficiency of execution and necessary parties.

Estoppel to deny delivery of official bond where delivered on condition unknown to obligee, see Execution of Instruments ¶ 193.
Bonds or contracts running to county officers by name but for county, see also Counties § 23.

¶ 329. Public officers, in receiving official bonds into their custody, have a right to rely upon the genuine signatures of sureties voluntarily affixed to a regular document conforming to law, without making inquiry of the sureties.—McCormick v. Bay City, 23 Mich. 457.

¶ 330. One who signs in blank as surety on an official bond and delivers it to his principal for completion makes the latter his agent for the whole business, and is estopped and bound by the action of such agent without regard to any secret instructions as to the condition on which it should be completed.—McCormick v. Bay City, 23 Mich. 457.

¶ 331. One who signs his name as surety to an official bond, and leaves it with another to procure thereto the signature of an additional surety, is estopped from denying his liability thereunder, where the bond has been properly accepted and filed, even though such additional signature was not obtained as promised, unless the structure of the bond notifies the official whose duty it is to act upon it that it is incomplete; and the mere fact that there was after the last signature a line where another surety could have signed, with the word "surety" written at the end, does not constitute such notice.—Township of Crystal Lake v. Hill, 109 Mich. 246.

¶ 332. Sureties are not liable on an official bond signed by them alone, and without their knowledge or consent accepted without the signature of a principal who is named upon its face as the primary debtor. And the burden of proving their consent to its being so accepted is on those who try to enforce it.—Johnston v. Township of Kimball, 39 Mich. 187.

¶ 333. A township treasurer should be a party to his own official bond.—Johnston v. Township of Kimball, 39 Mich. 187.

¶ 334. As the obligee named in a sheriff's bond has no active duty to perform, and no voice in taking or approving of the bond, or in bringing suit upon it, and there is no importance in the people being named as obligee rather than the county, it being important only that some party shall be named as promisee in whose name suits may be brought, the provision for naming the people may be treated as directory merely, and a bond sufficient in substance, which parties have given for the statutory purpose, which has had the statutory approval, and on which the public have relied, will be held sufficient to give the intended security.—Bay County v. Brock, 44 Mich. 45.

§ 77. ——Terms, provisions and conditions.

¶ 335. The official bond of a city officer must contain everything required by the charter, and, while the council may add to it by requiring further duties, none of the prescribed duties can be omitted, nor can an absolute obligation be made a conditional one.—City of Detroit v. Weber, 26 Mich. 284.

¶ 336. A recital in an official bond that the officer's term is one year, whereas such term is fixed by statute at two years, so that it cannot be limited by the body appointing the officer, is mere surplusage, and the bond is valid for two years.—Stadler v. City of Detroit, 13 Mich. 346.

¶ 337. The bond of the state treasurer upon which a surety company is surety is excepted from the operation of Pub. Acts 1895, No. 266, § 6, which provides for a deposit of the money for which such company would be responsible "if such deposit is otherwise proper"; it would be improper and illegal to deposit the state funds subject to a surety company's control.—Steel v. Auditor General, 111 Mich. 381.

¶ 338. A city treasurer's bond to the county treasurer, after stating the duty covered by the obligation, added the words, "reference being had to the warrant of the supervisor of said township attached, or to be attached, to the assessment roll of the year 1872." This clause was in excess of the statutory terms of the bond. Held, that it was surplusage and a nullity, and that the absence of a warrant could not make the bond inapplicable to moneys actually received on the roll.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 339. Where an official bond is given for the benefit of the public, there is no implied condition that other public officers shall perform their prescribed duties, and one who becomes a surety on the bond of a public official must be held to have entered into the engagement with knowledge of this rule.—Board of Education of Detroit v. Andrews, 142 Mich. 484.

§ 78. Voluntary bonds not required by law.

¶ 340. A county treasurer's bond to the board of supervisors for the faithful performance of his official duties was held valid, though there was no statute requiring it.—St. Joseph County Sup'rs v. Coffenbury, 1 Mich. 355.

§ 79. Acceptance and approval of bond and sureties.

Validity against parties without approval, see post § 80.

Mandamus to compel action on official bond tendered for approval, see Mandamus § 85.

Mode of approving bonds of county officers, see Comp. L. 1915, § 2512.

¶ 341. Where a statute requiring that an official bond shall be accepted and approved by a municipal council points out no mode of proceeding, whatever mode is taken should carry with it some action sufficient to express in an affirmative manner the assent and approbation of the body.—O'Marrow v. City of Port Huron, 47 Mich. 585.

¶ 342. Acceptance of the bond of the state treasurer is discretionary with those upon whom rests the duty of accepting it.—Steel v. Auditor General, 111 Mich. 381.

¶ 343. Where a city officer is required to give bonds, the city is bound to accept any sureties that are shown to be adequate, and cannot require particular names. It is not interested in knowing how they have been induced to sign the bonds, and if they have done so upon the representations and promises of some city officer, especially as to matters of record, the city cannot be held responsible, since such representations and promises are outside of such officer's authority as a public agent.—City of Detroit v. Weber, 26 Mich. 284.

¶ 344. Where a village council, having power to do so, requires a new bond from the village treasurer, which he voluntarily executes, and which the council accepts and approves, the fact that the council fails to pass and have recorded formal resolutions requiring and approving the bond constitutes no defense in suit upon the bond against the principal and surety.—Evart v. Postal, 86 Mich. 325.

¶ 345. A surety cannot officially approve his principal's official bond.—Stevenson v. Bay City, 26 Mich. 44.

¶ 346. Even if one who has been appointed to office after an illegal revocation of an earlier appointment is to be regarded as a de facto officer, this would be no reason for refusing to approve the first appointee's bond.—Speed v. Common Council of Detroit, 97 Mich. 198.

¶ 347. Although the auditor general might, and as between himself and the people ought to, have refused a county treasurer's bond which had not been approved by the prosecuting attorney and by both the circuit court commissioners of the county, as required by the statute under which it was given, and so, also, might and ought to have declined to allow the treasurer to make the tax-sales and have appointed another person to make them, as the statute contemplates and provides on failure of the treasurer to give the statutory bonds, yet, when on the faith of the defective bond the treasurer has been allowed to make, and has made, the sales, and has received the money, neither he nor his sureties on the bond, it being in all its provisions in strict compliance with the statute, can be heard to object that, when so executed and accepted, it was not properly approved. The statute requirement as to the approval of the bond is for the security and protection of the public, and not of the obligors of the bond. The people in their corporate capacity, having brought suit upon this bond as executed, are at liberty, so far as the obligors upon the bond are concerned, to waive the approval thereof, and the obligors cannot insist upon the approval for the purpose of defeating their liability.—People v. Johr, 22 Mich. 461.

§ 80. ——Validity against parties without approval.

¶ 348. Neither the failure of justification, nor the approval without such justification, of a township officer's bond, affects the validity of such bond as against either the principal or the sureties.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

¶ 349. The charter of Port Huron requires the city marshal's bond to be accepted and approved by the common council. Held, where the council, instead of passing on the bond, ordered it to be handed to the mayor for his decision, and the mayor refused to consider it, and handed it back to the clerk with the direction to put it on file, that there was no such acceptance and approval as would make the bond a binding obligation on the sureties.—O'Marrow v. City of Port Huron, 47 Mich. 585.

§ 81. Construction, operation and breach of bond.

¶ 350. Sureties on an official bond are only liable for their principal's default as officer, acting under color of office.—Stevenson v. Bay City, 26 Mich. 44.

¶ 351. The condition of the bond of a notary public that he will faithfully discharge the duties of his office is broken by his affixing a false certificate of acknowledgment to a mortgage, to which he has signed the names of the mortgagors without authority, and which he represents to the agent of the mortgagee, of whom he has negotiated the loan, as genuine both as to signatures and acknowledgment.—People for use of Doran v. Butler, 74 Mich. 643.

¶ 352. The sureties in a county clerk's official bond are liable for his act in fraudulently countersigning and filling up a warrant upon the county treasurer which had been signed in blank by the chairman of the board of supervisors. Though this was a misuse of his authority it was nevertheless an official act.—People v. Treadway, 17 Mich. 480.

¶ 353. Where, under How. St. § 8335, making the sheriff liable for the sufficiency of his sureties taken in replevin and entitled to sue on the bond, he has taken a bond with bad sureties, an action lies against his sureties on his official bond without first obtaining judgment against him.—People ex rel. Fletcher v. Lee, 65 Mich. 557.

¶ 354. A county treasurer and his bondsmen are bound by the action of the treasurer in receiving from his predecessor due bills and township orders in lieu of and for cash where there is no showing of acquiescence by the supervisors and no affirmative testimony as to how much was actually realized in cash.—County of Montmorency v. Wiltse, 125 Mich. 47.

¶ 355. Where a city charter requires the controller to perform "such duties in relation to the finances as shall be prescribed by ordinance," an ordinance imposing upon him the duty of negotiating city bonds is proper, and his sureties are liable for misappropriation by him of the proceeds of such bonds or for any unauthorized disposal of the bonds themselves.—Stevenson v. Bay City, 26 Mich. 44.

§ 82. Measure, items, and amount of liability.

Risks not germane to office on execution of bond, see post § 83.
Term or period of time covered, see post § 84.
Losses in other than term specified, see post § 85.
Liability on official bond for neglect or fraud in taking acknowledgment, see Acknowledgments § 24.
Liability on bond of city controller, see also Municipal Corporations ¶ 815.

¶ 356. An official bond covers whatever duties were imposed before it was given, even though such duties were added after the passage of the statute prescribing the terms of the bond.—Marquette County v. Ward, 50 Mich. 174.

¶ 357. In an action on a county treasurer's bond for moneys claimed to be due from the treasurer to the county, the county is entitled to recover sums which were not charged against the treasurer in former statements and not since accounted for.—County of Montmorency v. Putnam, 127 Mich. 36.

¶ 358. Sureties on a bond given by a city or county treasurer are not liable in an action thereon for moneys not collected, or moneys lawfully accounted for.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 359. The statutes and the lawful rules of the inspectors of the state prison are the measure of the official liability of the clerk of the state prison for which his sureties are bound, and it reaches only what would come within a fair construction of each.—Hulin v. People, 31 Mich. 328.

¶ 360. Sureties on the official bond of a county treasurer, conditioned for the payment over of all moneys coming into "his hands as treasurer," are liable for the defalcation of moneys borrowed for the county by authority of the board of supervisors, even though the board exceeded its power in authorizing the loan.—County of Cheboygan v. Erratt, 110 Mich. 156.

¶ 361. Whether the sureties on a county treasurer's bond would be liable for money borrowed by him without the concurrence of the board of supervisors, quære.—County of Cheboygan v. Erratt, 110 Mich. 156.

¶ 362. A county treasurer's bond requires him to account for "all moneys which shall come to his hands as treasurer." Held, that this covers moneys collected by him under the liquor tax law, though they neither belong to the county nor go into the county treasury.—Marquette County v. Ward, 50 Mich. 174.

¶ 363. An officer's sureties are not bound by a false settlement of his accounts.—Rice v. Township of Sidney, 44 Mich. 37.

¶ 364. Sureties on the bond of a village clerk, conditioned upon his paying over all moneys received by him by virtue of his office, were liable for the misappropriation of moneys collected for cemetery lots after the passing of Pub. Acts 1895, No. 3, chap. 7, § 57, providing for the appointment of a board of cemetery trustees and that the village clerk shall be clerk of such board.—Village of Allegan v. Chaddock, 119 Mich. 688.

¶ 365. In an action on the bond of a village officer, the village is entitled to have funds deposited by said officer in the public account in excess of the amount collected during certain months applied to a prior deficiency rather than to a subsequent conversion.—Village of Laurium v. Mills, 129 Mich. 536.

§ 83. ——Risks not germane to office on execution of bond.

¶ 366. Duties not yet existing and not germane to an office are not within the contemplation of sureties on the official bond, nor properly covered by their obligation. To bind the sureties the duties must plainly belong to the office.—White v. East Saginaw, 43 Mich. 567.

¶ 367. Sureties on an official bond are discharged when the duties and obligations of the office are essentially changed by statute and their risk increased.—White v. East Saginaw, 43 Mich. 567.

§ 84. ——Term or period of time covered.

¶ 368. Where the term of office, whether public or corporate, is for an indefinite period, or during the pleasure of the appointing power, and the obligation of the surety is couched in general language, the surety contracts for the indefinite term or during the pleasure of the appointing power, and he contracts for no less.—Webster v. Jossman, 199 Mich. 98.

¶ 369. Where, by the terms of an official bond, the sureties' liability is limited to only a portion of the term, such limitation will be recognized.—Webster v. Jossman, 199 Mich. 98.

¶ 370. Where sureties on an official bond engage by the language of the bond to become liable for any future term the principal may be elected or appointed for they may be held liable upon their contract.—Webster v. Jossman, 199 Mich. 98.

¶ 371. While, as a general rule, where a public officer is elected or appointed for a definite term and gives a bond in which the liability of the sureties is couched in general terms, the liability of the sureties is coextensive with the term, and ceases upon the beginning of another term by the same person, yet liability may be extended a reasonable time after the date fixed for expiration, if the term fixed has connected with it the words "or until his successor shall be elected and qualified" or words of similar import, and in such circumstances the liability on the bond will continue for a reasonable time for the election and qualification of the successor. —Webster v. Jossman, 199 Mich. 98.

¶ 372. The fact that a village clerk has always been appointed ex officio secretary of the water board does not combine the two offices and terminate the liability on his bond as secretary of the water board at the expiration of his term as clerk, where the office of secretary of the water board is created by council resolution, the appointment in question is expressly made, and the bond recites the appointment as secretary to serve until his successor shall be appointed and qualified.—Village of Laurium v. Mills, 129 Mich. 536.

§ 85. ——Losses in other than term specified.

¶ 373. Sureties upon the official bond of a township treasurer for his second term of office only are not liable for the default of their principal during his first term.—Township of Paw Paw v. Eggleston, 25 Mich. 36.

¶ 374. The sureties on the official bond of a city treasurer are liable only for the defaults of their principal during the term for which their bond was given, and where he has held the office for preceding terms their liability is to be determined by considering the term for which they were sureties by itself, precisely as if he had succeeded some one else, they to account for all the public money that came into his hands during that term.—City of Detroit v. Weber, 29 Mich. 24.

¶ 375. In an action upon the bond of a defaulting treasurer the question arose whether the defalcation was confined to his second term of office for which the bond was given. His cash book showed that at the end of his first term there was no deficiency, but he testified that there was "probably" or "possibly" a deficiency, though he did not discover it for a year afterwards. Held, that there was nothing in this to show a defalcation during the first term.—Marquette County v. Ward, 50 Mich. 174.

¶ 376. In an action on a county treasurer's bond, it was contended by the defense that a part of the shortage was created during the prior term of office, and that there was no evidence tending to show that the treasurer, at the expiration of his first term, had on hand the amount of money with which he was chargeable. While it appeared from the testimony of the deputy treasurer that, at the beginning of the second term, there was on hand in the usual depositories only $238 of the $2,500 with which the treasurer was then chargeable, it further appeared from the office books that, during the first two months of the second term, the disbursements exceeded the receipts by over $3,000. The court left to the jury the question whether any part of the defalcation occurred during the first term, and instructed them that, if it did, there could be no recovery on account of such prior defalcation. Held, that the charge was sufficiently favorable to defendants.—County of Cheboygan v. Erratt, 110 Mich. 156.

¶ 377. Under Comp. L. 1897, § 2993, which provides that city officers shall hold office for one year from the second Monday in April and until the successors are qualified, an officer's second term does not begin until he has qualified by having his bond accepted by the common council, and the sureties on his bond for the second term are liable only for loss of money coming into his hands after his bond was approved.—City of Grand Haven v. United States Fidelity & Guaranty Co., 128 Mich. 106.

§ 86. Reductions, credits and defenses of sureties.

Resignation of village officer as defense to exonerate surety, see Comp. L. 1915, § 2582.

¶ 378. Sums actually paid during one term of office are not to be disallowed to the sureties for that term because their principal, in stating his account at the close of the previous term, had credited himself upon his books with the same sums, by false entries made to help force a balance.—City of Detroit v. Weber, 29 Mich. 24.

¶ 379. No moneys can be lawfully paid out of the treasury of Bay City except upon warrants drawn according to the charter, and money paid by the treasurer to contractors without such warrants cannot be set up in reduction of his liability on his official bond. —McCormick v. Bay City, 23 Mich. 457.

¶ 380. Sureties upon a city treasurer's bond cannot claim release from liability because of the neglect of a committee of the council to examine the treasurer's accounts monthly as required by ordinance, or because they signed such bond in reliance upon the controller's assurance that such examinations had been or would be made, which was untrue in fact.—City of Detroit v. Weber, 26 Mich. 284.

¶ 381. A city ordinance having been passed, providing that the books, papers, sureties, etc., of the treasurer should be examined once a month by a certain committee, who should notify his bondsmen if they found any defalcation or irregularity, it was held that the neglect of this committee to dis-

charge its duty did not release the sureties. —City of Detroit v. Weber, 26 Mich. 284.

¶ 382. Misconduct on the part of a board of education in appointing one treasurer in consideration of a promise on his part to pay interest on funds in his hands does not render his appointment void but voidable only, and such cannot be urged as a defense by his sureties in an action on his bond as treasurer.—Board of Education of Detroit v. Andrews, 142 Mich. 484.

¶ 383. The charter of Lansing gives the common council full power to settle with the city treasurer when he leaves office. An outgoing treasurer accounted for the funds by giving certificates of deposit, but the bank which issued them failed, and the money was lost. Held, in an action against his bondsmen, that they were entitled to show that the council had ratified the treasurer's action, if that was irregular.—City of Lansing v. Wood, 57 Mich. 201.

¶ 384. The loss of a part of the records and the destruction of vouchers of a county treasurer by order of the supervisors is not conclusive against the county's right to recover on the treasurer's bond notwithstanding previous purported final statements between the supervisors and the treasurer.—County of Montmorency v. Wiltse, 125 Mich. 47.

¶ 385. In an action on a treasurer's bond it cannot be urged that the board of education was guilty of such fraud as will release the bondsmen where it appears from the evidence that before his appointment as treasurer of the board he wrote a letter to the board offering to pay interest on deposits in his hands as treasurer, and it was expected that he would deposit the funds in the bank where he was an officer, but it does not appear that the fact that he was a stockholder in the bank was known to the board as a whole although one member knew it.—Board of Education of Detroit v. Andrews, 142 Mich. 484.

§ 87. Actions on bonds and time to sue.

Parties plaintiff and defendant, see post § 88.
Declaration, pleadings and issues, see post § 89.
Burden of proof and presumptions, see post § 90.
Evidence, see post § 91.
Actions against officers in general, see ante § 71.
Period of limitations of action on official bond, see Limitations § 15.
Action on sheriff's bond by survivor of two persons jointly entitled to sue, see Estates of Decedents ¶ 1002.
Practice in suit by county on bond, see also Counties § 56.
General statutory provisions relative to actions on official bonds, see Jud. Act, chap. XXI, §§ 1-8; Comp. L. 1915, §§ 12783-12790.
Actions on bond of county treasurer, see Comp. L. 1915, §§ 2372, 2373.

¶ 386. The sureties on the bond of a county treasurer are not relieved from liability because of delay in the discovery of the latter's default.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 387. Provisions in an official bond limiting the time within which suit may be brought to a period less than that allowed by law are surplusage, when the bond otherwise complies with Comp. L. 1897, § 2354, How. St., 2nd Ed., § 1408.—Township of Forest v. American Bonding Co. of Baltimore, 187 Mich. 657.

¶ 388. An action by the board of supervisors on a treasurer's bond to recover for the amount of worthless checks received by him as cash is virtually one by the county in its governmental capacity under Comp. L. 1897, § 2466, How. St., 2nd Ed., § 948; so that laches or estoppel is not pleadable against it. —Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

§ 88. Parties plaintiff and defendant.

Declaration, pleadings and issues, see post § 89.
Variance in suing on joint bond where some are not liable, see also Bonds ¶ 54.
State or county as proper plaintiff to sue for public money improperly paid out of county treasury, see Counties § 54.
Actions on official bonds, see Jud. Act, chap. XII, § 2; Comp. L. 1915, § 12353.

¶ 389. The bond of the clerk of the state prison is properly sued by the people through the attorney general.—Hulin v. People, 31 Mich. 323.

¶ 390. A township treasurer's bond, running to "the people of the state of Michigan," instead of to the township, cannot be sued in the township's name. The state and the township being distinct political organizations, the error in the bond could not be avoided by any averment in the declaration. —Town of La Grange v. Chapman, 11 Mich. 499.

¶ 391. A county may sue in the name of its board of supervisors upon its treasurer's bond given to the board; and any objection that it should have sued in its own name is waived by pleading the general issue.—Johr v. St. Clair County Sup'rs, 38 Mich. 532.

¶ 392. Where a statute designates a public officer as the obligee in a bond required from another officer for the public security, he became the proper person to bring suit on the bond in the absence of statutory provisions.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 393. In an action by a public officer upon a bond running to him in his official character, the objection that it is not enough to designate the plaintiff by his official title alone, but that his individual name should be given, is one that must be taken before pleading to the merits, and cannot be raised for the first time in the supreme court.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 394. By statute, the party for whose use a sheriff's bond is sued is to be deemed the plaintiff in the action. Where one of two persons jointly entitled to prosecute the action died, it was held that action should be brought in the name of the people for the use of the survivor alone, without joining the administrator of the one deceased.—Jackson v. People, 6 Mich. 154.

¶ 395. After a firm had begun suit in justice's court and before it had obtained judgment one of the partners assigned to the firm's attorneys in the case all his "right, title, and interest in or to the claim" sued upon. Judgment having been rendered, execution was issued, but the constable neglected to pay over the moneys collected thereupon. Held, that the assignees of the claim, being the persons "entitled to such moneys" could maintain an action under How. St. § 6988 upon the constable's bond.—Montgomery v. Martin, 104 Mich. 390.

¶ 396. In the absence of provision by statute or city charter giving the right, an action on the official bond of a city marshal running to the city, cannot be maintained for the use and benefit of a third person injured by the marshal's malfeasance.—City of Eaton Rapids for use of Snyder v. Stump, 127 Mich. 1.

¶ 397. In suit against a surety upon the joint and several bond of a notary public, the statute does not require that his principal be joined as a defendant. The surety can be sued alone.—People for use of Doran v. Butler, 74 Mich. 643.

¶ 398. Where it appears that the funds were at all times within the control of the treasurer, and he could at any time have withdrawn them from the bank, it is no defense to an action on the treasurer's surety bond, he being an officer in the bank where the funds were deposited, that the deposits were made with the bank by the direction of the board of which he was treasurer, and responsibility for the insolvency of the bank was assumed by the board.—Board of Education of Detroit v. Andrews, 142 Mich. 484.

§ 89. Declaration, pleadings and issues.

General rules and principles of pleading, see Pleading.

Variance between pleadings and proof in action on official bonds, see Pleading, X.

¶ 399. A declaration on a coroner's official bond for taking an insufficient replevin bond sufficiently alleges a breach if it alleges that defendant did not well and faithfully perform his duty in the premises as coroner, and under this allegation makes the necessary specifications.—People ex rel. Fletcher v. Lee, 65 Mich. 557.

¶ 400. A declaration on the official bond of a county treasurer in an action to recover moneys which have passed into his hands describes such moneys properly enough as moneys of the county where, as in the case of liquor taxes, the county collects them only as trustee for its towns and villages.—Marquette County v. Ward, 50 Mich. 174.

¶ 401. Declaration in an action by a county against a treasurer and his sureties for the acceptance of worthless checks in payment for taxes, held to state a cause of action.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 402. In an action on an official bond where the gist of an action is the alleged embezzlement of funds of the state prison by the clerk of that institution, as their lawful custodian, the question of his liability for falsifying accounts, as a distinct ground of action, is outside the issue; so is the inquiry how far his bond is meant as a guaranty against dishonesty or peculation where his office gives him an opportunity to steal through propinquity to others who have charge of the funds.—Hulin v. People, 31 Mich. 323.

¶ 402a. A declaration on a coroner's official bond for taking an insufficient replevin bond sufficiently alleges a breach if it alleges that defendant did not well and faithfully perform his duty in the premises as coroner, and under this allegation makes the necessary specifications.—People ex rel. Fletcher v. Lee, 65 Mich. 557.

§ 90. Burden of proof and presumptions.

Evidence in general, see post § 91.

¶ 403. The delivery to the auditor general by a county treasurer of the bond provided for by Comp. L. 1857, § 877, How. St. § 1098, is in law part of its execution, and is an action upon such bond if no affidavit denying its execution is filed as provided by Circuit Court Rule 79, no proof of execution or delivery is required.—People v. Johr, 22 Mich. 461.

¶ 404. In an action to charge the county treasurer on his bond with failure of duty in not forwarding lists of delinquent tax lands to the auditor general, plaintiff must show, not merely that returns of such lands were in fact made by the collectors to the treasurer, and that no transcripts were received by him from the auditor general up to April 1st, but, also, that the transcripts were not

forwarded within a reasonable time after actual returns to the treasurer by the collector.—Houghton County Sup'rs v. Rees, 34 Mich. 481.

¶ 405. In an action against a former treasurer and his surety for breach of bond in that the treasurer had failed to account for and pay over to his successor money in his hands, where the defense was that various settlements had been made in full satisfaction, an instruction that it was the duty of the plaintiff not only to show money received but also to show disbursements to determine the indebtedness and whether there had been a breach in the condition of the bond, but that if there was a fair preponderance that there had been a breach, in that all the alleged settlements between the parties were erroneous because they failed to show a correct state of the accounts so that defendant was indebted in a larger amount, then this shows a noncompliance with the bond, and a breach which under these circumstances would cast on the defendant the burden of showing the disbursements, correctly sets out the law in the matter.—Macomb County Sup'rs v. Lovejoy, 143 Mich. 555.

¶ 405a. In an action against a county treasurer for a breach of his bond in that he had failed to turn over to his successor moneys in his hands, and the defense was that various settlements had been made in full satisfaction, but it was claimed that these settlements were erroneous because fraudulent, and did not show all the receipts, where the plaintiff introduced all the evidence it could procure and the defendant claimed that certain evidence of disbursements did not appear in the books because they had been destroyed, the further burden of proving disbursements equal to the receipts devolves upon the defendant.—Macomb County Sup'rs v. Lovejoy, 143 Mich. 555.

§ 91. Evidence.

General law of evidence, see Evidence.

¶ 406. Settlements made between county treasurers and the board of supervisors provided for by Comp. L. 1897, § 2479, while open to impeachment, are to be treated as prima facie evidence of the state of the account and therefore it was error to refuse to permit counsel in an action on a treasurer's bond to argue to the jury the question of the weight to attach to such settlements.—County of Montmorency v. Putnam, 122 Mich. 581.

¶ 407. The fact that the undisputed evidence in an action on a county treasurer's bond proved that the charges against the treasurer on settlements were incorrect, made such settlements no longer prima facie evidence of the correctness of the charges against him; the utmost which the treasurer could have claimed under such circumstances being that the settlements still afforded evidence of the correctness of his credits.—County of Montmorency v. Putnam, 135 Mich. 111.

¶ 408. Testimony in an action on a county treasurer's bond that certain payments made by a county treasurer were not credited to him in settlements, and testimony tending to show that the county had not been credited with certain payments, did not justify the discarding of the settlements but only went to their weight.—County of Montmorency v. Putnam, 122 Mich. 581.

¶ 409. Although the failure of the defendant treasurer to produce checks drawn on his bank account, to establish his right to additional credits in an action by the county, or to account for their nonproduction, might have weakened, it did not destroy the defendant's testimony, as his credibility as a witness was still for the jury, and not for the court.—County of Montmorency v. Putnam, 135 Mich. 111.

¶ 410. In an action upon a county treasurer's bond, where there was testimony that the treasurer deposited in the bank to the county's account, all moneys received by him except a small amount properly disbursed, and that he did not misappropriate or lose any of the money, and there was no evidence of mistakes in counting the money and no claim was made that the bank did not keep proper books, the jury could have inferred that all such money was properly disbursed but not that he disbursed for the county money justly chargeable to him, which never came into his hands.—County of Montmorency v. Putnam, 135 Mich. 111.

¶ 411. In an action on a county treasurer's bond, testimony showing that in various settlements between the treasurer and the board of supervisors, the county clerk's books were relied upon to show the condition of the account and that certain funds coming into the hands of the treasurer from the auditor general were not charged upon the county clerk's books, goes to show that these omitted items could not have been taken into account either by the supervisors or by the treasurer and notwithstanding statements of the treasurer denying that he has appropriated any moneys belonging to the county, claiming that he kept the funds separate from his own, a verdict and judgment for the treasurer will be reversed on appeal.—County of Montmorency v. Putnam, 127 Mich. 36.

¶ 412. Where bond, when produced on trial, contained an indorsement signed by the deputy auditor general as such deputy, entitling and describing the bond, stating the years and amount for which it was given, and that it was recorded and filed on a day named, such indorsement was held to show an approval and acceptance by the auditor general.—People v. Johr, 22 Mich. 461.

VIII. COMPENSATION AND EMOLUMENTS.

§ 92. In general; power of fixing compensation for services.

Statutory limitations, see post § 93.
Increase or decrease during term of office, see post § 94.
Right to compensation and emoluments in general, see post §§ 95-97.
Right to extra compensation, see post §§ 98-101.
Right to fees and mileage, see post §§ 102, 103.
Allowance for disbursements and expenses, see post § 104.
Assignment, waiver or contract with reference to salary, or compensation, see post § 105.
Estoppel or loss of right to claim, see post § 106.
Loss by neglect or delay in claiming, see post § 107.
Collection and enforcement of compensation, see post § 108.
Recovery by public overcompensation, see post § 109.
Salary of judges and additions thereto payable by counties, see Judges § 3.
Compensation and reimbursement of sheriffs, see Sheriffs, III.
Power of supervisors to fix compensation of certain officers, see Const. art. VIII, § 9.

¶ 413. The legislature has the power to fix the salary of a county officer, such as a clerk, in the performance of duties which do not relate exclusively to matters in which the county only is interested.—Board of Auditors of Wayne Co. v. Reynolds, 121 Mich. 99.

¶ 414. The city council of Cadillac has power to fix the health officer's salary, and the board of health cannot bind the council by assuming to fix it.—Coleman v. Common Council City of Cadillac, 49 Mich. 322.

¶ 415. Where the statute provides that an officer's salary shall be fixed by a board of public works and approved by the common council, the latter body alone cannot reduce it.—Fountain v. City of Jackson, 50 Mich. 15.

¶ 416. A board of auditors, after fixing a salary, cannot change such salary without some further action, spread upon its record. —People ex rel. Miller v. Wayne Auditors, 41 Mich. 4.

¶ 417. Where a common council is empowered by statute to fix the salary of an officer, merely appropriating for payment a less sum than had been paid before does not fix the salary at the smaller sum if the council continues to allow monthly bills at the former rate.—Fountain v. City of Jackson, 50 Mich. 260.

¶ 418. A protest is ineffective unless made to the body having power to act upon the subject-matter. If a salaried officer protests that the amount of salary allowed him is less than he is entitled to, it is of no effect to make the protest to the functionary intrusted with the mere duty of paying him, if the latter has no part in fixing the salary, and is under no obligation to report the protest to the body which fixes it.—Thomas v. St. Clair County Sup'rs, 45 Mich. 479.

¶ 419. Under Const. art. 10, § 10, the board of supervisors of Wayne county cannot fix the compensation to be paid for services rendered the county, that being expressly the province of the board of auditors; so held in regard to pay of experts employed to examine books of county auditors and treasurer.—Clegg v. Board of Auditors of Wayne County, 96 Mich. 188.

¶ 420. Under How. St. § 527, giving the board of supervisors power to fix the salary of the county treasurer, and section 508, providing that salaries shall not be increased during the term for which officers have been elected, the board may fix the salary of the county treasurer at a specified sum plus collection fees.—People v. Reigel, 120 Mich. 78.

¶ 421. The board of auditors of Wayne county, under How. St. § 2197x, which authorizes it to fix the compensation of deputy game and fish wardens, has the power to fix such compensation for each year at such sums as it thinks fit.—Moore v. Board of Auditors of Wayne County, 90 Mich. 269.

¶ 422. Laws 1879, Act No. 214 (How. St. § 9056), fixing the fees of a circuit court commissioner in criminal examinations, applies where he takes the evidence in person. Where it is done by a stenographer the board of supervisors is the final judge of proper compensation.—Pistorius v. Saginaw County Sup'rs, 51 Mich. 125.

¶ 423. Whether the supervisor has the right to fix the compensation when the electors have neglected to do so, quære.—Township of Texas v. Wager, 12 Mich. 39.

¶ 424. Since, by the terms of the act governing education in Detroit, the superintendent of schools is a teacher, and the primary school fund may be used to pay his salary, the amount calculated on for his salary by the board of estimates is not binding upon the school board in fixing his salary.—Attorney General ex rel. Zacharias v. Board of Education City of Detroit, 154 Mich. 584.

¶ 425. A board of supervisors will not be compelled by mandamus to allow a county clerk's claim for fees for issuing subpoenas to delinquent taxpayers under the tax-law of 1889, and for moneys paid the register of deeds for searches in his office to ascertain the names of owners of the lands taxed; since section 75 of that act provides that "all compensation" shall be paid by the county for services under the act and How.

St. §§ 577, 6592, 6594, provides that the services rendered to the county be compensated by salary or fees as fixed by the board of supervisors, and there are accordingly no ascertained fees payable, but upon a proper showing the board may be required to act under section 100 of said law, empowering the board to determine how county officers shall be paid for services under the Tax Law, and to determine what amount of compensation, if any, such clerk shall receive for his services under the law, and how it shall be paid.—Sherman v. Sanilac County Sup'rs, 84 Mich. 108.

¶ 426. While the register of deeds of Wayne county has the right to name his deputies and clerks, the number to be employed, and the price to be paid them, are entirely within the discretion of the board of auditors, and unless a clear abuse of this discretion is shown no court can review it.—Roulo v. Board of Auditors of Wayne County, 74 Mich. 129.

¶ 427. If it can be said that the board of state tax commissioners are authorized by implication to hire a clerk, the power to fix his compensation is in the board of state auditors and their judgment allowing less compensation than the contract of employment calls for is not subject to review.—Warner v. Board of State Auditors, 128 Mich. 500.

¶ 428. The three counties comprising a judicial circuit, through their board of supervisors, assented to the employment of a stenographer without stipulating as to his compensation, and this, under the statute, left his salary at $2,000. This sum was apportioned among the counties and paid for four years, when one of the counties was detached from the circuit. Held, that the previous assent of the counties to the employment of a stenographer at the statutory salary did not continue to be binding after this change, but that they were entitled to make new arrangements.—Hitchcock v. Blackman, 47 Mich. 146.

§ 93. ——Statutory limitations.

Constitutional limitations upon compensation of state officers, see Const. art. VI, § 21.
Compensation of members and officers of legislature, see Comp. L. 1915, § 12 et seq.
Compensation of members of constitutional convention, see Const. art. XVII, § 4.
Of adjutant general, see Comp. L. 1915, § 888.

¶ 429. The statutes relating to stenographers contemplate that they shall receive annual salaries, and are accordingly on duty not only during the sessions of court but at other times, so that a per diem allowance by a board of supervisors, in place of a salary, is unauthorized.—Stockwell v. Genesee County Supervisors, 56 Mich. 221.

¶ 430. Const. 1908, art. VIII, § 9, provides that the boards of supervisors shall have exclusive power to fix salaries and compensations of all county officers not otherwise provided by law. Sections 2611 and 11223, Comp. L. 1897, provide for the compensation of registers of deeds by fees. A board of supervisors fixed a register's salary at a certain sum. Held, he was entitled to the fees fixed by the statute and was not bound by the salary fixed by said board.—Vetter v. Fowler, 167 Mich. 499.

¶ 431. A board of supervisors can include in the compensation of the county treasurer the amount received for office charges or payments under the tax-laws.—People ex rel. Munger v. Clerk of Board of Sup'rs of Bay County, 38 Mich. 307.

¶ 432. Laws 1871, Act No. 138, gave the board of supervisors power to fix the salary of the judge of probate. Laws 1873, Act No. 140, amended it, but did not alter the effect of this provision. Held, that the mere fact of the amendment and re-enactment of the empowering clause did not authorize a board to fix again a salary which they had once fixed.—Chapman v. Berrien County, 50 Mich. 311.

¶ 433. Comp. L. 1897, § 2477, defining the duties of a county clerk and providing that it shall be his duty to perform such further duties as the board of supervisors may require, and Pub. Acts 1897, No. 425, §§ 1-3, fixing his compensation, make it ultra vires for the board of supervisors to agree to pay the county clerk for services rendered as clerk of a sub-committee appointed to superintend the erection of a court house.—County of Wayne v. Reynolds, 126 Mich. 231.

§ 94. Increase or decrease during term of office.

Right to extra compensation, see post §§ 98-101.
Law changing salaries as impairment of contract with incumbent officers, see Constitutional Law § 173.
Constitutional inhibition on changes in compensation during term, see Constitutional Law §§ 268, 269.
Constitutional prohibition against increase or decrease of compensation during term, see Const. art. XVI, § 3.
Time for fixing salaries and provision against change during term, see Comp. L. 1915, § 2514.

¶ 434. The judge of the superior court of the City of Grand Rapids is not a circuit judge so as to be within the exception of the Constitution, art. XVI, § 3, authorizing the increase of the salary of circuit judges during their terms of office.—Dunham v. Tilma, 191 Mich. 688.

¶ 435. Section 7, Act No. 392, Local Acts 1903, provides that the Board of Education

of Detroit shall appoint a superintendent of schools to hold office for three years, at a salary not to exceed $4,000. Under this act one Martindale was appointed, at a salary of $4,000, for the term 1906-1909. By Act No. 406, Local Acts 1907, the legislature amended the Act of 1903, and provided that in 1909 the board might appoint a superintendent, and fix his salary without any limitation as to amount. Held, that the amendment authorized the board to raise Martindale's salary during his term.—Attorney General ex rel. Zacharias v. Board of Education, City of Detroit, 154 Mich. 584. (Grant, C. J., dissenting.)

¶ 436. The Constitution, art. XVI, § 3, providing that salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment, was intended to apply to such a state of affairs as existed at the time of the adoption of the constitution, at which time public officers were only appointed for fixed terms, and hence does not apply to officers whose terms are indefinite, such as members of the board of assessors of the City of Detroit.—Burton v. City of Detroit, 190 Mich. 195.

¶ 437. The provisions of § 3, art. XVI of the Constitution, together with § 5d of the Home Rule Act (Act No. 279, Pub. Acts 1909, § 5446, How. St., 2nd Ed.) prohibiting the increase of the salary of a public officer during his term of office, apply to a person who was appointed a member of the Civil Service Commission of the City of Detroit at a time when no salary was attached to the office, but was provided for by charter amendment during his term.—Barrus v. Engle, 186 Mich. 540.

¶ 438. Relator was a drain commissioner with his term expiring December 31, 1909, and with his compensation based on the fee system. Act No. 118, Pub. Acts 1909, effective in September, 1909, provided that drain commissioners holding office December 31, 1909, should be continued in office until November, 1910, and that the board of supervisors should fix their salaries in October, 1909. The board fixed the salary at $800. In mandamus brought by relator drain commissioner, who held over, under the statute, from December 31, 1909, to compel the county clerk to pay him his salary for 1910, held, the writ should issue, and that Act No. 118 was not unconstitutional as increasing the salary of a public officer after election and appointment.—Chase v. Hart, 162 Mich. 74.

¶ 439. An official salary may be deemed to bind the parties paying and receiving it if no other compensation is provided by law, and the officer accepts it as fixed and goes into office on those terms; but this presumption does not arise where the salary has been cut down after the officer's election.—People ex rel. Douvielle v. Manistee County Sup'rs, 40 Mich. 585.

¶ 440. A superintendent of schools is not a contractor, and where he is appointed by the board of education for a limited term, at the maximum salary allowed by statute, and, under an amendment removing the salary limit, an increase is voted during the term, the increase looks to the future, and not to the past, and is not in violation of article 4, § 21, of the Constitution.—Attorney General ex rel. Zacharias v. Board of Education City of Detroit, 154 Mich. 584.

§ 95. Right to compensation and emoluments in general.

During disability or unlawful suspension or exclusion, see post § 96.
Right and effect of private compensation, see post § 97.
Power to fix, see ante § 92.
Right to fees and mileage, see post § 102.
Right to extra compensation, see post §§ 98-101.
Allowance for disbursements and expenses, see post § 104.
Right to assign or make waiver or contract with reference to salary or compensation, see post § 105.
Public policy as to agreements to pay illegal or excessive fees, see Contracts § 61.
Compensation of members of board of supervisors and mode of fixing same, see Counties § 51.
Compensation of grand juror acting as stenographer for grand jury, see Grand Jury ¶ 6.
Salaries and compensations of municipal judges and clerks, see Municipal Courts § 5.
Salaries and compensations of municipal officers and employees, see Municipal Corporations § 196 et seq.
Constitutional provision as to amount of compensation of members of legislature, see Const. art. V, § 9 et seq.

¶ 441. The emoluments of a member of a municipal police force belong to him as an incident to his office; not by force of contract, but because the law attaches it to his office.—Newberry v. Smith, 157 Mich. 181.

¶ 442. Acceptance of a salaried public office does not establish contract relations between the officer and the public whereby the latter must continue to pay the same salary as was paid at the time of the appointment to office.—Wyandotte v. Drennan, 46 Mich. 478.

¶ 443. Members of a board of supervisors are entitled to be paid only for services during meetings of the board, and cannot receive pay for services rendered upon committees when the board is not in session (How. St. § 502).—Ewing v. Ainger, 96 Mich. 587.

¶ 444. The salaries of public officers are not necessarily increased by statutes placing further duties upon them after such salaries

have been fixed.—Sherman v. Sanilac County Sup'rs, 84 Mich. 108.

¶ 445. The members of the board of water commissioners of the village of Cheboygan render their services, as such, gratuitously. —Perry v. Village of Cheboygan, 55 Mich. 250.

¶ 446. A stenographer appointed for a judicial circuit cannot compel the individual counties composing it to pay him specific sums by way of compensation, without showing that their respective quotas toward his statutory salary amount to those sums.—Goodale v. Marquette County Sup'rs, 45 Mich. 47.

¶ 447. The Stenographers' Act, Comp. L. 1871, p. 1528 (How. St. § 6504), contemplates that a person appointed stenographer should hold his office indefinitely, and independently of the county and the electors; that the appointment may be made for an entire judicial circuit whatever the number of counties it contains; and that it may be made for a single county when the circuit contains no more. But the entire circuit cannot be compelled to pay the appointee more than the statutory salary of $2,000, and this should be apportioned by the circuit judge among the counties composing it, Comp. L. 1871, § 5035 (How. St. § 6511).—Goodale v. Marquette County Sup'rs, 45 Mich. 47.

¶ 448. Where a proper order was made upon the township treasurer by a highway commissioner who was performing the duties of his office, though he had not yet filed his official bond, payment was enforced.—Mackenzie v. Baraga Township Treasurer, 39 Mich. 554.

County as employer within Workmen's Compensation Act, see note, 5 N. C. C. A. 903, 904.

§ 96. ——During disability or unlawful suspension or exclusion.

¶ 449. A legally elected officer, duly qualified and standing ready to perform the duties of his office, is entitled to the salary, if it has not been paid, even though debarred from the performance of his duties by an intruder acting in good faith.—Comstock v. City of Grand Rapids, 40 Mich. 397.

¶ 450. An officer de jure cannot enforce as against the public the payment of the salary of his office while another is de facto the incumbent.—Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 451. Where a person duly elected has obtained judgment of ouster against one who has kept him out of office under cover of a certificate of election from the returning board, he may qualify after obtaining judgment, and is entitled to recover damages for the time he was excluded, and the entire official salary from the beginning of the official term, without deduction for the services of the incumbent or his own earnings while ousted. The salary belongs to the office and is independent of the amount of work personally done by the officer.—People ex rel. Benoit v. Miller, 24 Mich. 458.

¶ 452. Payment of a fixed salary to a de facto officer while he is holding the office and discharging its duties constitutes a complete defense to an action brought by the officer de jure, after judgment of ouster, to recover the salary for the same period; and, in case of an elective city office, it makes no difference (1) that the members of the common council were ex officio members of the board of canvassers, and as such issued to the incumbent a certificate of election, no fraud or misconduct being imputed to them; (2) that the council assumed the defense of the quo warranto proceedings instituted by the claimant; or (3) that certain charter provisions were not observed in making the payments. But payments made after judgment of ouster has been rendered are unwarranted, and the municipality is liable to the officer de jure for the amount of the same. —Scott v. Crump, 106 Mich. 288.

§ 97. ——Right and effect of private compensation.

¶ 453. An official stenographer may recover for copies of testimony—other than the one he is required to file upon request—made by him under special contract. So long as stenographers discharge their official duties properly, they are not required to devote all their time to the public service.—Langley v. Hill, 63 Mich. 271.

§ 98. Right to extra compensation.

For services within scope of official duties, see post § 99.
For services not prescribed by law, see post § 100.
For overtime, see post § 101.
Increase or decrease during term, see ante § 94.
Compensation of supervisor for clerical work done in other office, see Counties ¶ 213.
Right of highway officer to compensation for overseeing work of his own servant and horses working on highway labor, see Highways ¶ 513.
Right of health officer to extra compensation above salary or regular fees, see also Health ¶ 35.
Right of health department employee to compensation for overtime, see also Health ¶ 18.

¶ 454. A police justice appointed by a common council to act with a committee of its members in revising the city ordinances is entitled to compensation from the city for his labor, whether the revision is passed or not; and the committee has nothing to do with his employment beyond dividing the labor, which, however, would bear on the

amount of his services.—McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 455. A county clerk whose salary has been fixed by the board of supervisors is not entitled to extra compensation from the county for services as building committee, and in purchasing wood and trees, etc., except upon a showing of facts from which a contract for payment could be implied.—People ex rel. Stetson v. Calhoun County Sup'rs, 36 Mich. 10.

¶ 456. The Local Acts of 1879, No. 381, which provides for the compensation of certain officers of Wayne county, among them the register of deeds, applies only to the salary and compensation then legitimately growing out of the duties of the various offices, and does not prevent the register of deeds from recovering the fees allowed by Acts of 1887, No. 262, for reporting mortgages for assessment; the latter statute applies to all the counties of the state.—Roulo v. Board of Auditors of Wayne County, 74 Mich. 129.

¶ 457. A city controller directed and authorized by the common council to receive, as agent of the city, certain bounty bonds and apply them in the manner designated by the special act authorizing their issue, is entitled to the same compensation that any other person so designated should have, and the law implies a promise to pay what his services are reasonably worth.—City of Detroit v. Redfield, 19 Mich. 376.

¶ 458. A police justice is entitled to a reasonable compensation for his services (unless intended to be gratuitous) for extra-official services in aiding the city to collect fee-moneys from the county.—McBride v. City of Grand Rapids, 47 Mich. 236.

¶ 459. Where the board of supervisors has fixed an annual salary for the county clerk to be in full for all services and so understood by him, he cannot afterwards claim extra compensation for services as such clerk, in criminal cases, drawing juries, recording births, deaths, etc., for which the law allows specific fees, with the intent, it would seem, that these should be paid in addition to the sum allowed him as clerk of the board of supervisors.—People ex rel. Stetson v. Calhoun County Sup'rs, 36 Mich. 10.

¶ 460. The work of transcribing the records of deeds done by a county supervisor, was not work pertaining to the duties of his office as supervisor, and was not inconsistent with any duty he owed growing out of his relations as such, and the action of the board in making such employment was not against public policy.—Hanna v. Chalker, 136 Mich. 8.

§ 99. ——For services within scope of official duties.

Right of sheriff to compensation as "jailer," see Sheriffs, III.

¶ 461. Where services performed by an officer are within his official duties, either when he takes the office or afterwards imposed, his salary, however inadequate, must be his only compensation.—City of Detroit v. Redfield, 19 Mich. 376.

¶ 462. The Tax Law (Pub. Acts 1893, No. 206, § 110), provides that "county officers shall be paid for services under this act by salary or otherwise, as the board of supervisors shall determine." Held, that a county clerk whose salary is fixed at a specified amount is not entitled to additional compensation for services contemplated by the act, except they be "extra" services covered by section 123.—Gardner v. Newaygo County Sup'rs, 110 Mich. 94.

¶ 463. The duty imposed upon county treasurers by the Tax Law of 1893, § 135 (Laws 1893, Act No. 205), to furnish a certificate showing whether there are any tax-liens or titles held by the state or any individual against the land described in a deed or other instrument, and that all taxes due thereon have been paid for the five years preceding the date of such instrument, comes within the scope of their official duties, and, while its imposition may be a proper subject for consideration by the proper authorities in providing needed assistance and fixing compensation for the future, they have no legal right to demand extra compensation for its performance.—Backus v. Carleton, Wayne County Treas., 99 Mich. 218.

¶ 464. Under Comp. L. 1897, § 3060, providing that a city treasurer shall receive such annual salary as council shall determine, and an ordinance fixing the salary at $750 in full compensation of all services rendered the city by him, a city treasurer is not entitled to the collection fees on taxes paid to him as that is made a part of his duty under sections 3033 and 3035.—City of Iron Mountain v. Uddenberg, 127 Mich. 189.

¶ 465. Where one who had been employed to conduct a suit on behalf of a city was afterward appointed to the salaried position of city counsellor, whereby the conduct of the suit fell within the line of his official duty; it was held that he could not recover on a quantum meruit for services rendered therein after the appointment was made, and that all previous understandings relating to services which it then became his duty to perform officially terminated by and merged in the appointment, unless otherwise expressly agreed.—City of Detroit v. Whittemore, 27 Mich. 281.

¶ 466. When the law implies that a particular service is already paid for by an official salary, it can raise no implication of an agreement to pay for it separately.—City of Detroit v. Whittemore, 27 Mich. 281.

¶ 467. Under Comp. L. 1871, § 470, How. St. § 476, a county clerk whose compensation

has been fixed by the board of supervisors at a specified annual salary is entitled to no additional compensation for services as clerk of the board of supervisors.—People ex rel. Stetson v. Calhoun County Sup'rs, 36 Mich. 10.

§ 100. ——For services not prescribed by law.

¶ 468. The law (Pub. Acts 1895, No. 236, creating the office of state statistician), nowhere prescribes it to be the duty of a county clerk to furnish to the state statistician copies of the records in his office, and the county is not bound to compensate the clerk for such services.—Gardner v. Newaygo County Sup'rs, 110 Mich. 94.

¶ 469. Under the Tax Law of 1889 the county clerk has no authority to incur expense in ascertaining who are the owners of the lands on the tax-record, and he cannot claim reimbursement for moneys paid the register of deeds for searches in his office to ascertain the names of such owners.—Sherman v. Sanilac County Sup'rs, 84 Mich. 108.

¶ 470. A township assessor, in making an assessment that he had no right to make, e. g., for a liquor tax belonging to a village, is not the township's agent, and is not entitled to compensation from it.—People ex rel. Village of Decatur v. Decatur Township Board, 33 Mich. 335.

¶ 471. An officer cannot recover compensation for voluntary services outside of the line of his duties, if rendered on his own responsibility in a case wherein he alone could not have hired their performance.—Perry v. Village of Cheboygan, 55 Mich. 250.

§ 101. ——For overtime.

¶ 472. Where the board of park commissioners of a city have provided that 9 hours shall constitute a day's work, a person engaged to work without any special contract as to overtime, is entitled to recover for overtime.—O'Boyle v. City of Detroit, 131 Mich. 15.

¶ 473. An employee of the park commissioners of a city who is working by the day and accepts his daily pay without making any claim for overtime, cannot be said to have waived any claim to pay for overtime where the superintendent knew that he expected pay therefor though the superintendent had no authority to fix the wages of employees.—O'Boyle v. City of Detroit, 131 Mich. 15.

§ 102. Right to fees and mileage.

Manner of computation, see post § 103.
Allowance for disbursements and expenses, see post § 104.
Right of sheriff to traveling fees for writs not served, see Sheriffs, III.
Mileage of members of legislature, see Const. art. V, § 9.

¶ 474. A legislative intention to give unearned fees cannot be inferred from uncertain terms in a statute.—Lyon v. City of Grand Rapids, 30 Mich. 253.

¶ 475. The fees allowed by statute for services in certain cases, over which the board of supervisors have no control, cannot include anything not clearly within their terms.—Lee v. Ionia County Sup'rs, 68 Mich. 330.

¶ 476. The statute of 1840, allowing to "the secretary of state, auditor-general, any clerk," etc., one dollar a day "for attending on subpoena with bills, records or other written evidence," was held not to apply to a justice in attendance with his docket. He is not such a clerk as was intended by the statute.—Prentiss v. Webster, 2 D. 5.

¶ 477. A police justice's trial fee of one dollar may be charged in all cases, however short the trial, but not where the case was dismissed or a nolle prosequi entered.—People ex rel. City of Grand Rapids v. Kent County Sup'rs, 40 Mich. 481.

¶ 478. A justice can have no trial fee in a criminal cause where defendant pleads guilty.—Potts v. Jackson County Sup'rs, 47 Mich. 635.

¶ 479. Under the charter of Grand Rapids the city marshal cannot claim fees upon local assessments collected by the city clerk after the marshal has returned the rolls as uncollected after the expiration of the warrants attached.—Lyon v. City of Grand Rapids, 30 Mich. 253.

¶ 480. A prosecuting attorney who appears and examines the witnesses in a divorce case, and at the conclusion of the testimony announces that the interests of the children and of the public good do not require that he should further contest the granting of a decree, is not entitled to the fee authorized by Laws 1887, Act No. 137.—Willcox v. Wayne Circuit Judge, 83 Mich. 1.

¶ 481. Under Const. art. 4, §§ 15 and 17, the speaker of the house of representatives cannot, as speaker, receive any compensation or mileage beyond what he receives as a representative.—People ex rel. Thurber v. Whittemore, 2 Mich. 306.

¶ 482. Under Comp. L. 1897, § 12, providing compensation for clerks and assistants of the house of representatives and senate and including 10 cents for every mile actually traveled, a journal clerk is not entitled to mileage certified by the proper officer unless he has actually traveled the miles compensated for.—Cook v. Auditor General, 129 Mich. 48.

§ 103. ——Manner of computation.

¶ 483. The fees specified by statute for certain services—over which fees the board

of supervisors has no discretion—should not be made to include anything not fairly within their terms. Others remain subject to discretion.—Lee v. Ionia County Sup'rs, 68 Mich. 330.

¶ 484. A legal "folio," in computing fees as compensation, is 100 words (Comp. L. 1871, § 7459, How. St. § 9034).—Thornton v. Village of Sturgis, 38 Mich. 639.

¶ 485. A custom among stenographers of estimating a certain number of folios to the page will not prevail as against an actual count reducing the number charged for in a transcript.—Maltby v. Plummer, 73 Mich. 539.

¶ 486. Under the statutes in force in 1861 and 1862 the township treasurer had the right to retain of his own authority only two per cent of the taxes of 1861 collected by him for his fees, where neither the electors of the township, nor the supervisors, had fixed his compensation at a higher rate.—Township of Texas v. Wager, 12 Mich. 39.

¶ 487. Where the electors did not determine what percentage should be added to the taxes for the collection expenses, and the supervisor added two and a half per cent, and, in his warrant for their collection, directed the treasurer to retain that amount for his fees, and the treasurer retained four per cent, paying over the remainder, it was held that he was liable to the township for the amount he had retained over two and a half per cent.—Township of Texas v. Wager, 12 Mich. 39.

¶ 488. Under How. St. § 1170m1, Laws 1887, Act No. 262, § 5, which provides for the reporting of mortgages for assessment purposes, the register of deeds is entitled to ten cents for each notice given by him of a mortgage reported to him by the register of deeds of another county, and to a like sum for each mortgage added to the book-lists since the district assessor's books were last delivered to the assessing officers.—Beekman v. Eaton County Sup'rs, 85 Mich. 584.

¶ 489. The tax collector in Detroit in 1855-56 was not entitled to collect from the city a percentage for his fees on taxes returned uncollected.—Kelsey v. City of Detroit, 7 Mich. 315.

§ 104. Allowance for disbursements and expenses.

Reimbursement for expenses by county, see Counties § 53.

¶ 490. While the disbursements of a county clerk for postage and express are legal charges against the county, a claim of $25.00 for such disbursements may well be rejected by the board of supervisors if not properly itemized.—Gardner v. Newaygo County Sup'rs, 110 Mich. 94.

§ 105. Assignment, waiver or contract with reference to salary or compensation.

Public policy as to agreements to assign compensation, see Contracts § 60.

Invalidity of contract for procuring or selling office, see Contracts § 59.

¶ 491. Where a justice of the peace assigns his unearned salary, the assignment is void on the ground of public policy, as impairing the efficiency of the public service.—Granger v. French, 152 Mich. 356.

¶ 492. Where a justice of the peace assigns his unearned salary, public policy requires that mandamus should lie in his favor to compel payment of it to him, though he himself be culpable in making such assignment.—Granger v. French, 152 Mich. 356.

¶ 493. That a town clerk remits or gives credit for his fees for filing a mortgage concerns none but the officer.—People v. Bristol, 35 Mich. 28.

¶ 494. An agreement by a justice of the peace with a litigant that he will charge no fees unless the judgment in his case is collected is void, and prevents the justice from recovering his fees if the party refuses to pay them.—Willemin v. Bateson, 63 Mich. 309.

§ 106. Estoppel or loss of right to claim.

Loss by neglect or delay in claiming, see post § 107.

Conclusiveness of audit of claim on question of right to further compensation, see also Health § 17.

¶ 495. An officer who accepts payment of the amount allowed for his services by the proper auditing board may not make a further claim for the same services.—Perry v. Village of Cheboygan, 55 Mich. 250.

¶ 496. A probate judge's silent acceptance of his salary as reduced by the board of supervisors from the amount previously allowed him is an implied assent to their fixing it at the lower rate, and precludes him from claiming more.—Thomas v. St. Clair County Sup'rs, 45 Mich. 479.

¶ 497. One of the counties continued without objection for three years to pay its proportion of $2,000, but the supervisors then voted to reduce the sum to be paid by them to $600. The stenographer received this without protest for four years, when the supervisors withdrew their assent to the employment and refused to pay longer. Held, that under these circumstances it must be deemed that no arrangement has been made, except so far as one party has paid and the other received money in satisfaction of services previously rendered.—Hitchcock v. Blackman, 47 Mich. 146.

¶ 498. Where an officer claims compensation for services not within the scope of his

duties they cannot be shown to have been gratuitous by evidence that he made no claim for compensation in conversation with third persons who would have no authority to make compensation or fix the amount thereof. But his statements that he made no claim or did not expect or desire pay would be competent.—McBride v. City of Grand Rapids, 49 Mich. 239.

§ 107. Loss by neglect or delay in claiming.

¶ 499. A person employed to manage a general store of a quarry company who also acts as postmaster does not lose his rights as against the quarry company to the commissions due him as postmaster by the fact that he neglected to claim or withdraw them for a period of four or five years, since the law will not imply a contract with reference to the emoluments of a public office.—Bailey v. Sibley Quarry Co., 166 Mich. 321.

§ 108. Collection and enforcement of compensation.

Payment of compensation to de facto officer as defense in suit by de jure officer, see ante ¶ 452.

Mandamus to compel audit and payment of claims for fees and salaries, see Mandamus § 91 et seq.

Mandamus to compel audit and payment of claim for salary or compensation or for performance of contract of public employment, see Mandamus §§ 91, 92, 94 et seq.

¶ 500. An amendment to the Tax Law allowing sale to be made to pay the marshal's fees will not apply to assessments made before the passage of the law unless plainly so intended.—Fuller v. City of Grand Rapids, 40 Mich. 395.

¶ 501. A defendant's refusal to pay stenographer's fees does not exclude his defense, certainly after trial has begun.—Wheaton v. Atlantic Giant Powder Co., 41 Mich. 718.

§ 109. Recovery by public of overcompensation.

Right of public to follow and recover funds paid out by officer, see also Municipal Corporations § 145.

Recovery by public of illegal or mistaken payment made for compensation not due, see Payment, VI.

¶ 502. Money paid to a county clerk for services as clerk to a committee, which were illegally allowed because his salary was by law to be in full of all services he should be required to perform, may be recovered from him notwithstanding the board has passed on his claim and allowed it.—County of Wayne v. Reynolds, 126 Mich. 231, overruling County of Wayne v. Randall, 43 Mich. 137.

¶ 503. A county may recover back money paid on account of the ultra vires action of the board of supervisors in voting additional compensation to the county clerk for serving as secretary of a sub-committee.—County of Wayne v. Reynolds, 126 Mich. 231, overruling County of Wayne v. Randall, 43 Mich. 137.

OFFICIAL BALLOT to PARCELS OF LAND.

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See Corporations, XXIV, A, E.
Pain—
As element of damages, see Damages §§ 24-27.
Res gestæ exclamations and complaints, see Evidence, VII, D, § 453.
Pandering—
As a crime, see Crimes § 120.
Paper Book—
See Appeal, VI, XI.
Paper Title—
As color of claim of adverse title by possession, see Adverse Possession § 30 et seq.
Proof in ejectment, see Ejectment, IV.
Sufficiency and marketability of offered title, see Vendors and Purchasers, III.
Papers—
In the sense of documents, see cross-references under "Documents."
In the sense of pleadings in the case, see Pleading; Equity, VII.
Par Value—
Restrictions on issuance of stocks and bonds at discount or for less than face value, see Corporations § 266 et seq.; Municipal Bonds, II.
Parades—
Ordinances and regulations concerning, see Municipal Corporations §§ 53, 54, 92.
In streets as nuisances or obstructions to travel, see Highways § 175.
Paramours—
Credibility of testimony and necessity for corroboration, see Witnesses, VI; Divorce § 67; Indictment § 317.
Paraphernalia of Wife—
See Husband and Wife, II, C.
Parcel Room—
Liability for baggage checked, see Carriers § 253.
Parcels of Land—
Mode of selling at involuntary sale, see Foreclosure §§ 35-37, 113-117; Executions §§ 64, 65.
Priorities among liens, see Mortgages, V; Liens § 11.
Marshalling of assets and securities, see Marshalling Assets.
Taxation and assessment, see Taxes, V; Local Improvements § 76.

PARDONS AND PAROLES.

TREATS of pardon of persons accused or convicted of crime and of the liberation on probation or on parole of persons imprisoned after conviction and the commutation of sentences for good behavior.

Analysis.

§ 1. In general; power and occasion to pardon.
§ 2. Requisites, conditions, and effect of pardon.

§ 3. Paroles and probations.
§ 4. Violation of probation, parole, or condition of pardon and procedure thereon.
§ 5. Commutation of sentences for good behavior.

Suspension of sentence, see Indictment § 494.

§ 1. In general; power and occasion to pardon.

Power of advisory board to parole prisoner, see post ¶ 10.
Conditions upon pardons, see post § 2.
Relative powers of the several departments of government, see Constitutional Law § 66.
Constitutional power to pardon, see Const. art. VI, § 9.

¶ 1. The power to pardon is an executive power expressly vested by the constitution in the governor, and exclusively belonging to his office.—People v. Brown, 54 Mich. 15.

¶ 2. The governor has power to pardon before sentence.—Spafford v. Benzie Circuit Judge, 136 Mich. 25.

¶ 3. A pardon granted after conviction but before sentence is valid.—People v. Marsh, 125 Mich. 410.

¶ 4. No requirement is made by statute that all pardons shall be presented and acted upon by the advisory board of pardons before being granted by the governor.—People v. Marsh, 125 Mich. 410.

§ 2. Requisites, conditions, and effect of pardon.

Pardon before sentence, see ante ¶¶ 2, 3.
Commutation for good behavior, see post § 5.
Paroles and probations, see post § 3.
Application for parole, see post ¶ 12.
Mode of calling attention of court to pardon before sentence, see Indictment ¶ 2332.
Effect of pardon to abate pending criminal case, see Indictment ¶ 2724.
Granting of pardons, statutory provisions and conditions, see Comp. L. 1915, § 15892 et seq.
Procedure before pardon board, see Comp. L. 1915, § 178 et seq.

¶ 5. A pardon signed by the governor, though by initials, and attested by the signature of the secretary of state and the state seal, is valid, if otherwise regular in form and substance.—Spafford v. Benzie Circuit Judge, 136 Mich. 25.

¶ 6. A pardon was not rendered invalid because it lacked an address, failed to state the date of conviction, erroneously recited that relator was sentenced, and was delivered directly to the defendant.—Spafford v. Benzie Circuit Judge, 136 Mich. 25.

¶ 7. Statutes seemingly contemplating that pardons shall be addressed to and returned by custodians who enlarge the persons pardoned, are directory.—Spafford v. Benzie Circuit Judge, 136 Mich. 25.

¶ 8. The condition in a pardon that the subject thereof "abstain from visiting places where intoxicating liquors are sold" means that he shall not resort to saloons for the purposes of drink, or social recreation or amusement.—People v. Moore, 62 Mich. 496.

¶ 9. It is not unlawful to make it one of the conditions of a pardon that the convicted person shall pay to the commonwealth a sum that will reimburse it for expense of trial.—People v. Marsh, 125 Mich. 410.

§ 3. Paroles and probations.

Implied conditions of parole, see post ¶ 12.
Authority of governor or advisory board to grant paroles, see Pub. Acts 1917, No. 198.

¶ 10. Under Act No. 67, Pub. Acts 1909, providing for parole and Pub. Acts 1905, No. 184, § 5, the advisory board in the matter of pardons has no authority to grant a parole to a prisoner prior to the date of expiration of the minimum term of an indeterminate sentence, to take effect at the expiration of the minimum term.—Adams v. Russell, 169 Mich. 606. Writ of error dismissed in 229 U. S. 353, 57 L. ed. 1224, 33 Sup. Ct. Rep. 846.

¶ 11. A paroled prisoner is still regarded as under the control of the prison authorities.—People v. Cook, 147 Mich. 127.

§ 4. Violation of probation, parole, or condition of pardon and procedure thereon.

Record of sentence after breach of parole, see Indictment § 503.
Power of warden or deputy to issue warrant for prisoner breaking parole, see Prisons.
Provisions for reimprisonment on violation of conditions of pardon, see Comp. L. 1915, § 15895.

¶ 12. When a prisoner applies for parole he applies under the provisions of the law, and agrees to its terms, and fully understands that for any misconduct provided in the statute he may be taken back to serve out his sentence. This power of recall is lodged in the warden, subject to review by the board of pardons.—People v. Cook, 147 Mich. 127.

¶ 13. Where a person is sentenced after violating his parole agreement, it cannot be said that he has been deprived of his liberty without due process of law since he has had no jury trial, etc., as he was not a free man but under the control of the court because of the crime of which he had been convicted. —People v. Dudley, 173 Mich. 389.

¶ 14. Where a person on parole is brought before the court for sentence for violating the parole agreement he is not being tried for a new crime so as to come within that part of the constitution which gives a person charged with a crime the right to be confronted with witnesses, to a jury trial, etc.— People v. Dudley, 173 Mich. 389.

¶ 15. Where a person convicted of a crime is placed in the custody and care of a probation officer, under Act 91, Pub. Acts 1907, as amended by Act 124, Pub. Acts 1909, the fact that he was placed in jail for violation of the conditions of the probation order does not revoke and terminate such probation so that the court would be without jurisdiction to impose a sentence after he had been released and brought back for a second violation.—People v. Dudley, 173 Mich. 389.

§ 5. Commutation of sentences for good behavior.

Changing commutations for good behavior as ex post facto law, see Constitutional Law § 233.

¶ 16. An unwritten custom, governing, in the absence of written rule, the "good time" to be forfeited for each case of misconduct by convicts, and which had existed so long as to be presumably known to all within the prison walls, was regarded by the court as binding, not only upon the prisoners but upon the board of inspectors, whose duty it was, under How. St. §§ 9703, 9704, to adopt of record and promulgate clear and specific rules; and such custom, after it had operated to fix and deduct a particular convict's lost time, could not be set aside by the board in his case.—In re Walsh, 87 Mich. 466.

¶ 17. Laws 1893, Act No. 118, § 33, which discriminates between convicts in the state prison who are serving a first, second, or third term as to the credit to be given them for good behavior, imposes upon the prison authorities the determination of the question as to which term a convict is serving, subject to his right to attack the correctness of the conclusion reached on habeas corpus.— In re Canfield, 98 Mich. 644.

¶ 18. Under Comp. L. 1897, § 2112, providing that the prison board may by general rules prescribe for forfeiture of good time by prisoners, a prisoner cannot be deprived of the right to earn a reduction of his term while out on parole where there is no express rule covering his case, and the rules apply in terms only to those within the prison.— In re Mann, 125 Mich. 402.

¶ 19. Comp. L. 1897, § 2112, providing that a prisoner "who has already served a second term in the said prison" shall be allowed no good time, does not include a term of imprisonment in the house of correction and reformatory imposed without jurisdiction.— In re Harney, 134 Mich. 527.

PARENT AND CHILD.

TREATS of the mutual rights, duties and liabilities arising from the parental relationship and liabilities of the parent to third persons. It excludes the general law of infants as distinguished from that depending upon the relation of the child to others (see Infants) and matters relating to juvenile delinquents (see Incompetents). For rights incident to the taking of another's child into the relation of one's own, see Adoption.

Analysis.

I. Custody and control of child.

§ 1. In general; welfare of child as test.
§ 2. As between parents.
§ 3. Parent or grandparent or third person.
§ 4. Emancipation of child.

II. Parental duty; support and necessaries of child.

§ 5. In general.
§ 6. Liability of parent for support of child.
§ 7. ——After divorce or separation of parents.
§ 8. ——Agreements to provide support.

§ 9. ——Adult children.
§ 10. Stepchildren.
§ 11. Liability for goods furnished or services rendered.

III. Services and earnings, and injuries to child.

§ 12. Right to earnings and services in general.
§ 13. Action by parent for earnings of child.
§ 14. Right of action for injuries to child.

IV. Property and contract rights between parent and child.

§ 15. In general.
§ 16. Conveyance from child to parent.
§ 17. Contract of child to care for parent.
§ 18. Conveyances and transfers from parent to child.
§ 19. ——On consideration of support and maintenance.
§ 20. ——Rights and remedies on breach.
§ 21. Burden of proof, presumptions and evidence.

V. Torts of child.

§ 22. In general.

VI. Support of indigent parents.

§ 23. In general.

Parent's domicile as child's domicile, see Domicile § 5.
Disability of children to intervene in divorce cases, see Divorce § 78.
Members of family as beneficiaries in fraternal benefit policy, see Fraternal Associations, IV.

I. CUSTODY AND CONTROL OF CHILD.

§ 1. In general; welfare of child as test.
As between parents, see post § 2.
Parent or grandparent or third person, see post § 3.
Emancipation of child, see post § 4.
Effect of marriage of male infant, see post § 19.
Custody and protection of infants, see Infants, II.
Rights under apprenticeship, see Apprentices.
Adoption of another's child, see Adoption.
Delinquent children, see Incompetents.
Effect of separation agreement fixing custody of children on power of court in subsequent divorce suit, see Divorce § 116.
Occasion and grounds for particular awards of custody in divorce, see Divorce § 114.
Illegitimate children, see Bastards.
Adjudicating status, custody and support in divorce cases, see Divorce, IX.
Crime of abduction or enticement from "parent or guardian," see Crimes § 39.
Habeas corpus to test right to custody, see Habeas Corpus § 4.
Father's interest as relator to compel admission of child to schools, see Mandamus ¶ 770.
Necessity for appointment of next friend or guardian ad litem for infant parties, see Guardian ad Litem § 2.
Parent as natural guardian of child, see Guardianship § 9.
Judgment in habeas corpus as conclusive of right to custody, see Habeas Corpus § 14.
Excessive punishment as criminal assault, see Assault § 3.
Reformatories in general, see Reformatories.
What deemed ill-treatment of child by parent, see Comp. L. 1915, § 7233.
Loss of right to custody because of ill-treatment, see Comp. L. 1915, § 7232.
Right of parent to custody of child, see Jud. Act, chap. LVIII, § 6; Comp. L. 1915, § 13955.
When guardian entitled to custody of child, see Jud. Act, chap. LVIII, § 7; Comp. L. 1915, § 13956.

¶ 1. A court is bound to consider the interest of the child in awarding custody to either claimant.—In re Mould, 162 Mich. 1.

¶ 2. When the right of the parent to the custody of a child is not clear and imperative, the best interests and happiness and personal attachments of the child must always control the decision of the court.—In re Gould, 174 Mich. 663.

¶ 3. The father's right to and authority over his child are secure and inviolable so long as he properly discharged the correlative duties, but this is subordinate to that of the state which is obligated by its duty of protection to consult the welfare, comfort

and interests of such child in regulating its custody during the period of its minority.—In re Gould, 174 Mich. 663.

¶ 4. In proceedings by habeas corpus to determine which parent is entitled to a child's custody, there should be full inquiry and examination on oath to enable the court to decide what the child's welfare requires.—Corrie v. Corrie, 42 Mich. 509.

¶ 5. A court of competent jurisdiction may decree the custody of a child as between a husband and wife or may give it to a suitable third person, and nothing in Comp. L. 1897, §§ 8689, 8701, relating to the natural guardianship of the father or mother, prevents such a course.—In re Knott, 162 Mich. 10.

§ 2. As between parents.

As between parent or grandparent or third person, see post § 3.

¶ 6. Upon the separation of the father and mother, the latter has, prima facie, the right to the custody of a minor child.—In re Knott, 162 Mich. 10.

¶ 7. Neither parent has any right to the custody of a child as against the child's own welfare.—Corrie v. Corrie, 42 Mich. 509.

¶ 8. In the determination of questions relating to the custody of a child the best interests of the child and the natural and humane feelings of the parents are considered.—Martin v. Benzie Circuit Judge, 200 Mich. 549.

¶ 9. Where the custody of children is disputed by their parents the children are considered to be as deeply interested as either of the parents, and the court is not disposed, even in a case of parental misconduct, to take any discretionary step that may prejudice them.—Rowe v. Rowe, 28 Mich. 353.

¶ 10. While a husband and wife on separating may make a valid contract for the care of their minor children, such a contract will not be sustained to the detriment of the minor child whose interests are of the first consideration.—Carpenter v. Carpenter, 149 Mich. 138.

¶ 11. A mother is not to be deprived of the custody of her child by the father's testamentary appointment of a guardian for it (How. St. § 6306).—Goss v. Stone, 63 Mich. 319.

¶ 12. Until the right to custody has been judicially determined as between parents of a minor who are living together as husband and wife, there is no rule, statutory or other, which permits either, as of right, to dispose of a minor child to the exclusion of the other.—In re Knott, 162 Mich. 10.

§ 3. Parent or grandparent or third person.

General law of adoption, see Adoption.

¶ 13. The superior right of a parent to the custody of his child should only be enforced when it accords with the best interests of the child.—Martin v. Benzie Circuit Judge, 200 Mich. 549.

¶ 14. In habeas corpus proceedings for the custody of a boy, who had been left by his father with his grandparents for several years, the father contributing nothing to his support, and the boy having been well cared for, where the petitioner, with the father's consent, had obtained letters of adoption, held it was to the best interests of the boy, as the paramount consideration, that he remain with his grandparents.—In re Gould, 174 Mich. 663.

¶ 15. In habeas corpus proceedings by a father for the custody of his seven-year-old daughter, it appeared that on the death of her mother she had been left by her father in the care of defendants, under an arrangement that she should remain with them until she was fifteen. Defendants gave her a good home and were kind to her. Held, that in the absence of satisfactory evidence of the suitableness or permanence of the home to which the father proposed to take her, defendants should be awarded her custody.—In re Solosth, 157 Mich. 224.

¶ 16. Upon the question of the fitness of foster parents to have the custody of a child, the evidence indicated that said parents were of good character; could supply a good home and surroundings, and had sufficient financial ability to rear the child properly. There was evidence that the foster mother had been at one time jealous of the child and feared it might supplant her son in the affection of her husband, which jealousy appeared to be temporary and to arise from nervous trouble. It further indicated that affection existed between the child and the parents and that for a period of two years she had been properly brought up by them. Held, the foster parents were suitable persons to have the custody of the child.—In re Courtright, 167 Mich. 689.

§ 4. Emancipation of child.

See also post ¶¶ 41, 42, 46.

Rights under apprenticeship, see Apprentices.

¶ 17. A parent may at any time emancipate a child before majority, and this may be done by an express agreement, or some formal act, and it may also arise by implication from proven facts and circumstances.—Fox v. Schumann, 191 Mich. 331.

¶ 18. Emancipation may take place at once by express arrangement, or it may occur gradually and by conduct implying mutual assent; and even in the latter case it may be

brought about in a short time.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 19. A male minor is not emancipated by marriage.—Austin v. Austin, 167 Mich. 164.

¶ 20. In an action by a minor against a husband and wife for breach of an agreement for domestic services, evidence held sufficient to sustain a finding that the minor had been emancipated.—Fox v. Schumann, 191 Mich. 331.

II. PARENTAL DUTY; SUPPORT AND NECESSARIES OF CHILD.

§ 5. In general.

Liability of parent for support of child, see post §§ 6-10.
Liability for goods furnished or services rendered, see post § 11.
Services and earnings, see post III.
Support of infants in general, see Infants, II.
Measure of damages for loss of parental care through killing of parent, see Death by Wrongful Act § 35.
Crime of abandoning or neglecting child, see Crimes § 38.
Bill by infant to set aside decree divorcing parents, see also Judgments ¶ 211.
Service of process on parent as service on child, see Process, II.
Illegitimate children, see generally Bastards.
Abandonment or desertion of child as crime, see Crimes, II.
Right of parent with respect to school attendance and proceedings to assert right, see Schools, VI.

¶ 21. The parental duty of giving personal care and protection to children is distinct from the duty to support them.—Courtright v. Courtright, 40 Mich. 633.

§ 6. Liability of parent for support of child.

After divorce or separation of parents, see post § 7.
Agreements to provide support, see post § 8.
Adult children, see post § 9.
Stepchildren, see post § 10.
Liability of father's estate for support of indigent adult child, see Estates of Decedents ¶ 460.
Right of parent to charge child for support where in receipt of child's services, see Guardianship ¶ 246.
Sufficiency of evidence of contract to pay for child's support, see also Contracts § 323, ¶ 1353.
Support of illegitimate child, see Bastards.
Liability for support of adopted child, see Adoption § 3.

¶ 22. An obligation rests on the father to pay for the board of his imbecile son.—Howe v. North, 69 Mich. 272.

¶ 23. A married woman's contract during coverture to pay for the board of herself, her husband, and her imbecile son, is not binding upon her, the obligation being her husband's.—Howe v. North, 69 Mich. 272.

¶ 24. The mother is as much morally bound to care for, support, nourish and educate her child as the father, and the law will not allow her to recover for so doing simply because the father omits his duty.—Lapworth v. Leach, 79 Mich. 16.

¶ 25. Plaintiff took defendant's child while a baby and cared for it in his home for many years. He testified that defendant repeatedly told him to take care of the child and he would pay the plaintiff. In a suit to recover for support provided the child, held, the trial court erred in instructing a verdict for the defendant.—Boyer v. Joyal, 164 Mich. 662.

§ 7. ——After divorce or separation of parents.

¶ 26. A father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce; and as against the public and the children he cannot escape the duty.—Courtright v. Courtright, 40 Mich. 633.

¶ 27. The father of an infant which is in its mother's custody under a divorce decree making no provision for alimony is under no implied obligation to pay the mother's second husband for the infant's support, nor can the mother make any contract with her second husband which would bind the father for such support without his consent.—Johnson v. Onsted, 74 Mich. 437.

¶ 28. A wife who is deserted by her husband before the birth of a child cannot recover of the father for its support, care or education by her without showing an express promise on the part of the father to pay for the same.—Lapworth v. Leach, 79 Mich. 16.

§ 8. ——Agreements to provide support.

¶ 29. A husband and wife on separating may make a valid contract for the care of their minor child. Such contract, while valid between the parties, will not be sustained to the detriment of the minor child, whose interests are of the first consideration.—Carpenter v. Carpenter, 171 Mich. 572.

¶ 30. Divorced persons agreed in writing that certain of their children might stay with their mother as much of the time as they wished, but that she should make no claim against the father for their support, and in consideration of this the father agreed that they might remain as aforesaid, and that he would of his own free will do for them towards their support, maintenance and education what seemed to him right, and at least would provide in store pay and provisions each year for five years an amount in value equal to fifty dollars. One child remained with its mother one year, another five, and another six, and she had to give them her

personal care and protection. Held, that the father was bound to pay the mother $50 a year for five years, not as support due the children, but as recompense to the wife for taking sole personal care of them.—Courtright v. Courtright, 40 Mich. 633.

¶ 31. Where a decree divorcing the parties had been entered without providing for the maintenance of their only child, and there was entered into between the parties an agreement whereby plaintiff agreed to dismiss her appeal from such decree in consideration of the transfer of certain money and property, a clause in the contract acknowledging receipt of the money and property and "the support of the boy A. D. for one year and clothe him until twenty-one years of age" is held to mean that the husband was obligated to support the boy for one year, and clothe him until he was 21.—Denler v. Denler, 142 Mich. 316.

§ 9. ——Adult children.

Earnings of adult stepchild, see post ¶ 40.

¶ 32. A father is liable for the support of his adult son in case he becomes a public charge.—Stilson v. Gibbs, 53 Mich. 280.

¶ 33. To render the father liable for the support of his adult son, such son must be a poor person within the meaning of How. St. § 1741.—Clinton v. Laning, 61 Mich. 355.

§ 10. ——Stepchildren.

See also post ¶ 40.

¶ 34. A widow is not legally bound to support her stepchildren.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

§ 11. Liability for goods furnished or services rendered.

Liability of parent for support of child, see ante § 6.

¶ 35. Comp. L. 1897, § 4495, imposing upon the parent a legal duty to support his minor child, implies an agency in the child to bind the father for necessaries.—Finn v. Adams, 138 Mich. 258.

¶ 36. Where a minor son spends most of his time away from home and is allowed to retain most of the wages which he receives for his labor, a dealer who furnishes him clothing cannot recover its value from his father if the latter has never authorized the son to buy on his credit, or authorized or confirmed the transaction, and if there is no showing that the articles furnished were in any proper sense necessaries, or that the father has failed in his duty to supply the son's wants.—Tyler v. Arnold, 47 Mich. 564.

¶ 37. Where a son contracted for medical services without the knowledge of his father and the physician did not determine whether the father had refused aid, the father was not liable for such services.—Sassaman v. Wells, 178 Mich. 167.

III. SERVICES AND EARNINGS, AND INJURIES TO CHILD.

§ 12. Right to earnings and services in general.

Action by parent for earnings of child, see post § 13.

Right of action for injuries to child, see post § 14.

Uncertainty of agreement for services, see also Contracts § 3, ¶ 31.

Gratuitousness of services, support or contributions between parents and children or between children for benefit of parents as jury question, see Contracts § 335.

Implied contract for services rendered parent by child, see Implied Contract § 11.

¶ 38. The earnings of minor sons belong prima facie to their fathers.—Reeder v. Moore, 95 Mich. 594.

¶ 39. The earnings of a minor son belong to his father unless the father has given him his time and earnings.—Allen v. Allen, 60 Mich. 635.

¶ 40. In an action by an adult stepdaughter against a stepmother for money had and received, to wit, earnings as a dressmaker collected by defendant, evidence that plaintiff did not know that she was entitled to her wages after she became of age is inadmissible; and so is evidence as to what plaintiff earned at dressmaking before she went to live with defendant.—Feiertag v. Feiertag, 73 Mich. 297.

§ 13. Action by parent for earnings of child.

Recovery by father as next friend as barring suit by him in his personal capacity, see Former Adjudication ¶ 305.

Instructions as to right to recover where jury may infer gratuitousness of services, see also Contracts § 359, ¶ 1560.

¶ 41. A father cannot recover for wages earned before her majority by a daughter whom he had emancipated, and where he has made no contract with her employer in regard to such wages.—Bell v. Bumpus, 63 Mich. 375.

¶ 42. Where a father sues for the value of his minor son's services, and the defense of emancipation previous to the son's going to work for defendant is set up, an inquiry as to whether the boy did not ask and obtain his father's permission before going to work for a third person named was properly excluded where the record did not show at what time such other service began, or how long prior to the engagement with defendant.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 43. In a suit by a parent for his child's earnings defendant may show that the boy

in the course of his service embezzled money, thus rendering his service not only valueless but positively injurious.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 44. Where a parent sued in assumpsit for the wages of his minor son, wrongfully harbored by one who had enticed him away from his father's house, it was held that, in the absence of any evidence or claim that the parties ever actually agreed together at all in regard to the minor's services, the assumpsit could not be so referred to any real agreement of a date later than that of defendant's enticement, as to imply that it rested on a distinct arrangement, which left the original wrong as a ground for a separate suit.—Thompson v. Howard, 31 Mich. 309.

¶ 45. A request to charge the jury imperatively and unqualifiedly that a father is entitled to his minor son's earnings and wages should be rejected.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 46. In a suit by a father to recover the wages of a minor, deceased son, the court in its instruction relative to moneys paid to the son from time to time, should not have omitted to charge that if there had been no emancipation such moneys given by the employers to the son, with the father's consent, should be credited to them as against the claim for wages.—Freeman v. Shaw, 173 Mich. 262.

¶ 47. A special finding that there was a contract between the plaintiff parent and the defendant with relation to the wages of a daughter is contrary to the evidence, where the girl's mother testifies that it was the intention that the girl should have her wages and her father testifies that he had no understanding with defendant as to whom the wages should be paid to, there being no other evidence.—Bell v. Bumpus, 63 Mich. 375.

Right of employer to set up as counterclaim damages sustained in consequence of negligence or wilful misconduct of minor employee, in action by parent for compensation, see note 1 N. C. C. A. 812.

§ 14. Right of action for injuries to child.

Torts of child, see post V.

Imputing to child negligence of its parent or custodian, see Negligence § 34.

Contributory negligence of injured child's parent or custodian, see Negligence § 28.

Recovery by child for injury as bar to action by father, see also Former Adjudication ¶ 168.

Injury to parents from death of adult child as loss under Death Act, see Death by Wrongful Act § 11.

Common-law right to recover for loss of services where death follows injury, see Death by Wrongful Act § 1.

Measure and elements of damages by loss of child's services, see Death by Wrongful Act § 36; Damages § 154.

Measure of recovery by parent suing for injury to child, see Damages § 154.

Cruelty to children as crime, see Crimes § 61.

Injury to child by killing of parent as basis for recovery for death, see Death by Wrongful Act § 11.

¶ 48. Since under section 4495, Comp. L. 1897, a mother is bound to support her minor child, she is entitled to recover for negligent personal injury to the child, where the father is divorced and provides no support for her or the child.—Yost v. Grand Trunk Ry. Co., 163 Mich. 564.

¶ 49. A parent cannot release her child's right of action for an injury.—Power v. Harlow, 57 Mich. 107.

Recovery of damages for wrongful death of minor child, see note 7 N. C. C. A. 937-948.

Recovery of damages by parents for wrongful death of adult child, see note 7 N. C. C. A. 1022-1027.

Right of adopting parent to recover for death of adopted child, see note 10 N. C. C. A. 743-748.

Dependency of parents under workmen's compensation acts, see note 16 N. C. C. A. 179-189.

Parent's right of action for injury to minor child under Federal Employers' Liability Act, see note 14 N. C. C. A. 1072-1073.

Unlawful employment of minor as affecting right of consenting parent to recover for death or injury, see note 14 N. C. C. A. 833-840.

IV. PROPERTY AND CONTRACT RIGHTS BETWEEN PARENT AND CHILD.

§ 15. In general.

Conveyance from child to parent, see post § 16.

Contract of child to care for parent, see post § 17.

Conveyances and transfers from parent to child, see post §§ 18-20.

Burden of proof, presumptions and evidence, see post § 21.

Threat against child as duress on parent and vice versa, see Duress.

Right of inheritance of parent from child, see Descent §§ 14, 15.

Validity of unfair or unnatural gifts, see Gifts § 27.

Validity of gifts as against other heirs, see Gifts, IV.

Contracts between infant and third persons, see Infants, IV.

Father or son as party to contract with third person, see Contracts § 11.

Contract rights of infants generally, see Infants, IV.

Contracts of parent for minor child, see Infants § 21.

Performance as consideration for promise to transfer or convey property, see Contracts § 107.

Consideration for agreements for support, see Contracts, V.
Rescission and cancellation suits, see Rescission, VI.
Grounds for rescission of agreements and conveyances, see Rescission, II.
Breach of support agreement as ground for rescission, see Rescission, II.
Scope and terms of cancellation decree and proper incidental relief, see Rescission, VI.
Sufficiency of re-entry by parents for breach of condition for support, see Deeds ¶ 335.

¶ 50. In contract dealings between father and son there is no implied promise on either's part to pay for board, clothes, money and the like furnished in consequence of the relationship, and an express promise must be shown to support a recovery.—Allen v. Allen, 60 Mich. 635.

¶ 51. In the absence of express agreement a widow is not liable to her daughter-in-law with whom she lives for the support of herself and her imbecile son; the law implies no promise to pay by reason of the relationship. —Howe v. North, 69 Mich. 272.

¶ 52. Where a son living in his father's family expends money at his father's request and with his knowledge and assent in building a house for him, the father is liable to the son for the amount so expended, unless there was a different understanding between them.—Hillebrands v. Nibbelink, 44 Mich. 413.

§ 16. Conveyance from child to parent.

Presumptions and evidence as to conveyance, see post § 21.
Right to rescind in general, see Rescission, I.
Grounds for rescission or cancellation, see Rescission, II.
Conditions upon rescission and restoration of benefits, see Rescission, III.

¶ 53. A daughter who, shortly after becoming of age, conveys to her father, with whom she is living, certain lands without other consideration than love and affection, may have the deed set aside upon a showing that she did not know that her mother owned the land and that title came to her upon her mother's death.—Graham v. Lamb, 120 Mich. 577.

¶ 54. A deed to a daughter of property which she had helped to pay for by laboring with her father and mother, her contribution being estimated at one-third of deferred payments amounting to $1,500, followed by a reconveyance to the grantor, her father, and the retention of possession of the deed by her, when coupled with evidence that the deed to her was to protect her interest of $500 at the time of the father's remarriage, will support a finding that the intention was to vest title in the father by the later deed subject to a $500 interest in the daughter.—Hall v. Dobbin, 119 Mich. 106.

¶ 55. The fact that a father makes statements to his daughter which she believes, and which induce her to execute a deed to him, is not a reason for discrediting such statements, any more than it is a reason for finding them to be true.—Draper v. Brown, 153 Mich. 120.

§ 17. Contract of child to care for parent.

Novation of agreements for support, see Novation § 1.
Validity of oral agreement to support parent, see Frauds, Statute of § 3.
Bond to parents as obligation enforceable by either of them, see Bonds ¶ 39.

¶ 56. A contract, between a man and wife on the one part and their son and his wife on the other, whereby the younger parties are to care for the elder as children are expected to care for parents who have arrived at an age when no longer able to care for themselves, the habits and temperament of each of the individuals involved being known to the rest, is assumed to have been entered into with reference to such knowledge and it is the duty of these parties to bear and forbear mutually in order that harmony be preserved. —Miner v. Miner, 91 Mich. 44.

¶ 57. A claim that money was paid by an aged parent to a child under a contract for future support, held not established by the evidence.—Moeller v. Notter, 184 Mich. 355.

¶ 58. In an action for defendant's breach of a contract to provide a home for and support his father-in-law, in consideration of the latter's paying over all his wages to the former, the extent of the provocation for plaintiff's abandoning the arrangement is for the jury.—Ehlert v. Klenger, 43 Mich. 61.

§ 18. Conveyances and transfers from parent to child.

On consideration of support and maintenance, see post § 19.
Rights and remedies on breach, see post § 20.
Presumptions and evidence as to conveyance, see post § 21.
Injunction to prevent parent conveying or incumbering property in breach of contract, see Injunctions § 63.
Equitable liens of improvers of another's lands in good faith or in reliance on contract, see Liens § 3.
Right to rescind in general, see Rescission, I.
Grounds for rescission or cancellation, see Rescission, II.
Conditions upon rescission and restoration of benefits, see Rescission, III.
Conveyances and transfers resulting in trusts, see Trusts.

¶ 59. Conveyances of property between aged parents and their children will be scrutinized with vigilance, since equity regards them with suspicion.—Guinon v. Guinon, 184 Mich. 56.

¶ 60. A father's conveyance of land to his son without consideration is valid as against the former's administrator where no creditors claim.—Warren v. Tobey, 32 Mich. 45.

¶ 61. A father's settlement with his son for services after he has reached his majority is not to be discouraged, and the transfer of property made in satisfaction will not be disturbed in favor of the father's administrator where there is no proof of fraud or undue advantage.—Bowen v. Lockwood, 26 Mich. 441.

¶ 62. Where the testatrix, in order to claim a pension, executed a deed of two pieces of land to one daughter and her granddaughter, and gave it to her attorney, it being subsequently delivered to the daughter at her direction, such deed, it reasonably appearing that she had sufficient mental capacity to dispose of her property, will not be set aside in an action by another daughter, even though it was made after the husband of the grantee had dissipated a large amount of the estate of testatrix and absconded.—Price v. Hagle, 171 Mich. 455.

¶ 63. The transfer of certain securities claimed to have been made by complainant, a very old man, to his daughter, was held invalid and was set aside in chancery, where, though there was no conscious fraud, it was in effect a taking of all he had and dividing it among defendant children.—Crips v. Towsley, 73 Mich. 395.

¶ 64. Where a father in deeding property to one of his sons is not fraudulently or improperly influenced, and where he acts with intelligence, his motive cannot be inquired into on the question of whether such conveyance should be set aside on the ground of mental incapacity and undue influence, since conveyances resulting from the preferences by parents for particular children cannot be judicially set aside unless it is clear that they are the effect of disease, fraud or estimates of the character and conduct of the children based upon misconceptions or notions having no foundation.—Terry v. Terry, 170 Mich. 330.

¶ 65. A deed prepared by the grantee and obtained by him from an uncle who had stood in loco parentis to him, and who, at the time of giving it, was supposed to be hopelessly ill, was set aside, the court being satisfied that the uncle did not understand it to be such a conveyance as it was, or authorize it to be so made.—Case v. Case, 26 Mich. 484.

¶ 66. A deed from an old woman to her son and his children of all the land she had, reserving only a life estate unprotected by any covenant by the son to pay taxes or insurance or to keep up repairs, and with no agreement in writing by him to furnish her with support, will be set aside at her suit wherein it appears that in addition to those facts she has been forced to leave the premises where she had been living with the son's family because of the ill treatment visited on her, and that when she made the deed she trusted her son implicitly and relied on him, though he denies any promise to support her and testifies that in making the deed she did so voluntarily and thereby stripped herself of all her property.—Lockwood v. Lockwood, 124 Mich. 627.

¶ 67. A person whose senses are blunted, who is absent-minded, inattentive and childish, and also under the influence of liquor, but whom the court could not pronounce incapable of doing an act as to the effect of which he was fully and fairly informed, was held to have been the subject of fraud in the execution of a deed, prepared by and executed to his son, in whom he implicitly confided; the contents and effect of the deed not having been fully and fairly explained to him.—Seeley v. Price, 14 Mich. 541.

¶ 68. A son fearing that a will made by his mother was unfavorable to him, persuaded her to come and live with him, and thereafter procured from her a deed of valuable property without any consultation by the mother with any one outside of his immediate family. The deed was recorded and two years later was called to the attention of the mother who denied having given any deed but recalled having signed some instrument which she supposed was a modification of her will. She brought action to have the deed set aside. Before the action was heard both the mother and son died. Held that the deed should be cancelled.—Whitely v. Whitely, 120 Mich. 30.

¶ 69. Undue influence in securing the execution of a deed to a son sufficient to support a decree to set aside such instrument is shown, where the evidence discloses that the grantor is a woman 80 years old, and unable to read or write; that she has made three wills and has twice attempted to distribute her real estate by deeds to her three children, having made six deeds; that the deed in dispute was in favor of her son and covered one-half of the homestead which she had occupied for more than 30 years; that the consideration was nominal, reserving to the grantor the use and occupation of the premises during her lifetime, and requiring grantee to pay her granddaughter, on becoming of age, $100; that such grantee had been living in North Dakota, and shortly before the execution of such deed came to live with his mother; that all the instruments mentioned, except the first will, were made after his return; and that such grantor left her home soon after making of such deed, claiming that she was ill treated.—Crowley v. Crowley, 140 Mich. 38.

¶ 70. The fact that a mortgagee over 80 years of age assigns the mortgage of one son to his children by his first wife in order to even up the benefits received from his estate among the children is not evidence of undue influence.—Holmes v. Holmes, 129 Mich. 412.

§ 19. ——On consideration of support and maintenance.

Conditions for support in deeds, construction and effect, see also Deeds, III, E.
Agreement to support as consideration for transfer of property from parent to child, see also Fraudulent Conveyances ¶ 158.
Payment of money as gift or purchase of support, see Gifts ¶ 3.
Equitable liens growing out of agreements for support, see also Liens § 3.

¶ 71. An agreement by a daughter and her husband to support her father during his life is a sufficient consideration for a conveyance of the father's lands to the daughter, and, having been executed, upholds the conveyance as against a previous will.—Goff v. Thompson, H. 60.

¶ 72. A son agreed to support his father and family, and the father conveyed his farm to him. About five years afterwards the son conveyed the farm to his brother, who gave him a mortgage on it for some stock and for expenditures on the land. The grantee immediately conveyed the land to the father, who knew of the mortgage and did not complain of it. But three years later he filed a bill asking that it be cancelled as fraudulent against himself. Held, that the bill could not be sustained on this showing.—Tuttle v. Tuttle, 41 Mich. 211.

¶ 73. An arrangement for the immediate and actual transfer of personalty to a son in consideration of his undertaking to support his parents, if performed, gives title as upon a present sale and authorizes the son to hold as against his father's administrator.—Chambers v. Hill, 34 Mich. 523.

¶ 74. A deed from a mother to her son in consideration of future support, as well as a subsequent agreement in relation thereto, will be sustained where the transaction is not inequitable, the conveyance is voluntarily made with full understanding of its nature, and was not induced by undue influence.—Guinon v. Guinon, 184 Mich. 56.

¶ 75. In the case of a deed procured from an aged man by one of his children, who agreed to keep him and care for him until death, the transaction otherwise partaking much of the character of a testamentary disposition, evidence that there was no secrecy about the transaction, that grantor was of good mind and strong will but afflicted with a fatal malady that required care tends to show that there was no undue influence.—Campbell v. Campbell, 75 Mich. 53.

¶ 76. A conveyance made by aged parents to their son-in-law in consideration of a mortgage for support was set aside on the ground of fraud and undue influence, where it appeared that the father was ill and mentally enfeebled at the time and the wife was blindly obedient to him, and where a dispute immediately arose between them as to whether personal farm property also passed with the land.—Stuyvesant v. Wilcox, 92 Mich. 228.

¶ 77. A family arrangement whereby a son, in exchange for a less valuable farm and some personal property of his own, was to obtain a conveyance from his parents of their own homestead and personal property, and was to support and take care of them for life and pay them a third of the farm products and of the proceeds of the personalty, is not so unreasonable as to indicate fraud or undue influence.—Van Donge v. Van Donge, 23 Mich. 321.

¶ 78. An aged couple deeded their property to their son on an agreement by him to give them a good and sufficient support, without any labor or service on their part except such as they might give voluntarily. The father died and the mother continued to live quietly with her son for several years until he married, when difficulties arose and she went to live elsewhere, claiming to be entitled to her support wherever she chose to reside. Held, that in view of the moderate circumstances of the parties the understanding evidently was that the son was to support his parents at his home, and that the mother could not demand support elsewhere unless she showed that he failed in his duty to her.—Pratt v. Pratt, 42 Mich. 174.

¶ 79. A son orally agreed with his father to live with and support his parents during their lives, in consideration of receiving all the personal property on the farm whereon they resided as life-tenants, and all he could raise thereon. He took possession, worked the farm, and supported his parents for five years. Held, that his temporary absence, with his father's consent, he having left ample means for his parent's support, would not divest him of his title to the crops sown by him or to the personal property on the farm, nor would a sale of the latter by his father in such absence do so.—Carr v. McCarthy, 70 Mich. 258.

§ 20. ——Rights and remedies on breach.

Right to rescind in general, see Rescission, I.
Grounds for rescission or cancellation, see Rescission, II.
Conditions upon rescission and restoration of benefits, see Rescission, III.
Suits to cancel, procedure and relief, see Rescission, VI.
Action for money recovery on rescission, see Rescission, VII.
Specific performance as remedy, see Specific Performance.

¶ 80. In a bill to set aside a deed from parents to a son, conditioned upon care and maintenance of the parents during life, etc., where a single act of misconduct on the part of the son against the surviving father was not sufficient ground for setting aside the deed, the decree was required to provide for reimbursement to the father for cost of main-

tenance during the time he resided away from the son's home after the occurrence in question, and for payment of such a sum each week as the father's proper maintenance might require during the time he chose to reside elsewhere than with the son, and for medical and funeral expenses; and to recognize the father's right to return to the son's house if he chose to do so, and to perform the other obligations imposed by the deed.—Woolcott v. Woolcott, 133 Mich. 643.

¶ 81. An octogenarian, who had been living with one of his sons, went to live with another to whom he gave a general power of attorney to dispose of his real estate, worth about $5,000. He was feeble, and in such condition as to be easily wrought on, and he was induced to convey his land to this son for an expressed consideration of $4,000, most of which was illusory. He did not understand, however, that he was absolutely depriving himself of his property. Such securities as he received in return from his son he gave up or destroyed. Held, on his bill for rescission of the conveyance, that the son's dealings, especially as they were carried on while acting in a fiduciary capacity, were intrinsically wrong, and that rescission should be granted; also that the son had no equity to recover his outlays on his father, as he had been in possession of the property, and had taken advantage of his father's residence with him to further his designs.—Thorn v. Thorn, 51 Mich. 167.

¶ 82. Land on which all the parties were living, and which had been grantors' homestead for forty-three years, was conveyed to grantors' son and his wife in consideration of support by grantees for life, a contemporaneous life-lease back to grantors reciting that "such care and provisions" should "be furnished" grantors "only in case they made their home with" grantees. Disputes having arisen, the grantees removed to another place and refused to care for or support grantors unless the latter would live with them. Held, that the agreement meant support on the land conveyed and leased back, and that the conveyance should be cancelled for failure to perform.—Mansfield v. Mansfield, 92 Mich. 112.

¶ 83. If, as the result of unkind feeling developed between the parties to a deed by an aged father to his son and daughter-in-law in consideration of care and support on the premises in which the father retains a life lease, the father cannot live agreeably and contentedly in the friendly relations contemplated by their agreement with his son and daughter-in-law, it is within the power of the chancery court to subsequently require other suitable provisions to be made for him in other congenial surroundings by them or at their expense.—Williams v. Williams, 198 Mich. 1.

¶ 84. A son whose parents have turned over to him their property in consideration of his supporting them stands as their guardian and may take no advantage in dealing with them; and a mortgage extorted by him will be reduced to the actual consideration.—Bowe v. Bowe, 42 Mich. 195.

¶ 85. In a suit by a father against his son to set aside a conveyance of land upon the ground of fraud and undue influence, the relief will be granted, although it cannot be held that complainant was incompetent to execute the deed, where it appears that the deed did not embody the actual understanding of the parties, that neither of them intended to enter into such legal relations as they actually did assume, and that the son, intending to acquire all his father's property by whatever means were necessary, accomplished his purpose by fraud and a species of undue influence.—Russell v. Russell, 150 Mich. 517.

§ 21. Burden of proof, presumptions and evidence.

Slightness of proof required for gift, see Gifts § 33.
Lesser evidence of gift required where from parent to child, see Gifts § 20.
Admissibility of evidence as to existence of contract for support, see also Contracts § 312, ¶¶ 1278, 1279.
Evidence as to agreement to pay for services or support, see also Contracts § 323.
Sufficiency of evidence of duress practiced by parent on child or child on parent, see Duress § 7.
Sufficiency of evidence of delivery of deed from father to child, see Execution of Instruments ¶¶ 250, 271.
Presumption and proof of legitimacy of children, see Bastards § 1.
Suits to cancel, procedure and relief, see Rescission, VI.
Admissions by parent or child as binding on each other, see Evidence § 423.

¶ 86. Where a mother whose mind is weakened by age has dealings in reference to her property with a son who has control of it, and relies upon his integrity not to mislead her, the dealings must be characterized by perfect good faith, and the burden of establishing fairness is on those whose claims are based on such dealings.—Crawford v. Hoeft, 58 Mich. 1.

¶ 87. The burden of proving good faith is on the grantee where a deed was obtained by a son from his mother who was living with him and who was given no opportunity to consult with any one except members of grantee's family, though she had another son and other relatives, and the mother repudiated the deed as soon as it was called to her attention.—Whitely v. Whitely, 120 Mich. 30.

¶ 88. In an action to set aside a deed given by a mother to her son in consideration of her life support, the defendant has the burden of showing that the complainant fully understood the terms, import and extent of the instrument, and that it was not obtained

by undue influence.—Guinon v. Guinon, 184 Mich. 56.

¶ 89. A son who has entire charge of the business and property of his aged and ignorant mother and who is her confidential adviser, has the burden of showing the bona fides of an assignment of a mortgage by her to him.—Snyder v. Snyder, 131 Mich. 658.

¶ 90. On a bill by an aged father against his son and daughter-in-law to set aside a deed of property to them subject to a life lease, the burden is on defendants to show that the agreement with their father is not to his disadvantage, is fair to him and of his own free will; that no advantage has been taken by them because of his age, mental condition, or confidence in them and that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do.—Williams v. Williams, 198 Mich. 1.

¶ 91. The relationship of father and daughter does not create such a fiduciary relation as will shift the burden of proof to the defendant so as to compel her to show that she can justify what she has done; where, in a bill for an accounting by the daughter of the proceeds of real estate deeded to her by her father, he alleges, but fails to show, either that he was feeble in body or mind, at the time of such transfer, or that he was induced to execute such deed by fraud, overreaching, or undue influence on the part of his daughter.—Russell v. Phillips, 145 Mich. 268.

¶ 92. Where property conveyed to several children by their parents is merely a reasonable compensation to grantees for their services and care rendered to grantors, the burden of proof is upon other children who seek to set aside such deed on the ground of undue influence and incompetency.—Lynch v. Doran, 95 Mich. 395.

¶ 93. Under an agreement that a mortgagor should assume the burden of the mortgagee's undertaking with the latter's mother to support her for life, the compensation for which agreement was to be regulated in a particular manner and to be allowed upon the mortgage, such mortgage was held, after some years, to have been satisfied.—Gallup v. Jackson, 47 Mich. 475.

¶ 94. On a bill to set aside a deed from an uneducated man 86 years of age to his daughter, with whom he was living, evidence held insufficient to establish undue influence. —Akers v. Mead, 188 Mich. 277.

¶ 95. The evidence held to establish a contract between a father and his children whereby the latter were to have the former's property at his death if they would remain at home after majority and work a farm.—Hogan v. Hogan, 187 Mich. 278.

¶ 96. A deed of husband and wife conveying all of their property to two of their children will not be vacated on the ground that they were incompetent and were unduly influenced to thus dispose of their property, in an action brought by others of grantors' children; where, although the testimony is conflicting, it appears that grantors were alone with the official who drew the deed at the time of its execution, that such official, who appears to be a reputable and intelligent man, testified that such deed was drawn as the parties wanted it, and that they appeared to be entirely competent to make it, and his testimony is corroborated in part by the testimony of his wife who witnessed such deed, and where the sworn answer of the surviving grantor indicates that after the death of her husband her attention was called to the fact that except for such deed the property would all have been hers, and that yet she desired the deed to stand.—Kamin v. Kamin, 145 Mich. 626.

¶ 97. Undue influence over decedent, whereby the execution of conveyances was secured in favor of an invalid daughter to the disadvantage of the other children, is not established by evidence that decedent entertained a dislike for one of her sons-in-law, and feared that he might succeed to any interest conveyed to his wife, and that she was very ill at the time the papers were signed, where it does not appear that the grantee influenced decedent to form a dislike for her son-in-law, or that the instruments were executed for any other reason than to carry into effect an expressed intention of placing the invalid daughter, who had received less in advances than the other children, where she would be above want.—Lodewyck v. Lacroix, 115 Mich. 590.

¶ 98. A bill for an accounting of the proceeds of real estate deeded by a father to his daughter, and to establish a lien in favor of such father on real estate purchased with such proceeds, on the grounds of fraud and undue influence, is properly dismissed; where, although the testimony as to the consideration for such transfer is in irreconcilable conflict, the evidence shows that the father, at the time of such transfer, was neither feeble in mind nor in body, but was shrewd and intelligent for one in his station in life, that he was not induced by his daughter to make the contract but that he induced her to enter into it because the mortgagee was "crowding" him for his money; that his daughter was not a member of his household, lived in another county, only saw him once a year, and had no charge of his affairs; and where the mother, who was a material witness for complainant if his allegations were true, was not called to testify and no reason for her absence is shown in the record.—Russell v. Phillips, 145 Mich. 268.

¶ 99. Where a parent agreed with his children that they should have his property at his death if they would remain at home after

majority and work a farm, held that the evidence showed that the title to the real and personal property vested in the children, subject to the parent's use of such portion thereof as was necessary for his proper maintenance and support.—Hogan v. Hogan, 187 Mich. 278.

V. TORTS OF CHILD.

§ 22. In general.

Torts against child and right to action for injuries to child, see ante § 14.
Negligence of parent in entrusting child with firearms, see Negligence § 10.
Torts of infants, see Infants, V.
Parents' liability for child's negligent use of vehicles on highway, see Highways § 375.
Presumption of parent's liability for negligence of son while using the former's automobile, see Highways ¶ 1533.
Assault in defense of parent or child, see Assault § 17.
In so far as the child is servant or agent of the parent the responsibility of the parent is that of a master. See Master and Servant, IV.
Service of process on parent as service on child, see Process, II.

¶ 100. A father is not liable for injury from his son's careless driving, unless the son was acting for his father or under his control.—Brohl v. Lingeman, 41 Mich. 711.

Liability of parent for negligence of minor child, see note 8 N. C. C. A. 299-313.

VI. SUPPORT OF INDIGENT PARENTS.

§ 23. In general.

Proceedings to reimburse public for support of indigent parent, see Poor Persons.
Care and support of parent by public, see Poor Persons.
Liability of children for support of poor parents by the public, see Poor Persons § 10.

¶ 101. The proceedings under Comp. L. 1871, chap. 49, How. St., § 1742, to compel a son to support his mother are summary, enforceable by attachment, and not reviewable on writ of error.—Smith v. Lapeer County Superintendent of Poor, 34 Mich. 58.

¶ 102. A son is not liable to a doctor for surgical and hospital services given the father except where such liability is incurred by a compliance with the provisions of section 4487, Comp. L. 1897, relating to the support of parents unable to maintain themselves.—Schwanz v. Wujek, 163 Mich. 492.

PARI DELICTO to PARISH REGISTERS.

Cross-References.

Pari Delicto—
- Rule of nonrelief to parties in equal wrong, see Contracts § 89 et seq.; Equity § 5.
- Noncontribution among wrongdoers, see Indemnity §§ 17-19.
- Action over against primary wrongdoer where lesser wrongdoer has suffered liability, see Indemnity, II, B; Highways §§ 263, 264.

Pari Materia—
- Rule for construction of statutes, see Statutes, V.
- Construction of contracts and writings together, see Contracts §§ 150, 152.

Parish Registers—
- As documentary evidence, see Evidence §§ 509, 536.

PARKS AND COMMONS.

TREATS of the law relating to public open spaces for enjoyment or ornament as distinguished from utilitarian public places like streets.

Analysis.

§ 1. In general.
§ 2. Purchase, dedication or condemnation for parks.
§ 3. Proper uses and diversions.
§ 4. Discontinuance or vacation.
§ 5. Government, regulation, and control.
§ 6. Rights and liabilities of adjoiners on parks.
§ 7. Parkways and parked driveways.
§ 8. Privately owned amusement parks.

[Note. Inasmuch as many parks are held under terms of charters of particular cities, few references to the statutes have been made. See the charter of the particular city.]

§ 1. In general.

Mode of acquisition of land for parks, see post § 2.
Proper park uses and diversions, see post § 3.

Control, regulation, and government of parks, see post § 5.
Rights of abutters and adjoiners, see post § 6.
Parkways and parked driveways, see post § 7.
Amusement parks, see post § 8.
Matters of local self-government respecting parks, see Constitutional Law, II, and especially § 80.
Issuance and delivery of park bonds, see Municipal Bonds § 9.
Conditions precedent to issuance of park bonds, see Municipal Bonds § 5.
Park funds and objects thereof, see Municipal Corporations § 142.
Right to free water service for parks from water department, see Waters, VI.
Injunction to prevent injury to public parks, see also Injunctions § 84.
Anchorage of house boat and contamination of waters flowing down to park as improper use of navigable waters, see Navigable Waters ¶ 38.
Use for park as adverse possession against dedication for other public purpose, see Adverse Possession § 3.
Duty of municipality to inspect and repair boulevards and parkways, see also Highways § 206.
General law of public buildings, markets, and places other than parks and commons, see Municipal Corporations, X; Highways.
Nature of public title and uses in open spaces in Original Plan of Detroit, see Municipal Corporations § 101.
Power of cities and villages to acquire and maintain parks, see Const. art. VIII, § 22.
Liability of city for injuries growing out of ball games and other amusements permitted in public places, see note, 11 N. C. C. A. 662-665.

§ 2. Purchase, dedication or condemnation for parks.

Power of municipality to take and hold land for parks, see Municipal Corporations § 100.
Power of city to acquire and maintain park beyond limits, see Municipal Corporations § 29.
Time when proceedings for purchase of park land become an obligation creative of city debt, see Municipal Corporations ¶ 516.
Parks as proper objects of dedication, see also Dedication § 2.
Manner of acceptance requisite to accept dedication, see Dedication ¶¶ 47, 48.
Insufficiency of user to make out acceptance of dedicated square, see Dedication § 11.
Intent to dedicate as requisite, see Dedication ¶ 17.
Common-law dedication for park by defective plat, see Dedication § 18.
Estoppel to question dedication for square or open place, see Dedication § 34.
Estoppel of public to claim park as dedicated, see Dedication § 35.
Acceptance of dedication by voluntary labor and contributions by citizens, see Dedication ¶ 149.
Evidence sufficient as to dedication for park, see also Dedication ¶ 96.
General law of condemnation proceedings, see Eminent Domain.
Authority to county boards to accept lands for parks and to maintain same, see Comp. L. 1915, § 2318 et seq.
Provisions for condemnation in villages and fourth-class cities, see Comp. L. 1915, §§ 2784-2819, 3136-3164.
Provisions for purchase and maintenance by boards of supervisors, see Comp. L. 1915, §§ 2318-2324.

¶ 1. After the county has refused to accept an offer of dedication made for a particular purpose, e. g., a courthouse square, the proprietor's grantees of other lots cannot insist on having the land kept open as public grounds.—Sinclair v. Comstock, H. 404; Baker v. Johnston, 21 Mich. 319.

¶ 2. In an action of ejectment to recover a piece of land, formerly a part of a public square, it is presumed that the board of supervisors in taking title to realty for use of county acted in accordance with its official duty and for the county's interests.—Thayer v. McGee, 20 Mich. 195.

¶ 3. Sales of lots, bounded upon streets surrounding a space marked on the plat as a public square, have no tendency to prove an acceptance by the public of the square as devoted to public uses, or an estoppel in favor of the public. Purchasers of such lots must be presumed to understand the conditions upon which such spaces are dedicated to the public. Nor would such purchasers have any individual right of entry upon, or occupancy of, such spaces.—Baker v. Johnston, 21 Mich. 319.

¶ 4. In proceedings to condemn land for the widening of a boulevard the instructions to the jury should not treat the question as though the widening of the boulevard up to the premises sought to be condemned was not only an accomplished fact, but was an admitted public necessity, and submit to the jury the mere question whether the taking of the property involved was necessary to make the boulevard of uniform width.—Commissioners of Parks of Detroit v. Moesta, 91 Mich. 149.

¶ 5. In a proceeding to condemn land for the widening of a boulevard the jury may be instructed that the term "necessary" does not mean indispensable or imperative, but only convenient and useful, and, therefore, if they find that the improvement is useful, and a convenience and benefit to the public sufficient to warrant the expense of making it, their verdict may be that it is necessary.—Commissioners of Parks of Detroit v. Moesta, 91 Mich. 149.

¶ 6. After dedication the proprietor cannot resume ownership so as to deprive his grantees who have bought with reference

thereto of advantages of open streets or squares.—Sinclair v. Comstock, H. 404.

¶ 7. Neither witness nor attorney fees can be awarded in condemnation proceedings under Local Acts of 1889, No. 388, relating to parks and boulevards in Detroit.—Hester v. Commissioners of Parks of Detroit, 84 Mich. 450.

¶ 8. Under Local Acts 1889, No. 388, which provides for condemnation proceedings by the commissioners of parks and boulevards of the city of Detroit, and that the jury impanelled therein "shall be sworn to ascertain and determine the necessity of taking the several parcels of land sought to be taken for the purpose set forth in the petition, and, if taken, to determine and award to each person entitled thereto the proper compensation," etc., the question of the necessity for taking the property, including the public necessity for making the improvement, is fully committed to the jury.—Commissioners of Parks of Detroit v. Moesta, 91 Mich. 149.

¶ 9. Under Local Acts of 1889, No. 388, § 15, a right of way for a boulevard may be condemned across the right of way of a railroad company even though such right of way is covered with tracks and side-tracks, and is called a "yard."—Commissioners of Parks of Detroit v. Detroit, G. H. & M. R. Co., 93 Mich. 58.

¶ 10. A right of way for a boulevard across the tracks of a railroad company may be condemned and taken under Local Acts 1889, Act No. 388, which provides that the commissioners therein named may acquire, by legal proceedings, "any lands or interest in land which may be found necessary for the opening of any park and enlargement or extension of any park or boulevard which may hereafter be laid out, located or established."—Commissioners of Parks of Detroit v. Michigan Cent. R. Co., 90 Mich. 385.

§ 3. Proper uses and diversions.

Vacation without specifying intended future use, see post ¶ 14.

¶ 11. A public park is not subverted to an improper use by the construction of a pavilion at a corner thereof and at the intersecting point of two street railways as a place of shelter and refreshment for people waiting for cars and for people using an ice skating rink in the park during the winter months, and for people visiting the park.—Dodge v. North End Improvement Ass'n, 189 Mich. 16.

¶ 12. The charter of Detroit of 1857, with its amendments, held to confer no authority upon the council to convert the city parks into streets; while giving a general authority to lay out and open streets, it defines the council's powers in respect to the parks to be "to make, grade, improve and adorn the public parks, squares, spaces and all grounds in said city belonging to or under the control of the corporation, and to control and regulate the same consistently with the purposes and objects thereof." Such a conversion is not consistent with the purposes and objects of such park, and would terminate their distinct existence.—Board of Education v. City of Detroit, 30 Mich. 505.

§ 4. Discontinuance or vacation.

Vacation of streets, see Highways, VI.

Grant of park land by deed as implied revocation of dedication of it, see Dedication ¶ 63.

¶ 13. The city of Detroit can vacate any of its open spaces or parks at its discretion, when deemed a necessary public improvement, and of this the council is to judge for itself.—Riggs v. Detroit Board of Education, 27 Mich. 262.

¶ 14. Where the common council of Detroit proceeds to vacate public grounds (the Campus Martius), under the charter of 1857, it is not necessary that they should specify in the resolution any subsequent use to which they may contemplate putting the grounds.—Hinchman v. City of Detroit, 9 Mich. 103.

¶ 15. It is not necessary that the jury impanelled to assess the damages and benefits to individuals by reason of the improvement in vacating public grounds should pass upon the necessity of the contemplated improvement.—Hinchman v. City of Detroit, 9 Mich. 103.

§ 5. Government, regulation, and control.

Distribution of powers over parks and authority to control them, see also Municipal Corporations § 31.

Power of park board to employ its own subordinates, see Municipal Corporations § 180.

Removal of park commissioner, see Officers ¶¶ 182, 198, 200.

Township control, see Comp. L. 1915, § 2192 et seq.

¶ 16. Under the Act of Congress of March 2, 1895 (28 Stat. at Large 946), turning over to the state the lands now constituting Mackinac Island State Park for park purposes, and Comp. L. 1897, §§ 1258 and 1259 accepting the park and creating a board of commissioners to have control and management thereof, such commission has power to require license fees from owners of vehicles used for hire, though such owners had already paid license fees to the city of Mackinac Island within whose limits the park is included.—Kerrigan v. Poole, 131 Mich. 305.

¶ 16a. A city cannot maintain ejectment for the recovery of possession of a park claimed under a common-law dedication, even if Comp. L. 1897, § 3154, giving cities control over parks, would authorize ejectment in such

cases of dedication, it not appearing that plaintiff city was organized under chapter 88 of which section 3154 is a part.—City of St. Joseph v. Schulz, 132 Mich. 218.

§ 6. Rights and liabilities of adjoiners on parks.

Rights in space dedicated but not accepted, see ante ¶ 1.

Disability of dedicator to revoke dedication and deprive abutters of their rights, see ante ¶ 6.

Right of abutter to have driveway connecting with boulevard, see also Highways ¶ 503.

Sale with reference to plat showing park or square as creating private easements therein, see Easements § 8.

¶ 17. The building of a brick foundation by the owner of land abutting on public park property is not an invitation or license to the public to use it as a retaining wall or an embankment to contain earth filled in upon the public property.—Abrey v. City of Detroit, 127 Mich. 374.

¶ 18. A city which fills in land purchased as a part of parks and boulevards and not a public highway is bound to exercise the same care as to abutting property as a private owner.—Abrey v. City of Detroit, 127 Mich. 374.

¶ 19. A city which fills in land purchased as a part of parks and boulevards and not a public highway is liable for injuries to the foundation of an abutting building caused by the pressure of the dirt piled against it.—Abrey v. City of Detroit, 127 Mich. 374.

§ 7. Parkways and parked driveways.

Condemnation of crossing over railroad, see ante ¶ 10.

¶ 20. The strips on each side of the driveway through the approach to the bridge leading to Belle Isle Park in the city of Detroit may be inclosed by the city for ornamentation, and abutting owners have no right of passage thereover, the land acquired for such approach being regarded as part of the park.—Abrey v. Livingstone, 95 Mich. 181.

§ 8. Privately owned amusement parks.

Duty of owner of public park to keep same in safe condition, see Exhibitions and Shows ¶¶ 4, 12.

Liability of carrier to patron hurt at its amusement park by crowding, see Carriers ¶ 524.

Liability of carrier for assault on its passenger at its amusement park, see Carriers ¶ 527.

PARLIAMENTARY LAW.

TREATS of the rules governing proceedings of deliberative bodies.

§ 1. In general.

Meetings and procedure in city councils, see also Municipal Corporations § 35.

Motion to reconsider vote by which legislature consented to appointment and subsequent refusal to ratify, as defeating appointment, see Officers ¶ 64.

Majority rule in corporate meetings, see Corporations, IX, XVII, A.

Quorum in directors' meetings, see Corporations § 117.

Credentials and qualifications of delegates in political conventions, see Elections § 26.

¶ 1. The Senate has power to provide by its rules for the reconsideration of a vote confirming an appointee of the Governor and, under Rule 40, which treats of the subject of reconsideration of votes in general without specifically mentioning the particular action, a motion to reconsider a vote "by which the Senate advised and consented to the nomination" to fill a vacancy in the Board of State Tax Commissioners, made on the same day, and a subsequent refusal to confirm the appointment, is effective to defeat the appointment.—Attorney General ex rel. Dust v. Oakman, 126 Mich. 717.

¶ 2. The board of supervisors acting under Comp. L. 1897, § 2484, having adopted Cushing's Law and Practice of Legislative Assemblies to govern the board in all cases not conflicting with their rules or with the state laws cannot entertain a motion to reconsider the action whereby a circuit judge was given additional compensation except by a vote of a majority of all of the supervisors.—Beach v. Kent, 142 Mich. 347.

¶ 3. The courts will not disturb a ruling of the city council upon a question of parliamentary law.—Davies v. City of Saginaw, 87 Mich. 439.

PAROL to PARTICULARS.

Cross-References.

Parol—

See topic treating of the thing which is characterized as "parol," e. g., Assignments; Contracts; Trusts.

Necessity of writing, see topics above referred to, and see Frauds, Statute of.

Parol leases, see Landlord and Tenant.

Parol acceptance of bill of exchange, see Negotiable Instruments § 35.

Parol Evidence—
Exclusionary rules of evidence, see Evidence, V.
As secondary evidence, see Evidence, IV; Indictment § 184 et seq.
Of extraneous matters to construe writings, see Contracts, VI, A; Statutes, V; Wills, VI, A.
Paroles—
Of convicted prisoners, see Pardons and Paroles.
Parsonage—
Exemption from taxation, see Taxes, III.
Part Payment—
See Limitations, VI, B; Frauds, Statute of, II, C, 2.
Sufficiency to sustain right to specific performance, see Specific Performance, II.
Sufficiency to raise trust out of parol transaction, see Trusts, III.
Application of part to discharge of indebtedness, see Payment, III.
Satisfaction of claim by acceptance of part, see Accord and Satisfaction.
Partial—
The word "partial" is used as an adjective with a variety of legal terms. See the word to which it is so applied.
Partial invalidity, effect on other parts of contract or writing, see Contracts § 94; Statutes, V; Wills, VI; Trusts, I.
Partial Payments—
Construction of contract provisions, see Contracts § 189.
Application of partial payments, see Payments, III.
Calculation of interest on, see Interest § 31.
See also ante "Part Payment."
Particulars—
Bill of particulars, see Pleading, V; Indictment § 38; Justices of the Peace § 101.
Motions for further and better particulars, see Equity, VII, C; Pleading, IV.
Particularity required in specific instruments, see topic treating of the instrument in question.

PARTIES.

TREATS of the general law of parties to bring or defend civil actions, suits, and proceedings in the nature of actions. Questions of parties necessary or proper to particular actions are treated in specific topics dealing with such actions.

Analysis.

§ 1. In general.
§ 2. Plaintiffs, necessary or proper.
§ 3. ——Public actions and suits.
§ 4. ——Private or public party complainant.
§ 5. Complainants suing in behalf of themselves and others.
§ 6. Suits in interest of third persons or by representatives.
§ 7. Joinder of coplaintiffs.
§ 8. Necessary and proper defendants.
§ 9. Joining parties as defendants.
§ 10. Impleading nonjoining persons as defendants.
§ 11. Name or capacity in which to sue or defend.
§ 12. Same person in several capacities or as distinct parties.
§ 13. New parties, substitutions, and amendments.
§ 14. Descriptions and names of parties.
§ 15. Objections and defects, misjoinder and nonjoinder.
§ 16. Excuses for nonjoinder.
§ 17. Intervention.
§ 18. Privileges and immunities of parties.

[Note. The law of parties is so closely involved with the law of the particular causes of action that they must be considered and treated together in all except the most general principles. For this reason the cases dealing with the questions of parties in a given cause of action are to be found in the topic treating of such cause of action. Illustrative cross-references are found below, though they are not exhaustive. The law of parties also involves the law of pleading, and

hence the cases on the mode and manner of impleading the parties and of objecting for defects of parties have been treated in Pleading and in Equity, VI, VII, both which see. The topic Parties is therefore reduced in scope to rules of the most general application.]

Parties in particular actions and proceedings—
- In actions on contracts, see Contracts § 277 et seq.
- To actions on bonds, see Bonds §§ 5, 6.
- In actions on bills and notes and indorsements thereof, see Negotiable Instruments § 95 et seq.
- In actions on contracts and transactions done through agents, see Agency §§ 77, 78, 89, 104.
- To bills for enforcement of or protection of rights under assignments, see Assignments for Creditors §§ 36-40.
- In suit by or against associations, see Associations §§ 10, 11.
- In action against carrier for injury in carriage of goods, see Carriers § 79.
- In creditors' suits, see Creditors' Suits § 24.
- In creditors' suits to enforce stockholders' liability, see Corporations §§ 328, 337.
- In divorce suits, see Divorce § 78.
- To actions for injury to or protection of easements, see Easements § 41.
- To injunction suits, see Injunctions § 101 et seq.
- In actions by or against partnership associations, see Joint Stock Companies § 18.
- In actions and suits on insurance policy or benefit certificate, see Insurance, XX, B; Fraternal Associations § 69.
- In actions by or against copartnerships or members thereof, see Partnership, VI.
- In suits to quiet title, see Quieting Title, III.
- In quo warranto, see Quo Warranto, III.
- In reformation and rescission and cancellation suits, see Reformation, III; Rescission, VI.
- In specific performance suits, see Specific Performance, IV.
- In delinquent tax and tax sale proceedings, see Taxes.
- In trust suits, see Trusts.
- In will contests and suits for construction, see Wills.
- In appeals and on error, see Appeal, IV.
- On appeal from justices' court, see Justices of the Peace § 212.
- In certiorari, see Certiorari §§ 25, 26.
- To criminal prosecutions, see Indictment § 2.
- To contracts, see Contracts, II; Bonds § 5; Negotiable Instruments; Sales, III.

§ 1. In general.

Parties as requisite to jurisdiction, see Courts § 89.

Necessity of adverse party to make cause appealable, see Appeal § 13.

Citizenship for purpose of federal jurisdiction, see Courts §§ 89, 90.

Who regarded as parties to bills in equity, see Equity § 64.

Who are parties for purpose of bar and estoppel by judgment, see Former Adjudication § 55.

Persons represented by parties for purpose of bar or estoppel by judgment, see Former Adjudication §§ 63-76.

Nominal parties and substantial parties affecting disqualification of judge by relationship, see Judges ¶ 35.

Prosecuting attorney as party within meaning of statutes disqualifying justice of peace who is related to party, see Justices of Peace ¶ 13.

Dismissal or discontinuance as to part of the coparties, see Discontinuance §§ 2-4.

Judgments against parties severally, see Judgments, II, C.

Affirmance as to some parties and reversal as to others, see Appeal § 486.

Costs in chancery to or against nominal, unnecessary, representative, or public parties, see Costs §§ 34-37.

Necessity for appointment of next friend or guardian ad litem for infant parties, see Guardian ad Litem § 2.

Joinder of husband and wife as parties in actions affected by coverture, see Husband and Wife, VI.

Doctrine of lis pendens and persons affected by dealings with parties, see Lis Pendens.

Statutory designation of parties as "plaintiff" and "defendant," see Jud. Act, chap. XII, § 1; Comp. L. 1915, § 12352.

Statutory provisions as to capacity of Indians and foreign corporations to sue or be sued, see Jud. Act, chap. XII, §§ 17-19; Comp. L. 1915, §§ 12368-12370.

Provisions as to suits by and against infants and persons under disability, see Jud. Act, chap. XII, § 28 et seq.; Comp. L. 1915, § 12379 et seq.

§ 2. Plaintiffs, necessary or proper.

See also topics referred to at the head of this topic following analysis.

Necessity that plaintiff be the party wronged, see also Actions ¶ 9.

Disability of assignee to sue in federal court unless assignor could, see Courts § 90.

Proper plaintiff in action on assigned cause, see Assignments § 30.

Who may sue on promises for benefit of third person, see Contracts § 18.

Proper or necessary plaintiffs in actions on contract, see Contracts §§ 277-280.

Necessary and proper plaintiffs in action for conversion, see Conversion §§ 19-21.

Parties to sue for loss of baggage, see Carriers § 255.

Necessary and proper parties complainant in suits for equitable relief from drain proceedings or drain taxes, see Drains § 105.

Right of woman seduced to sue in her own name, see Seduction, I.

Real party in interest as proper plaintiff, see Jud. Act, chap. XII, § 2; Comp. L. 1915, § 12353.
Provisions as to suits by married women as sole plaintiffs, see Jud. Act, chap. XII, §§ 5, 6; Comp. L. 1915, §§ 12356, 12357.

¶ 1. Section 2, Chap. XII, of the Judicature Act, Pub. Acts 1915, No. 314, providing that "every action shall be prosecuted in the name of the real party in interest," etc., cannot be invoked to give to an alleged "real party in interest" a right of action which does not exist.—In re Bush's Estate, 199 Mich. 192.

¶ 2. It is the policy of our legislation to permit the real party in interest to sue in his own name.—Watson v. Watson, 49 Mich. 540.

¶ 3. Owners of a vessel may sue in their own names on an insurance policy taken out by charterers which states that in case of total loss the insurance shall be paid to the owners.—Richelieu & O. Nav. Co. v. Thames & Marine Ins. Co., 58 Mich. 132.

¶ 4. An action at law must generally be brought in the name of the party who holds the legal interest as distinguished from the equitable right, even though the latter embraces the exclusive interest in the benefit to be derived from the property.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489; Forrest v. O'Donnell, 42 Mich. 556.

¶ 5. No one is authorized to sue in the right of another who has the legal title.—Kinney v. Harrett, 46 Mich. 87.

¶ 6. Assignees need not sue in the names of their assignors, nor is it necessary to bring an action in the name of one person for the use and benefit of another, even in cases where the right of action for a tort is assignable.—Watson v. Watson, 49 Mich. 540.

§ 3. ——Public actions and suits.

Private complainant in suits affected with public interest, see post § 4.
Attorneys authorized to conduct litigation for public, see Attorneys, III; Municipal Corporations § 182.

¶ 7. The legislature has power to direct what officer shall bring any class of public actions, and what shall be done with sums collected therein.—Township of Denver v. White River Log & Booming Co., 51 Mich. 472; and see Smith v. Village of Adrian, 1 Mich. 495; Village of Romeo v. Chapman, 2 Mich. 179.

§ 4. ——Private or public party complainant.

Taxpayers' injunction suits, see Injunctions §§ 21, 103; and see Counties § 55; Municipal Corporations § 209; Townships, VIII.
Public and private nuisance suits, see Nuisances.
Who may institute contempt proceedings, see Contempt § 24.
Proper relator in certiorari to review county action, see Certiorari § 25.
Sufficiency of interest to be relator in mandamus, see Mandamus §§ 126-128.

¶ 8. Private persons cannot assume to themselves the right to institute proceedings in chancery to redress grievances on behalf of the public. They can only proceed where the individual grievances are distinct from those of the public at large, and such as give them a private right to redress.—Miller v. Grandy, 13 Mich. 540; Steffes v. Phelps, 68 Mich. 291.

¶ 9. Where a grievance is purely public, redress cannot be sought by a private citizen.—Sweet v. Smith, 153 Mich. 674.

§ 5. Complainants suing in behalf of themselves and others.

Excuses for nonjoinder, see post § 16.
Right of stockholders to sue on corporate cause of action where corporation cannot or will not, see Corporations § 345 et seq.

¶ 10. The only cases where individuals can sue on behalf of themselves and others are where the interests, though numerous, are all separate, individual, and not joint or public interests, identical in character and origin, but all private and independent rights growing out of the same transaction or fraud.—Miller v. Grandy, 13 Mich. 540; Steffes v. Phelps, 68 Mich. 291.

§ 6. Suits in interest of third persons or by representatives.

[Note. Generally speaking a representative may sue or defend in behalf of those whom he represents, except where his own interest or other like cause makes them necessary parties, the suit being one within the scope of his office. See Estates of Decedents; Trusts; Corporations, and see also topics treating of the specific remedies. A judgment in such a suit is res adjudicata on all those who were thus represented. See Former Adjudication, V.]
Real party in interest as proper plaintiff, see ante § 2.
Legal or equitable owner as proper plaintiff, see ante § 2.
Stockholders as unnecessary parties in suit against corporation proper, see Corporations § 187.
Trustee in bankruptcy as proper plaintiff, see also Bankruptcy § 15.

¶ 11. Administrator of deceased member of mutual benefit association properly sues for benefit where person designated by member to receive benefit for wife and children refuses to act.—Neville v. Detroit Firemen's Fund Ass'n, 104 Mich. 149.

¶ 12. In a suit by a trustee, holding mortgages in which were invested funds held for certain beneficiaries, to foreclose such mortgages and to enforce a trust of land created to guarantee the payment of such mortgages, it is no defense that children may yet be born who may be entitled to share in the invested fund, and that such children are not parties, where the investment was made under order of court which has power to see that the fund is divided among the proper parties.—Miller v. McLaughlin, 141 Mich. 425.

¶ 13. Where the law empowers a person who has a claim or cause of action to authorize another to begin and prosecute suit thereon it will be for the use and benefit of the person really entitled; the claim or cause of action is not assigned to the plaintiff.—Watson v. Watson, 49 Mich. 540.

¶ 14. Where a suit is authorized it is no concern of the defendant that it is really in the interest of a third party, who has equitable rights which he expects to have recognized in case it is successful.—Tong v. Marvin, 26 Mich. 35.

§ 7. Joinder of coplaintiffs.

Excuses for nonjoinder, see post § 16.

Impleading nonjoining persons as defendants, see post § 10.

Averments in equity as to joinder and nonjoinder, see Equity § 86.

Pleading jointly or severally against distinct parties on joint and several obligations, see Pleading, II.

Right of persons assessed on their several lands for drain to join in bill to set aside tax, see Drains § 105.

Right of executor, administrator, guardian, or trustee of express trust, or of party to contract made for the benefit of another to sue in his own name without joining persons for whose benefit the action is prosecuted, see Jud. Act, chap. XII, § 2; Comp. L. 1915, § 12353.

Rule for joinder in equity as plaintiffs, see Jud. Act, chap. XII, § 10; Comp. L. 1915, § 12361.

¶ 15. Those who have no joint interest cannot join as plaintiffs; e. g., copartners seeking to recover in trover the value of their individual exemptions in the firm property.—Rogers v. Raynor, 102 Mich. 473.

¶ 16. There can be no splitting of causes of action on a single insurance policy. Whoever sues must be able to enforce the whole of it.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

¶ 17. One to whom, jointly with her husband, a promise has been made, cannot sue in her sole name thereon unless he has assigned his claim to her, and that is not shown by his testifying at the trial that he was willing she should so sue.—Howe v. Hyde, 88 Mich. 91.

¶ 18. An employee allowed to participate in the profits of a business merely as a means of determining his compensation is not entitled to join with his employer in an action for an injury to such business.—Child v. Emerson, 102 Mich. 38.

§ 8. Necessary and proper defendants.

[Note. The question who may and who must be made a defendant is usually so much a question of the particular cause of action or remedy that it is not capable of a general treatment in one place. See topics treating of the particular remedy or right of action, a number of which are mentioned in cross-references at the head of this topic. Whether or not all persons implicated in a tort are to be joined depends on their participation in such degree as to be responsible and on the further rule that tort liability is joint and several. See Torts and especially specific topics, such as Assault § 19; Conversion §§ 13, 22; False Imprisonment § 20 et seq.; Libel § 2; Malicious Prosecution § 2; Negligence § 37; Nuisances § 14; Trespass, II.]

Necessary and proper respondents in mandamus, see Mandamus §§ 130, 131.

Necessary and proper parties defendant in suits for equitable relief from drain proceedings or drain taxes, see Drains § 108.

Participation in and responsibility for contempts, see Contempt § 13.

Costs in chancery for adding needless parties, see Costs § 31.

Provisions for suits in chancery against unknown defendants, see Jud. Act, chap. XII, § 20 et seq.; Comp. L. 1915, § 12371 et seq.

¶ 19. Only those whose interests would be affected by a decree need be made parties.—Norris v. Hurd, W. 102.

¶ 20. Indorsers joined with their principal in an action on his note need not be joined with him as defendants to a bill in aid of the execution issued therein where the property levied on belongs to the principal alone.—First Nat. Bank of St. Johns v. Tyler, 55 Mich. 297.

¶ 21. A bill to compel the delivery of a mortgage to a creditor, and to declare such mortgage prior to a deed to another creditor need not make a bank and its receiver parties, where the other creditor accepted the deed for the benefit of the bank and fully presented its defenses, the rights of all parties being fully protected in the proceeding.—Belding Sav. Bank v. Moore, 118 Mich. 150.

§ 9. Joining parties as defendants.

Excuses for nonjoinder, see post § 16.

Averments in equity as to joinder and nonjoinder, see Equity § 86.

Joinder of corporation and stockholders, as parties defendant in justice's court, see Justices of the Peace ¶ 365.

Joining parties in actions on joint contracts, see Contracts §§ 278, 281.
Joining garnishees, see Garnishment §§ 18, 19.
Defendants to be joined in action on bail bond, see Arrest ¶ 153.
Separate appearance by joint party, see Appearance § 5.
Joinder of nonresident defendants as violation of right to jury of vicinage, see Jury ¶ 10.
Joinder of parties as affecting right to remove cause, see Removal of Causes § 2.
Separableness of controversies among diverse parties to admit of removal, see Removal of Causes § 2.
Rule for joining defendants who may be severally or jointly and severally liable, see Jud. Act, chap. XII, § 15; Comp. L. 1915, § 12366.
Rule as to proper defendants in equity, see Jud. Act, chap. XII, § 10; Comp. L. 1915, § 12361.
Statutory rule as to joinder of husband and wife in tort actions, see Jud. Act, chap. XII, § 7; Comp. L. 1915, § 12358.

¶ 22. An obligation, joint and several, may at law be sued against any or all of the obligors.—Dederick v. Barber, 44 Mich. 19.

¶ 23. An action cannot be maintained upon a joint debt against less than all the debtors.—Post v. Shafer, 63 Mich. 85.

¶ 24. Under Comp. L. 1897, § 10055, the owner of a joint and several obligation may bring proceedings against all or any of the obligors.—McKinley v. Small, 178 Mich. 555.

¶ 25. It is not usually necessary to sue wrongdoers jointly in tort; and an agent may as well be sued separately as any other joint wrongdoer.—Weber v. Weber, 47 Mich. 569.

§ 10. Impleading nonjoining persons as defendants.

Statutory rule, see Jud. Act, chap. XII, § 10; Comp. L. 1915, § 12361.

¶ 26. One of the creditors who had not been paid was made a defendant instead of complainant to a suit to annul an assignment or alternatively to enforce their rights. Held, that as complete justice could be done between the parties on this bill, the fact of his not being made complainant was not a good cause of demurrer.—Suydam v. Dequindre, H. 347.

¶ 27. One who is in privity with a complainant, and has precisely the same rights, and does not join as complainant, is properly impleaded as defendant; and where the case is one in which all rights can be adjudicated without a cross-bill, be is concluded by the decree, and cannot begin another suit in his own behalf.—Waldo v. Waldo, 52 Mich. 91.

¶ 28. Where one of two beneficiaries under a trust in their favor in a will refuses to join as a complainant in a bill to enforce the trust, such beneficiary is properly and necessarily made a party defendant.—Weaver v. VanAkin, 77 Mich. 588.

¶ 29. When a necessary party will not consent to be made a complainant to a chancery bill, although his interest is on the side of the other complainants, he may be joined by them as a defendant.—In re Sloman's Estate, 186 Mich. 434.

§ 11. Name or capacity in which to sue or defend.

Real party in interest as proper plaintiff, see ante § 2.
Validity of law allowing association to be sued in associate name, see Constitutional Law § 190.
Parties or name to be used by county in suing or being sued, see Counties § 56.
Name in which municipality should sue or defend, see Municipal Corporations § 212.
Name in which township or township officers shall sue or be sued, see Townships, VIII.
Name in which action for penalty should be brought, see Penalties.
Name in which process is to run, see Process, I.
Costs against real party suing in name of assignor, see Costs ¶ 559.
Suits by or against unincorporated associations, see Jud. Act, chap. XII, § 12; Comp. L. 1915, § 12363.
When municipality, county, township, or school district should be sued and when officer thereof is proper defendant, see Jud. Act, chap. XII, § 3; Comp. L. 1915, § 12354.
Name in which suits on official and statutory bonds shall be brought, see Jud. Act, chap. XII, § 2; Comp. L. 1915, § 12353.

¶ 30. One doing business under a firm name but having in fact no partner properly sues in his own name an account growing out of the business.—Bjorkquest v. Wagar, 83 Mich. 226.

¶ 31. Judgment in favor of plaintiff, in an action for personal injuries, brought by a minor by his father as next friend, will not be reversed because the minor became of age pending suit and no amendment was made to show that plaintiff was prosecuting the suit for himself, where defendant could not have been prejudiced by the failure to amend.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

§ 12. Same person in several capacities or as distinct parties.

¶ 32. In bringing suit in equity to reach the funds of an estate in trust, it is not a fatal misjoinder that complainant sues as assignee of one party in interest and as guardian of another.—Henderson v. Sherman, 47 Mich. 267.

¶ 33. Complainant in a bill cannot properly appear as a defendant in the same suit.—Henderson v. Sherman, 47 Mich. 267.

§ 13. New parties, substitutions, and amendments.

Objection for improper substitution, see post § 15.
Procedure to substitute parties on death of one, see Abatement §§ 19, 20.
Amendments of pleadings making new parties, see Pleading, VI.
Making amendments on error, see Appeal § 523.
Amendments in equity as to parties, see Equity § 129.
Amendments of parties in mandamus, see Mandamus § 134.
Effect of amendment of defendant's name as against intervener in garnishment, see Garnishment ¶ 290.
Rule as to making new parties in equity, see Jud. Act, chap. XII, § 10; Comp. L. 1915, § 12361.
Addition or dismissal of parties to cure nonjoinder or misjoinder, see Jud. Act, chap. XII, § 13; Comp. L. 1915, § 12364.
Rule as to substitution for public officers or trustees under statute in case of death or removal, see Jud. Act, chap. XII, § 8; Comp. L. 1915, § 12359.
Change in parties not to impair existing rights and priorities, see Jud. Act, chap. XII, § 14; Comp. L. 1915, § 12365.

¶ 34. Where a mutual-benefit certificate payable to the member's wife, heirs, administrator or assigns was sued upon erroneously in the name of the administrator of the wife, who did not survive her husband, an amendment substituting as plaintiffs the member's heirs—his brothers and sisters, and the children of a deceased brother—should be allowed, the same persons being ultimately interested in either view and the suit having been erroneously brought in his name.—Wood v. Lenawee Circuit Judge, 84 Mich. 521.

¶ 35. Under How. St. § 7631, authorizing amendments of any process, pleading or proceeding either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before judgment, new parties cannot be introduced by amendment of the declaration; e. g., an assignee of an interest in an insurance policy cannot in a suit thereon be brought in as a plaintiff.—Wood v. Metropolitan Life Ins. Co., 96 Mich. 437.

¶ 36. Where a deserted wife whose husband, after inducing her to join with him in conveying their homestead, has left the country, files a bill asking that the deed be set aside for fraud or be declared a mortgage and redemption allowed, he should be brought in by publication if the bill is regarded as one to redeem.—Sanborn v. Sanborn, 104 Mich. 180.

§ 14. Descriptions and names of parties.

The description of the parties and the statement and spelling of their names in the body of the pleadings is rather a matter of pleading than of parties.

Necessity and sufficiency of names and descriptions in pleadings, see Pleading; Equity § 86.
Necessity and sufficiency of descriptions and names in process, see Process, I, II, D.
Necessity and sufficiency of names and decription in judgments, see Judgments § 11.
Effect of misnomer or mistake on conclusiveness of judgment, see Former Adjudication ¶ 31.

§ 15. Objections and defects, misjoinder and nonjoinder.

Effect of failure to substitute minor on attaining age, see ante ¶ 31.
Modes of objecting to pleadings for insufficiency or defect of parties, see Pleading, III, IV; Equity, VII, C.
Waiver of objections to joinder, manner of joinder, or misjoinder, see Pleading, XI; Saving Questions.
Pleading to merits as admission of proper joinder by amendment, see Appearance ¶ 24.
Death of party as abatement of action, see Abatement §§ 2, 3.
Abatement of action for want of parties or misnomer or misjoinder, see Abatement § 4.
Diversity of parties and of their interests as preventing joinder of counts in one action, see Pleading § 44.
Misjoinder working multifariousness in equity, see Equity §§ 73-76.
Who may demur or object to misjoinder or nonjoinder in equity, see Equity § 94.
Time for objection for defects of parties in equity and waiver of such objections, see Equity § 120.
Relevancy of evidence as to plaintiff's interest in suit, see also Evidence § 75.
Defects and objections as to parties as ground for collateral attack, see Judgments § 106.
Presumption on appeal as to parties and their identity, see Appeal § 368.
Review of order dismissing parties, see Appeal § 403.
Effect of nonjoinder of coparty to contract, see also Contracts §§ 278, 281.
Absence of party as affecting arbitration among others similarly interested, see Arbitration ¶ 14.

¶ 37. A misjoinder of parties is the improper joining together of parties to a suit.—Bowers v. Gates, 201 Mich. 146.

¶ 38. Misjoinder of defendants, even though all are joined in a single count, does not abate an action ex contractu (How. St., § 6400; 1897 C. C. Rule 27).—Durgin v. Smith, 115 Mich. 239.

¶ 39. An objection that in a suit to enjoin the collection of a city sewer tax the city marshal alone was made defendant, omitting the city, is obviated where at the hearing

the parties were amended, no previous objection having been made.—Thomas v. Gain, 35 Mich. 155.

¶ 40. The substitution of an administrator to sue in ejectment on plaintiff's death rather than the heirs, is not prejudicial error, and is amendable in the supreme court.—Cook v. Bertram, 86 Mich. 356.

¶ 41. Heirs of a deceased member may be substituted as plaintiffs in suit brought in name of beneficiary's administrator where such beneficiary had predeceased member and they were the persons beneficially interested in the suit erroneously brought in his name.—Wood v. Lenawee Circuit Judge, 84 Mich. 521.

¶ 42. Where in a suit to recover against a township and a road commissioner on a contract of indemnity the township is not liable, such misjoinder of the township does not prevent a recovery against the commissioner.—Hoek v. Township of Allendale, 161 Mich. 571.

¶ 43. In an action on a contract in which the declaration is general and there is no plea in abatement, nonjoinder of the parties is no obstacle to a recovery in a case showing that defendant and another made the contract declared upon.—Beasore v. Stevens, 155 Mich. 403.

§ 16. Excuses for nonjoinder.

Sufficiency of excuse for nonjoinder, see also Equity ¶ 337.

¶ 44. When it is apparent that the parties who may be affected by the decree are very numerous, and that to require the joinder of all who may be interested will be virtually to deny any remedy to a complainant, their joinder will not be insisted upon.—Pettibone v. McGraw, 6 Mich. 441.

¶ 45. The rule that prohibits a court of equity from making a decree unless all those who are substantially interested are made parties to the suit is inapplicable in a case where it is not in the power of the complainants to make them parties.—Michigan State Bank v. Hastings, 1 D. 225.

§ 17. Intervention.

Chancery interventions, see Equity, VI.

Right to intervene to dissolve or claim adversely to attachment, see Attachment §§ 105, 132.

Right to intervene in log lien proceedings, see Forestry § 21.

Right to intervene in proceedings in rem against vessel, see Shipping, IV.

Leave to sue receiver or to intervene in receiverships, see Receivers, IV, C.

Intervention in corporate actions during receivership, see also Corporations § 244.

Intervention by creditors or stockholders in corporate receivership and dissolution proceedings, see Corporations §§ 251, 252.

Intervention by third persons (children) in divorce suits, see Divorce § 78.

Intervention by prosecuting attorney in divorce, see Divorce § 79.

Intervention in action on bill or note, see also Negotiable Instruments § 99.

Intervening in interpleader suits, see Interpleader ¶ 25.

Intervention in mandamus, see Mandamus § 132.

Character of interests represented by intervening trustee in bankruptcy, see Bankruptcy § 15.

Who are "representatives" entitled to appear and answer after judgment by default on published service, see Defaults § 29.

Right of intervener to have certiorari to decision on dilatory plea, see Certiorari § 25, ¶ 91.

Mandamus to correct orders on motions for leave to intervene, see Mandamus § 38, ¶ 253.

Statutory right to intervene at law or in equity, see Jud. Act, chap. XII, § 11; Comp. L. 1915, § 12362.

¶ 46. Comp. L. 1915, § 12362, relating to the right of intervention in an action at law or suit in equity by any one claiming an interest in the litigation, being a remedial act, must be liberally construed to effectuate the intents and purposes thereof.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 47. The purpose of the Judicature Act, Pub. Acts 1915, No. 314, Chap. 12, § 11, authorizing intervention in any action at law or in equity by one claiming an interest in litigation, is designed to prevent a multiplicity of suits.—Weatherby v. Kent Circuit Judge, 194 Mich. 46.

¶ 48. Under the Judicature Act, Pub. Acts 1915, No. 314, Chap. 12, § 11, authorizing the assertion of rights by one claiming an interest in litigation by intervention, and providing that the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, one cannot by intervening, ask affirmative relief and at the same time attempt to repudiate the power of the court to proceed with the cause upon which the intervention rests.—Weatherby v. Kent Circuit Judge, 194 Mich. 46.

¶ 49. A saloonkeeper who has executed an indemnity bond to a corporate surety company which is surety on his saloon bond has an interest in the litigation of an action by a wife against such surety to recover on the bond because of the illegal sale of liquor to her husband so as to be entitled to intervene in such action.—Weatherby v. Kent Circuit Judge, 194 Mich. 46.

¶ 50. Bondsmen of a bankrupt building contractor have a direct financial interest in the outcome of an action by the trustee in bankruptcy of the contractor to recover on

a building contract so as to warrant intervention under Comp. L. 1915, § 12362, where an action on the contractor's bond for labor and materials furnished the contractor is pending, and it is immaterial whether in the bankruptcy court the whole sum recovered by the trustee should be held to be the property of the bondsmen by the right of subrogation or that they were entitled to share in the distribution of the fund so created the same as any ordinary creditor.—McMillan v. Portsmouth Township School District No. 2, 200 Mich. 280.

¶ 51. Under Comp. L. 1915, § 12362, providing that in an action either at law, or in equity, any one claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, the executor of the estate of a life tenant may intervene in a suit by the holder of an invalid mortgage given by the life tenant alone to set aside a mortgage given by the testator and satisfied by part of the proceeds of the second mortgage and in part by money belonging to the life tenant individually, and to be subrogated to the rights of the mortgagee under the first mortgage to the extent of its claim, where such executor seeks to have the payment by the life tenant declared a lien on the real estate.—Detroit & North Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 52. The real owner may intervene in a log lien suit brought against a tax-title claimant who had a bare possession.—Cook v. Cook, 106 Mich. 164.

¶ 53. A general creditor will not be granted leave to intervene in a suit by a creditor and stockholder against a corporation, if the petitioner has no other or greater rights than any other creditor and under the bill will be fully protected with others, and How. St., chap. 281, authorizing a creditor to file a bill for like purposes does not give the right to intervene in such a suit.—Smith v. George T. Smith Mfg. Co., 119 Mich. 11.

¶ 54. An indemnity insurance company does not in effect intervene and become a defendant in an action of tort for malpractice by a patient against his physician who has a policy in the company, within Comp. L. 1915, § 12362, providing that in "an action either at law, or in equity, any one claiming an interest in the litigation, may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding," because of the fact that it appears, represented by the same counsel who appear for the insured, and takes upon itself the burden of the defense pursuant to the contract with the physician.—Bowers v. Gates, 201 Mich. 146.

¶ 55. Any irregularity in the practice in allowing an attorney to intervene in a suit by a taxpayer against a city to enjoin the payment of a claim for legal services under an alleged illegal contract with intervener will not be considered where the attorneys for the city ask that such attorney's brief and argument be considered as that of the city.—Schurtz v. City of Grand Rapids, 199 Mich. 20.

¶ 56. A city attorney cannot bring the corporation into court by filing a brief in a case in which the city is not impleaded.—People ex rel. Attorney General v. Hatch, 60 Mich. 229.

§ 18. Privileges and immunities of parties.

Privilege of parties from arrest on capias, see Civil Arrest § 2.

Right to require party in divorce to attend subject to call as witness by adversary, see Divorce ¶ 336.

¶ 57. There is no general exemption from the service of process without arrest merely because the party is attending court awaiting the trial of a cause.—Case v. Rorabacher, 15 Mich. 537.

¶ 58. Service of a justice's summons upon a nonresident of the county while he is in such county attending upon a trial of an action as a party and witness should be set aside.—Letherby v. Shaver, 73 Mich. 500.

PARTING WITH VALUE.

Cross-References.

Parting with Value Without Notice—
As applied to doctrine of bona fide purchaser, see Notice and Record of Title, I, C; Negotiable Instruments § 78.

PARTITION.

TREATS of the equitable suit for division of property among the common owners thereof, as distinguished from suits to adjust accounts or equities of persons in joint or common interests in which property division is not the principal object of the suit (see Accounting Suits; Partnership, VII); and from suits for the assertion of a paramount right (see Dower; Homestead). It also treats of voluntary divisions among common owners.

Analysis.

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I. NATURE, RIGHT AND PROPRIETY.

§ 1. In general; proper remedy.

Persons entitled and maturity of right, see post §§ 2-4.
Estates and interests subject to partition, see post § 5.
Waiver and agreements affecting right, see post § 6.
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Partition by probate court, see Estates of Decedents, XV.
Duty to construct and maintain partition fences and liability for trespasses by animals as affected thereby, see Fences § 3.
Presumption that adoption of statute of partition of sister state carries with it the construction thereof as settled in such state, see Statutes, V.
Ejectment rather than bill of revivor and supplement as mode of recovering parcels allotted, see Equity ¶ 924.
Partition of lands of husband and wife in divorce proceedings, see Comp. L. 1915, § 11438.
Division of property held under trust, see Jud. Act, chap. XXXI, §§ 88-91; Comp. L. 1915, §§ 13345-13348.

¶ 1. The special province of a bill for partition is to sever the joint possession, and not to try legal titles.—Hoffman v. Beard, 22 Mich. 59.

¶ 2. If the title, though of a legal character, be undisputed, or, perhaps, though denied, if it appear to be so clear and incontestable as not to admit of a legal doubt, the bill will be maintained, as it will be where the title is an equitable one, or partly equitable and partly legal.—Hoffman v. Beard, 22 Mich. 59.

¶ 3. Mortgages executed by the seller on his own undivided half, not alleged or shown to have interfered with sales, or otherwise to have operated to the prejudice of the purchaser, will constitute no reason for partition.—Avery v. Payne, 12 Mich. 540.

¶ 4. Ejectment is the proper remedy rather than proceedings in partition where the question is whether a defendant has or has not title by adverse possession.—Fenton v. Mackinac Circuit Judge, 76 Mich. 405.

¶ 5. A bill in equity for a partition was properly dismissed, where the whole title was purely legal and there was no obstacle to a trial in ejectment, and where, since the bill had been pending, there had been two trials in ejectment, in both of which the verdict had been against the complainant's title.—Hemingway v. Griswold, 22 Mich. 77.

¶ 6. The remedy is in equity (by bill for partition) where one of the heirs to land taken under a primary school certificate seeks to recover her share against another who holds the interests of the other heirs and has obtained from the state the patent to the lands, since ejectment would not lie.—Porter v. Osmun, 135 Mich. 361.

§ 2. Persons entitled and maturity of right.

See also ante ¶ 6.
Conditions precedent and establishment of legal title, see post § 3.
Necessity and sufficiency of possession or seizin, see post § 4.
Estates and interest subject to partition, see post § 5.
Time for filing bill and laches, see post § 11.
Proper and necessary parties, see post §§ 12-14.
Persons entitled to partition in probate court, see Estates of Decedents, XV.
Persons entitled to partition under statute, see Jud. Act, chap. XXXI, § 1; Comp. L. 1915, § 13258.

¶ 7. Under the law as it stood in R. S. 1846 (Comp. L. 1857, § 2904), if the representative did not take possession for the payment of debts, the heirs could proceed in equity for a partition of the lands among themselves.—Campau v. Campau, 19 Mich. 116.

¶ 8. Under Comp. L. 1897, § 11020 et seq., § 11050 et seq., contemplating that persons holding mortgages and other liens may be made parties and their interests adjusted in partition proceedings instituted by the owners of the land, a tenant in common was entitled to maintain partition against a cotenant who had redeemed from mortgage foreclosure, although the former had neither paid nor tendered his share.—Wettlaufer v. Ames, 133 Mich. 201.

¶ 9. Where the owner of lands conveyed an undivided moiety to another, for a sum of money which was less than its value, to be paid from the proceeds of sales to be made of the lands, and which was secured by mortgage on the lands, and a part of the consideration consisted in the services of the purchaser in taking charge of and selling the joint property under a contract between them, and a principal part of the seller's security for the purchase price, and for the efficiency and fidelity of the purchaser in the management and sale of the property, consisted in the control he would have over the sales of the purchaser's interest, it was held that so long as the seller was not guilty of refusal to perform his part of the contract, or of any default which would relieve the purchaser from the obligation to perform, or prevent his performance, the latter was not entitled to partition.—Avery v. Payne, 12 Mich. 540.

¶ 10. Heirs may have partition among themselves although the estate has not been

settled. Notwithstanding the right of the administrator to take possession for the purpose of collecting rents, etc., their heirs have such an estate in possession as will enable them to maintain a suit in equity for partition.—Campau v. Campau, 19 Mich. 116.

¶ 11. One who has an undivided interest in a life estate in lands, and also an undivided interest in the reversion, cannot maintain a bill for partition against the other reversioners, since as reversioner he has not the requisite possession and as life tenant he does not hold in common or jointly with them (How. St. §§ 7850, 7852, construed with How. St. § 5983).—Metcalfe v. Miller, 96 Mich. 459.

¶ 12. Under How. St., chap. 270, one of the several owners of an undivided interest in lands in possession may maintain against his cotenants a bill for partition, joining as defendants—by reason of their having independent interests that may be affected by the proceeding—the tenants for life of the other undivided interests and all the remaindermen in being, though, by the terms of the will under which the several interests were acquired, persons not yet in being may be entitled to an interest in the remainders, at the termination of the life estates.—Biddle v. Biddle, 117 Mich. 28.

¶ 13. If dissatisfied with the act of his cotenant in deeding away his interest in a parcel of the estate, the nongranting cotenant can at once commence proceedings in partition, making the individual grantors of his cotenant parties thereto.—Pellow v. Arctic Iron Co., 164 Mich. 87.

¶ 14. A testator left his real estate to trustees to hold for twelve years, with power to sell and reinvest the proceeds. He provided that if two of his children should die before the twelve-year period was out, the trust should terminate; also that it might, after six years, be terminated at the option of the trustees. Held, that without the happening of either of said contingencies, complainant heir could not maintain a bill to partition the land before the end of the twelve-year period.—Ward v. Ward, 163 Mich. 570.

§ 3. ——Conditions precedent and establishment of legal title.

Necessity and sufficiency of possession or seizin as condition precedent, see post § 4.

¶ 15. Complainant in a suit for partition is not bound to first establish his title in an action at law unless defendant sets up an apparently good legal title; and an equitable right in defendant as a cotenant, growing out of his improvement of the property, does not subject complainant to that necessity, but, on the contrary, such right is only available to defendant in a partition suit.—Hooper v. DeVries, 115 Mich. 231.

¶ 16. Proceedings in partition in which a plea of ouster and adverse possession has been entered are properly stayed until complainant's title is established in a court of law, where defendants are in possession of the land and claim title by adverse possession, and where the title appears from the evidence to be doubtful and uncertain.—Fenton v. Mackinac Circuit Judge, 76 Mich. 405.

¶ 17. Ancillary administration is a prerequisite, under sections 9281 and 9282 of Comp. L. 1897 (How. St., 2nd Ed., §§ 10994, 10995), to the maintenance of a suit for the partition of land located within the state, by devisees claiming under a will probated in a sister state.—Rolph v. Rood, 182 Mich. 590.

¶ 18. It is only when a partnership relation exists between the parties as to the property sought to be partitioned, or there is some agreement, express or implied, between them, that an accounting shall be had before a division of the property can be made, that such accounting is a prerequisite to a suit for partition.—Godfrey v. White, 60 Mich. 443.

§ 4. ——Necessity and sufficiency of possession or seizin.

¶ 19. The complainant must have an actual or constructive possession to entitle him to partition, where the title is a legal one.—Hoffman v. Beard, 22 Mich. 59; Hemingway v. Griswold, 22 Mich. 77.

¶ 20. "An estate in possession" within the meaning of the statute for partition means merely an estate in present enjoyment.—Campau v. Campau, 19 Mich. 116; Eberts v. Fisher, 44 Mich. 551.

¶ 21. One may be said to have an "estate in possession" within the statutes relating to partition unless there is some intervening estate in the land the owner of which has a paramount right of possession as against him.—Campau v. Campau, 19 Mich. 116.

¶ 22. The possession of other cotenants, not holding adversely, inures to the benefit of a cotenant seeking partition.—Hoffman v. Beard, 22 Mich. 59.

¶ 23. Where land has been left by will in trust for a period of twelve years, an heir cannot maintain a bill for partition by virtue of section 11015, Comp. L. 1897, which provides a right of partition in persons having the right to possession.—Ward v. Ward, 163 Mich. 570.

¶ 24. If the possession of lands of which partition is sought be vacant, it follows the title.—Hoffman v. Beard, 22 Mich. 59.

¶ 25. The possession of a tenant in common of any specific portion of the entire tract owned in common is subject to the incidents of partition.—Tharp v. Allen, 46 Mich. 389.

§ 5. Estates and interests subject to partition.

Estates subject to partition in probate court, see Estates of Decedents, XV.

¶ 26. When partition proceedings are directed against several distinct parcels of land, each is subject to partition by itself.—Walsh v. Varney, 38 Mich. 73.

¶ 27. Where a grantor of land to a cemetery association has reserved from the land a lot for burial purposes such reservation is not part of his estate subject to partition, because the graves of the dead cannot be partitioned among the heirs of one who owns a burial lot in a cemetery.—Sharp v. Sharp, 148 Mich. 278.

¶ 28. Property exempt as a homestead is nevertheless subject to partition as between the heirs-at-law or their assignees.—Robinson v. Baker, 47 Mich. 619; Patterson v. Patterson, 49 Mich. 176.

¶ 29. The estate which husband and wife take under a deed to them as such is not subject to partition proceedings.—Jacobs v. Miller, 50 Mich. 119.

¶ 30. The owners of the undivided twenty-three twenty-fourths of a tract of timbered land conveyed their interest in the timber to a stranger to the title, after which they joined with the owner of the remaining one twenty-fourth in a deed of the fee of the land, which deed contained no reservation of the timber, but the grantee had notice of its sale and conveyance. Held, that it would have been competent for chancery, under its general powers, to compel the grantors of the timber to institute proceedings for the partition of the land and timber as a whole, and that this right of the vendee cannot be defeated by the subsequent merger of the title; that partition should be had, and twenty-three twenty-fourths should be assigned to one parcel, and one twenty-fourth to another, and the grantee of the timber should be declared to be the owner of the timber upon the larger parcel, with the right to cut and remove it pursuant to the terms and conditions of his deed.—Mee v. Benedict, 98 Mich. 260.

¶ 31. Partition in the probate court is confined to such lands as have been assigned to the heirs or devisees after the payment of debts, etc., but there is no such restriction in equity.—Campau v. Campau, 19 Mich. 116.

§ 6. Waiver and agreements affecting right.

Voluntary partitions, see post V.

Partition in probate court, see Estates of Decedents, XV.

Necessity that agreements for partition be in writing, see Frauds, Statute of, § 62.

¶ 32. Comp. L. 1857, § 4616, How. St. § 7850, which provides that joint tenants or tenants in common may have partition, does not prevent parties holding lands jointly, or in common, from making such agreements as may modify or limit their rights to partition.—Avery v. Paine, 12 Mich. 540.

¶ 33. The rule that a tenant in common of lands may have partition is not of universal application. A party may enter into such agreements with his cotenant as to estop him from enforcing the right of partition.—Eberts v. Fisher, 54 Mich. 294.

§ 7. Effect of partition on title and rights in premises.

Effect on estate by entireties of statute of partition, see Husband and Wife ¶ 79.

Persons receiving by partition decree as bona fide purchasers under recording acts, see Notice and Record of Title § 25.

Effect of pendency of partition proceedings on right of mortgagee to foreclosure sale, see Foreclosure ¶ 442.

Right to partition as defense in ejectment, see Ejectment § 18.

¶ 34. Partition of lands devised by a will dividing real estate among heirs does not change the nature of the title to each share.—Haddon v. Hemingway, 39 Mich. 615.

§ 8. Presumptions and evidence of partition.

Judicial record of partition as best evidence, see Evidence § 122.

¶ 35. Recitals in deeds setting out a partition and individual ownership coupled with more than sixty years' possession, occupancy, improvements and sales of portions of the property, furnish sufficient proof of actual partition by deed or by proceedings in the probate court, which have been lost and were not recorded.—Hunt v. Rabitoay, 125 Mich. 137.

II. JURISDICTION AND PROCEDURE ON BILL.

§ 9. Jurisdiction in general.

Incident to foreclosure, accounting or other equitable suits, see post § 10.

Time for suit and laches, see post § 11.

Proper and necessary parties, see post §§ 12-14.

Bill and subsequent pleadings, see post § 15.

Issues, proof and variance, see post § 16.

Presumptions and evidence, see post § 17.

Revivor of partition proceedings, see post § 18.

Propriety and nature of remedy, see ante I.

Estates and interests subject to partition, see ante § 5.

Jurisdiction of probate court to make partition, see Estates of Decedents, XV.

Equitable jurisdiction in general, see Equity, III.

Suit in state court for partition pending federal suit by omitted heirs for portion, see Abatement ¶ 49.

Proper county in which to bring partition proceedings, see Venue, I.

Making partition and assignment of dower in same suit, see Dower § 42.
Necessity in partition suit for appointment of guardian ad litem for infant parties, see Guardian ad Litem ¶ 5.
Jurisdiction of superior courts in partition, see Municipal Courts ¶ 49.
Jurisdiction of court to make division among heirs, see Jud. Act, chap. XXXI, § 81; Comp. L. 1915, § 13338.

¶ 36. Chancery jurisdiction in partition was received with the common law.—Parkinson v. Parkinson, 139 Mich. 530.

¶ 37. Courts of equity have exclusive jurisdiction of suits for the partition of personal property.—Godfrey v. White, 60 Mich. 443.

¶ 38. The jurisdiction of courts of chancery over proceedings in partition as to nonresidents is special and limited, and dependent entirely upon the statute. All the necessary facts to confer jurisdiction must therefore affirmatively appear upon the record.—Platt v. Stewart, 10 Mich. 260.

¶ 39. Equity has jurisdiction to make partition between joint owners of lands, notwithstanding a remedy is given by statute.—Thayer v. Lane, H. 247.

¶ 40. No jurisdiction is acquired over nonresident defendants not appearing, where no affidavit of nonresidence is filed, and without such affidavit an order of publication is void. The recital of an affidavit in the order is not evidence that one was made.—Platt v. Stewart, 10 Mich. 260.

¶ 41. Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is.—Godfrey v. White, 43 Mich. 171.

¶ 42. Where the case made by the bill contemplates as chief and eventual relief a severance of holdings, and where a decision as to whether, in any eventuality, there should be partition, depends upon the solution of questions, some of which are distinctly appropriate to equity, the circumstance that other questions in the case, if standing by themselves, might be regularly contested and settled in ejectment, is not enough to oust the jurisdiction of chancery.—Wallace v. Harris, 32 Mich. 380.

§ 10. ——Incident to foreclosure, accounting or other equitable suits.

¶ 43. On a bill filed for the foreclosure of a mortgage, partition of the premises cannot be decreed though the proofs show it would be equitable.—Payne v. Avery, 21 Mich. 524.

¶ 44. If the necessary facts are alleged and proved, and all the parties to be affected are before the court, partition between tenants in common may be decreed upon a bill filed to restore a destroyed deed of an undivided interest.—Wallace v. Wallace, 63 Mich. 326.

¶ 45. A bill for partition and accounting filed by the administrator and certain heirs against another of the heirs in possession, will be sustained as a bill for partition, and a sale will be ordered, although the administrator is not a proper party, and the heirs had no occasion to institute the suit, where it appears that the land is of little value, and such course will be cheaper than to remand the case to the probate court to allow the administrator to proceed to sale.—Owings v. Owings, 150 Mich. 609.

§ 11. Time for suit and laches.

Maturity of right, see ante § 2.
Effect of statute of limitations on determining proper parties defendant, see post ¶¶ 59, 61.
Time for suit and bar of statute of limitations, see Jud. Act, chap. XXXI, § 78; Comp. L. 1915, § 13335.

¶ 46. After division of an estate by the heirs thereto has been acquiesced in for twenty years, a bill for partition cannot lie in behalf of one of the heirs to disturb it.—Mitchell v. Mitchell, 68 Mich. 106.

¶ 47. An execution creditor who has purchased his debtor's interest in certain land at sheriff's sale is not barred from maintaining a bill in equity for partition of the land by the fact that he did not seek his remedy in equity within one year from the date of the levy, where the only remedy open to him at the time was a bill to set aside an instrument purporting to convey the land, and it appears that the execution of such instrument was kept secret by defendants.—First Nat. Bank of Durand v. Phillpots, 155 Mich. 331.

§ 12. Proper and necessary parties.

Cotenants and grantees of cotenants, see post § 13.
Heirs, devisees and representatives, see post § 14.
Persons entitled to bring bill, see ante § 2.
Knowledge of contents of bill imputable to cotenant served with process, see Defaults ¶ 102.
Fraudulent commissioners as parties to bill to review decree for their fraud, see Equity ¶ 985.
Proper and necessary parties to partition suit, see Jud. Act, chap. XXXI, §§ 2-9; Comp. L. 1915, §§ 13259-13266.
State as party in suit for partition, see Jud. Act, chap. XXXI, §§ 76, 77; Comp. L. 1915, §§ 13333, 13334.

¶ 48. An allegation in a partition bill that a sheriff executed a deed of lands to parties named, purporting to convey a defendant coparcener's estate, will not show any interest in them making them necessary parties, un-

less it also shows by what authority the deed was executed.—Campau v. Campau, 19 Mich. 116.

¶ 49. Under the statute of partition a wife whose husband is seized of an interest in the lands to be divided may be made a party, and if she is not, her inchoate right of dower will not be affected. The court of chancery has power in partition proceedings to guard this inchoate right of dower, where the wife is made a party, without departing from its principles.—Greiner v. Klein, 28 Mich. 12.

¶ 50. The holders of adverse claims under tax titles are not proper defendants in partition.—McCamman v. Davis, 162 Mich. 435.

¶ 51. Under Comp. L. 1897, § 11020 et seq., § 11050 et seq., it seems to be contemplated that persons holding mortgages and other liens may be made parties, and their interests adjusted, in partition proceedings by owners of the land.—Wettlaufer v. Ames, 133 Mich. 201.

¶ 52. The holder of an inchoate lien for paving taxes, in the shape of a redeemable lease, need not, under Comp. L. 1871, § 6274, How. St. § 7858, be made a party defendant to a bill for the partition of the property; it is proper, however, to make him so, and in case of nonredemption the lien may be made chargeable on the defendants, as the final form of relief may make suitable.—Eberts v. Fisher, 44 Mich. 551.

§ 13. ——Cotenants and grantees of cotenants.

Nature of cotenancies in general, see Tenants in Common, I.

¶ 53. In a suit for partition it is immaterial whether the tenants in common are parties complainant or defendant; their rights when determined by the decree are res judicata, and cannot be reviewed save by appeal.—Pierson v. Conley, 95 Mich. 619.

¶ 54. Whether a purchaser from one of several tenants in common of an undivided interest in a part only of the property held in common acquires such a title as to make him a necessary party in a suit brought for partition by other tenants in common, quære. —Campau v. Campau, 19 Mich. 116.

¶ 55. Where one cotenant has granted to a third person his interest in a parcel of the estate and the nongranting cotenant then seeks to partition, he must make said third person a party defendant.—Pellow v. Arctic Iron Co., 164 Mich. 87.

¶ 56. A guardian ad litem should be appointed in partition proceedings to represent and protect the interests of an infant tenant in common.—Prince v. Clark, 81 Mich. 167.

¶ 57. A cotenant whose interest had been mortgaged and the mortgage foreclosed but whose right of redemption had not expired because of an extension of time, is a proper party to a proceeding for partition of the property.—Chidsey v. Wayne Circuit Judge, 131 Mich. 5.

¶ 58. A railroad company to which all the tenants in common of a tract have deeded a strip in fee for a right of way is not a necessary party to a suit between such cotenants for the partition of the tract, excluding the strip in question.—Hooper v. McAllister, 115 Mich. 174.

§ 14. ——Heirs, devisees and representatives.

Heirs as persons entitled, see ante ¶¶ 7, 10.

Partition by probate court and proceedings therein, see Estates of Decedents, XV.

¶ 59. A bill for partition must make all the heirs, against whom the statute of limitations has not run, parties.—Benedict v. Beurmann, 90 Mich. 396.

¶ 60. To a bill for partition brought by heirs of a deceased tenant in common, their mother, as entitled to dower in such tenant's estate, is a proper, and, it seems, a necessary party.—Campau v. Campau, 19 Mich. 116.

¶ 61. Partition cannot be decreed where an heir, against whom the statute of limitations has not run, has not been made a party.—Benedict v. Beurmann, 90 Mich. 396.

¶ 62. The executors and devisees of a deceased tenant in common, not asking partition among themselves, may jointly file a bill to have their interests set off from that of the cotenant.—Page v. Webster, 8 Mich. 263.

¶ 63. Upon demurrer to a bill for partition, the court need not concern itself with the question of the failure to bring in the administrators of the estates of the ancestor and one of the children, where the bill showed upon its face that one of such parties left no debts, and did not show whether the estate of the other was administered or not.—Mertens v. Cook, 135 Mich. 35.

¶ 64. An administrator is not a proper party complainant to a bill filed by some of the heirs against another heir in possession of realty, for partition, and an accounting for rents and profits.—Owings v. Owings, 150 Mich. 609.

§ 15. Bill and subsequent pleadings.

Issues, proof and variance, see post § 16.

Necessity that decree conform to pleadings, see post § 20.

Decree and incidental relief from bill, see post III.

Sufficiency of notice of lis pendens in partition suit, see Lis Pendens § 2.

Multifariousness of bill to set aside partition and for other relief, see Equity ¶ 290.

Equitable pleading in general, see Equity, VII.

Multifariousness of bill for partition and for discovery of tax purchases and to declare latter void, see Equity ¶ 291.
Proper county in which to file partition bill, see Venue, I.
Summons and service of process in suit, see Jud. Act, chap. XXXI, §§ 10, 11; Comp. L. 1915, §§ 13267, 13268.

¶ 65. A bill for partition alleging ownership of the land in common, was not subject to demurrer on the ground of adequate remedy at law.—Mertens v. Cook, 135 Mich. 35.

¶ 66. A bill for partition by executors and devisees set forth that the undivided interest was devised to the latter in common, with the power, nevertheless, in the executor to sell and dispose of the same. Held, a sufficient statement of the respective interests of complainants, they asking no partition as between themselves.—Page v. Webster, 8 Mich. 263.

¶ 67. A bill for partition averred that the land was devised to eleven heirs who were named; that seven had assigned to defendant, who holds seven-elevenths of the property, and that complainants, who represent four of the heirs, claim the rest. Held, that it sufficiently averred defendant's interest and would be good for a union of four-elevenths in complainants, if it did not, indeed, show that each held one-eleventh.—Eberts v. Fisher, 44 Mich. 551.

¶ 68. Allegations in a bill for partition, as to the rights and obligations of tenants of the defendant, could only be a ground of demurrer by the tenants themselves; and being only collateral to the regular issues in partition, there is no legal objection to averring or establishing any facts that would determine the relative interests of all parties. Any facts bearing upon the termination of the lease by forfeiture or otherwise are pertinent, as the object of the bill is not properly to enforce a forfeiture, but to determine the right to a partition and the extent of the property to be partitioned.—Eberts v. Fisher, 44 Mich. 551.

¶ 69. A bill for partition showing that defendant is tenant in common with complainant, and that the latter also holds a mortgage on the former's interest, makes out a good case for partition, which cannot be affected by any further needless allegations of grievances if they are not inconsistent with the title set up.—Hoffman v. Ross, 25 Mich. 175.

¶ 70. A partition bill that discloses that persons not made parties have like interests with those set up by the complainant is demurrable for want of parties.—Taylor v. King, 32 Mich. 42.

¶ 71. Allegations concerning receipt of rents and profits by defendant are not repugnant, and may, under some circumstances, become relevant upon the settlement of partition proceedings.—Hoffman v. Ross, 25 Mich. 175.

¶ 72. Where defendants in partition desire to rely on a lease made by them they must include such averments in their answers as will enable them to maintain their interests, so that, whether the land is partitioned or sold, equities may be adjusted in it or in its proceeds.—Eberts v. Fisher, 44 Mich. 551.

¶ 73. To A.'s bill for partition of his father's estate against B. (his father's widow), and against the widow and heirs of C. (his deceased brother), B. filed a cross-bill seeking assignment of dower and damages for detention of dower. Held, that the cross-bill was demurrable, and that if B. had any claim for arrearages against C.'s estate it should have been established separately against such estate, and ought not to be mixed up with a claim against his heirs.—Bearinger v. Pelton, 78 Mich. 109.

§ 16. Issues, proof and variance.

Presumptions and evidence, see post § 17.
Partition in probate court, see Estates of Decedents, XV.
Issues and proof as to interests of infant party, see Infants ¶ 135.
Existence of joint tenancy as issue for determination, see Jud. Act, chap. XXXI, § 16; Comp. L. 1915, § 13273.

¶ 74. The circuit court cannot go into a general overhauling of an estate in a partition suit.—Wright v. Wright, 79 Mich. 527.

¶ 75. Where complainant in his bill for partition states that he does not question the validity of a trust under which the lands in question are held, he is estopped from contending at the hearing that no trust was created.—Ward v. Ward, 163 Mich. 570.

¶ 76. The title acquired by adverse possession constitutes a legal title; and the question of the possession, by defendant in a partition suit, of such a title to the interest in the land claimed by complainant, is not raised by an answer which avers that complainant holds the legal title to said interest in trust for defendant.—Miller v. Miller, 100 Mich. 563.

¶ 77. A claim by defendant in partition, in support of his contention that complainant should first establish his title at law, that, if ejectment were brought, the person under whom complainant claims would be a necessary party, and might have a valid defense to the action, is inconsistent with an answer which asserts that defendant is the sole owner and in sole possession of the property.—Hooper v. DeVries, 115 Mich. 231.

¶ 78. Where a tenant in common of land in partition is also a lessee of the land, it

saves circuity of action to consider all of his claims together; but the jurisdiction does not depend on so doing.—Eberts v. Fisher, 44 Mich. 551.

¶ 79. Where partition of lands in which an infant has an interest is prayed for, the facts must be inquired into as fully when the infant is complainant as when he is defendant.—Claxton v. Claxton, 56 Mich. 557.

§ 17. Presumptions and evidence.

General law of evidence, see Evidence.
Evidence of adverse possession by cotenant, see Adverse Possession §§ 45, 46, 50.
Partition in probate courts, see Estates of Decedents, XV.

¶ 80. Where complainant in partition relies on clear record title, and he has shown a purchase of the interest he claims, and payment therefor, the burden rests on defendant to show notice of equitable rights acquired prior to the purchase.—Hooper v. DeVries, 115 Mich. 231.

¶ 81. Where an inheritance consists of separate city lots which have been platted, each lot is presumed, in the absence of any showing to the contrary, to be a separate holding.—Butler v. Roys, 25 Mich. 53.

¶ 82. If parol evidence is admissible at all to show that the obligation to pay off a mortgage given by one tenant in common had been assumed by the other on making partition, it must be very conclusive when there is no other consideration than the partition. —Webb v. Rowe, 35 Mich. 58.

¶ 83. Although an assignment of the residue of an intestate's estate to the person entitled after administration is a prerequisite to a partition of the lands in the probate court, a slight showing that such an assignment has been made will support a finding to that effect where it appears that the probate court has proceeded to partition the lands among the heirs.—Dickison v. Reynolds, 48 Mich. 158.

¶ 84. Where the defendant in a partition suit rests his claim to the interest in the land claimed by complainant on a parol agreement for its purchase, which he claims to have fully performed, and which he seeks to establish mainly by his own testimony, he cannot complain that the court requires him to establish said claim by clear and cogent proof.—Miller v. Miller, 100 Mich. 563.

¶ 85. A claim by one tenant for supporting the mother of the tenants in common is properly denied on partition on proof of an agreement by the mother that he should receive the use of the property for such support, though in fact the use belonged to her and not to the promisor.—Clark v. Clark, 134 Mich. 602.

§ 18. Revivor of partition proceedings.

Modification and revivor of decree, see post § 22.
Effect of revivor of partition proceedings on subsequent parceling, see post ¶ 106.
Revivor bill in equity in general, see Equity, XI.
Partition in probate court, see Estates of Decedents, XV.

¶ 86. Where the grantees of partitioners hold separate and undivided interests and the partition proceedings were not defective as to the parties, they cannot have the proceedings revived for the purpose of barring of their rights persons who had not been made parties, so as to prevent them from asserting their legal rights by bringing ejectment.—Walsh v. Varney, 38 Mich. 73.

III. DECREE AND INCIDENTAL RELIEF.

§ 19. In general.

Conformity to pleadings, see post § 20.
Award of costs and counsel fees, see post § 21.
Vacation, opening or modification and revivor, see post § 22.
Procedure on decree and making the partition decreed, see post IV.
Effect of voluntary partitions, see post V.
Partition by probate court and adjudication therein, see Estates of Decedents, XV.
Provision for partition in decree on partnership accounting, see also Partnership § 119.
Partition as incidental relief in suit to restore lost deed, see also Restoration of Papers ¶ 12.
Making decree for partition incident to bill to establish dower right, see Dower ¶ 112.
Finality of decree to operate as res adjudicata, see Former Adjudication ¶ 87.
Decree partitioning decedent's estate as res adjudicata upon heirs, see Former Adjudication ¶ 391.
Decree in partition res adjudicata of the equality in value of the parcels, see Former Adjudication ¶ 416.
Scope of reviewable questions on appeal, see Appeal § 304.
Appealability of decrees, see Appeal, III, B.
Persons receiving by partition as bona fide purchasers, see Notice and Record of Title § 25.
Form of decree in case of parties not appearing, see Jud. Act, chap. XXXI, § 18; Comp. L. 1915, § 13275.
Decree as determining rights, titles and interests in property and partition in accordance with the rights and titles determined, see Jud. Act, chap. XXXI, § 17; Comp. L. 1915, § 13274.

¶ 87. It is competent for the court, in partition proceedings, to adjust the equities of the parties in the decree.—Schultz v. Dennison, 159 Mich. 259.

¶ 88. Equity has authority to partition equitable as well as legal estates; and in so

doing will apply the provisions of Comp. L. 1897, § 11100, which provide that in sales under decree of partition, inchoate dower may be ascertained and valued and a proper award made in lieu of it, the dower being prior to the partition of the estate and the situation such that a sale subject to dower left outstanding would be inequitable between the co-owners.—Chase v. Angell, 148 Mich. 1.

¶ 89. A bill by a remainder-man for partition, cannot be retained as a bill for the construction of a will where it contains no prayer for such relief, and does not aver that there is any dispute as to the construction of the will.—Warren v. Warren, 151 Mich. 95.

¶ 90. A bill for partition showing on its face that defendants are in possession, cannot be retained as a bill to quiet title.—Warren v. Warren, 151 Mich. 95.

¶ 90a. Relief against void tax-titles acquired by a tenant in common may be had on a bill for partition filed by his co-tenant.—Page v. Webster, 8 Mich. 263.

§ 20. Conformity to pleadings.

Bill and subsequent pleadings, see ante § 15.

¶ 91. Partition will be decreed according to the equitable rights of parties. But to enable the court to make such decree, their equitable rights should appear from the pleadings.—Thayer v. Lane, W. 200.

¶ 92. When one of several heirs files a bill for partition of land in which his mother is entitled to dower, and the other heirs disclaim any rights in the land during the life of the mother, it is erroneous, after decreeing the setting off of complainant's interest, to go further and make partition among the mother and the other heirs.—Campbell v. Campbell, 21 Mich. 488.

§ 21. Award of costs and counsel fees.

Partition in probate court, see Estates of Decedents, XV.

Notice of lien for costs through attorney, see Attorneys ¶ 79.

Costs on appeal in partition suit which should have been disposed of in course of administration, see Costs ¶ 542.

Allowance of costs against property or fund, see also Costs § 39.

Amounts allowable as solicitors' fees, see Costs § 64.

Rules for awarding costs generally in chancery, see Costs, II, B.

Costs in suit, see Jud. Act, chap. XXXI, §§ 55, 65, 67; Comp. L. 1915, §§ 13312, 13322, 13324.

¶ 93. The decree in partition proceedings should charge the costs upon the parties in proportion to their respective rights (Comp. L. 1871, § 6333, How. St. § 7917).—Shepherd v. Rice, 38 Mich. 556.

¶ 94. In partition proceedings under How. St., ch. 270, the court has power to award to the complainant out of the fund a reasonable allowance for solicitor's fees above taxable costs.—Greusel v. Smith, 85 Mich. 574.

§ 22. Vacation, opening or modification and revivor.

Revivor of partition proceedings, see ante § 18.

Collateral attack or impeachment of decree of partition in probate, see Estates of Decedents, XV.

Revivor of partition decree to adjust accounting, see Abatement ¶ 106.

¶ 95. A decree of partition cannot be opened to change results without also setting aside the titles obtained under it.—Walsh v. Varney, 38 Mich. 73.

¶ 96. Where an award of partition is so extravagantly one-sided as to shock the conscience and there is no pretense of justification, it must be held fraudulent in law whatever the purpose of the commissioners may have been in making it.—Adair v. Cummin, 48 Mich. 375.

¶ 97. Where commissioners appointed to make partition divided the land equally, but so that one share was worth twice and a half as much as the other, and contained 200 acres of upland with 174 under cultivation and 30 acres of lowland and about 20 of swamp, while the other consisted of 60 acres upland with 9 acres cleared and about 180 acres of marsh and swamp, it was held that the inequality was so great as to amount to fraud, and the partition, though confirmed, might be set aside.—Adair v. Cummin, 48 Mich. 375.

IV. PROCEDURE ON DECREE AND MAKING THE PARTITION.

A. IN GENERAL.

§ 23. Procedure by commissioners in general.

Confirming or setting aside of report and rereference, see post § 24.

Presumptions as to validity and correctness of report, see post § 25.

Decree and incidental relief, see ante III.

Mode of division and adjustment of shares and owelty, see post IV, B.

Sale and division of proceeds, see post IV, C.

Commissioner's deed as color of title, see Adverse Possession ¶ 138.

Appointment of commissioners to make the partition decreed, see Jud. Act, chap. XXXI, § 20; Comp. L. 1915, § 13277.

Proceedings of commissioners appointed to make partition as decreed, see Jud. Act, chap. XXXI, §§ 20-26; Comp. L. 1915, §§ 13277-13283.

Oath of commissioners appointed to make the decreed partition, see Jud. Act, chap. XXXI, § 22; Comp. L. 1915, § 13279.

Manner of making partition by commissioners, see Jud. Act, chap. XXXI, § 23; Comp. L. 1915, § 13280.
Report of commissioners, see Jud. Act, chap. XXXI, § 24; Comp. L. 1915, § 13281.

¶ 98. In a suit for partition of lands, under How. St., chap. 270, notice to defendant parties at interest in such lands, of meeting of commissioners, is essential to the validity of their action.—Simpson v. Simpson, 59 Mich. 71.

¶ 99. Parties interested in partition proceedings may properly be heard by the commissioners, on notice to all concerned to appear before them at a specified time and place to prove, if they wish, the value of the lands.—McLaughlin v. Wayne Circuit Judge, 57 Mich. 35.

¶ 100. Commissioners in partition proceedings must apply to the court for any instructions they may need; and if interested parties take part in their deliberations or in the preparation of their report, the report will be set aside.—McLaughlin v. Wayne Circuit Judge, 57 Mich. 35.

¶ 101. It is not necessary that all the commissioners should sign or acknowledge the report, in the partition of decedent's land and assignment of dower to the widow, but their deliberations should be had together, and they must all meet when their final action is taken and the report is made and signed (How. St., chap. 270).—Simpson v. Simpson, 59 Mich. 71.

§ 24. Confirming or setting aside of report and rereference.

Review of order of confirmation of commissioners' report, see Appeal § 437.
Decree on confirmation of report, see Jud. Act, chap. XXXI, § 28; Comp. L. 1915, § 13285.
Setting aside of report of commissioners and recommitting case or appointment of new commissioners, see Jud. Act, chap. XXXI, § 27; Comp. L. 1915, § 13284.
Report of sale and order thereon, see Jud. Act, chap. XXXI, §§ 51, 52; Comp. L. 1915, §§ 13308, 13309.

¶ 102. In a suit for partition of land under Comp. L. 1897, chap. 304, where the court sets aside the commissioners' report under section 11042, the commissioners must proceed in their second determination as in the first by complying with sections 11039, 11040 and where they fail to do so the report is a nullity.—Tolsma v. Tolsma, 180 Mich. 79.

§ 25. Presumptions as to validity and correctness of report.

Fraud of commissioners as ground for bill of review, see Equity ¶ 952.

¶ 103. A party to a partition is not at fault for assuming that the commissioners appointed to make it have acted impartially.—Adair v. Cummin, 48 Mich. 375.

¶ 104. The good faith of commissioners in making partition is a question that may be determined by circumstances; the evidence of legal fraud need not be specific.—Adair v. Cummin, 48 Mich. 375.

¶ 105. Where the report of the commissioners and the decree in partition proceedings are silent as to any inequality in the division of the property, and the decree makes no provision for compensation therefor pursuant to How. St. § 7931, it will be presumed that no inequality existed, and said presumption cannot be overthrown by parol testimony in a collateral proceeding.—Burger v. Beste, 98 Mich. 156.

B. MODE OF DIVISION AND ADJUSTMENT OF SHARES AND OWELTY.

§ 26. Parceling, allotment, and adjustment of equities.

Accounting for rents and profits, see post § 27.
Allowance for improvements and advances or expenditures, see post § 28.
Sale and division of proceeds, see post IV, C.
Allotment so as to preserve homestead and dower rights, see also Dower ¶ 137.

¶ 106. The fact that a partition suit is revived as against the administrators of an estate for purposes of an accounting merely does not affect the rights of the heirs at law in the subsequent partition of the inheritance over which the administrators would have no control.—De Mill v. Port Huron Dry Dock Co., 30 Mich. 38.

¶ 107. In making partition between heirs at law or their assignees, where there is a homestead and also other lands, if there is a widow with a right of dower, she should have her dower and homestead right saved to her in the homestead land whenever it can be done consistently with justice.—Robinson v. Baker, 47 Mich. 619.

¶ 108. In a suit between the heirs at law of deceased persons for a partition, defendant consented to the partition and prayed an accounting by complainant as to money and property alleged to have been intrusted to her by one of the decedents. The evidence showed that such decedent had lived to an advanced age, had managed her property herself during that time, and had expended money quite liberally in gifts and otherwise; and it was also shown that she had been under considerable expense for physicians, nurses, and the like. Excluding the gifts, it appeared that there was in fact an increase in the estate over and above living expenses. Held, that there was nothing to show that complainant had received anything for which she was liable to account.—Reese v. Lamore, 156 Mich. 158.

¶ 109. Where partition is had between tenants in common, one of whom has previously conveyed an interest to a stranger, the court may properly consider such conveyance in partitioning the land so as to secure the interest of such purchaser.—Benedict v. Torrent, 83 Mich. 181.

§ 27. Accounting for rents and profits.

¶ 110. The accounting for rents and profits is one of the important incidents of a partition in equity.—Hoffman v. Ross, 25 Mich. 175.

¶ 111. A tenant in common who had occupied part of premises under an agreement by her husband to pay rent, and who continued occupancy after the husband's death and at times paid some rent, was rightfully charged rent in an accounting in partition proceedings.—Wettlaufer v. Ames, 133 Mich. 201.

¶ 112. How. St. § 5778, which provides that one tenant in common may maintain an action for money had and received against his cotenant for receiving more than his just proportion of the rents and profits, and which is construed to justify a recovery only for moneys actually received, exclusive occupancy not being sufficient to create a liability under the statute, does not impair the right of a tenant against whom the premises have been held adversely by his cotenant to have an allowance made in partition proceedings for the value of the use and occupancy.—Fenton v. Miller, 116 Mich. 45.

¶ 113. An accounting for rents and profits during the pendency of partition proceedings up to the date of the final decree is proper without a further reference, where the testimony furnishes a sufficient basis therefor.—Hunt v. Hunt, 109 Mich. 399.

§ 28. Allowances for improvements and advances or expenditures.

¶ 114. A tenant in common who makes improvements upon the common property, which substantially increase its value, is entitled, after a sale of the property in partition proceedings, to have the improvements considered in determining his just share of the proceeds of the sale.—Fenton v. Miller, 116 Mich. 45.

¶ 115. In a suit for partition, compensation for improvements will not be allowed to a defendant whose 25 years' use of the land offsets such improvements.—Pierson v. Conley, 95 Mich. 619.

¶ 116. The equitable principle which permits a tenant in common to charge his cotenant for improvements, had no application in a partition by one of the remaindermen against a defendant who had been in possession as a life tenant for 24 years, and had also acquired rights as a remainderman.—Porter v. Osmun, 135 Mich. 361.

¶ 117. Improvements will not be taken into account in a partition suit where, by reason of joint occupation, and the voluntary commingling of accounts for improvements, advances and services, it is impossible to ascertain the relative cost and value of what has been done by each.—Campbell v. Campbell, 21 Mich. 438.

¶ 118. Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other from possession, the excluded tenant is to be allowed for rental and the tenant in possession for betterments and improvements, equity requires either that the former should be limited in his credit for rents to the value of the premises in their original state, or, if he is to have the benefit of disbursements made in improving the premises to add to their rental value, be charged with his share of the cost of the improvements at the time they were made, rather than with their depreciated value at the time of partition.—Fenton v. Miller, 116 Mich. 45.

¶ 119. Where former owners of tax titles having adverse claims are not proper defendants to partition, complainants may be allowed the expenses of purchasing such tax titles and of procuring an abstract where the expenditures are made in good faith for the benefit of the entire estate.—McCamman v. Davis, 162 Mich. 435.

¶ 120. Whether a widow who for many years has carried on the farm which belonged to her deceased husband, and has brought up a family of children, during which time she has paid off a mortgage on the farm and has canceled the notes, but afterwards has taken an assignment of it to herself, is strictly entitled to hold a lien on the land for the amount paid by her, quære. But when one of the children, after having arrived at maturity, files a bill for a partition of the premises, equity requires that, as between the widow and the complainant in partition, she should be compensated for her advances to pay off the mortgage; and that she should be allowed interest on the sums she has paid, except as to the proportion which her dower right should bear.—Campbell v. Campbell, 21 Mich. 438.

¶ 121. A cotenant in possession is not entitled, upon partition, to an allowance for insurance claimed to have been paid by him, where it does not in any way appear that the insurance inured to the benefit of the excluded tenant.—Fenton v. Miller, 116 Mich. 45.

¶ 122. Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other from possession, the former asks credit for betterments and improvements made during the entire period, he cannot equitably have the statute of limitations applied against the excluded tenant's right to an allowance for

use and occupation during the same period. —Fenton v. Miller, 116 Mich. 45.

¶ 123. A cotenant asking for partition of property bid in by another cotenant on foreclosure sale must contribute to the cost of the purchase by which the lien was discharged.—Reed v. Reed, 122 Mich. 77.

C. SALE AND DIVISION OF PROCEEDS.

§ 29. Propriety or occasion for sale.

Manner, place and conduct of sale, see post § 30.

Rights under sale and division of proceeds, see post § 31.

Statutory provision for sale of premises where division cannot be made, see Jud. Act. chap. XXXI, § 30; Comp. L. 1915, § 13287.

¶ 124. A decree in partition proceedings overruling the finding of the commissioner that the premises were not susceptible of partition without great prejudice to the owners, and directing the construction of a wall through a building located in a lot hexagon in shape, which would involve not mere construction but tearing down, was reversed and a sale ordered; the case being clearly within Comp. L. 1897, § 11045, relating to sales upon a report of the commissioner that the premises were not subject to partition without great prejudice to the owner.—Gilman v. Boden, 136 Mich. 125.

¶ 125. Where a decedent's estate is subject to a homestead right in favor of his widow and minor children, is indivisible and exceeds the homestead allowance in value but not in area, it cannot be sold in partition proceedings (How. St. §§ 7723, 7728, 7729).—Zoellner v. Zoellner, 53 Mich. 620.

§ 30. Manner, place and conduct of sale.

General law of judicial or involuntary sales, see Judicial Sales, and cross-references there collated.

Terms and manner of conducting sale, see Jud. Act, chap. XXXI, §§ 31-45; Comp. L. 1915, §§ 13288-13302.

¶ 126. A court has no authority to subdivide a single parcel of land for the purpose of a partition sale unless a proper showing has been made to it that such subdivision will result in the securing of a higher price. —McCamman v. Davis, 162 Mich. 435.

¶ 127. Under Comp. L. 1897, §§ 11014, 11045, 11063 and 11068 governing sales in partition where lands are situated in different counties, the court may direct a sale of all the lands to be made in the county where the court sits.—Morris v. Wayne Circuit Judge, 130 Mich. 336.

§ 31. Rights under sale and division of proceeds.

Whether dower interest affected by partition sale where dowress not party to proceedings, see Dower § 28.

Computation and allotment of money for dower to adjust same in partition, see Dower § 56.

Compensation where equitable division impossible, see Jud. Act, chap. XXXI, § 79; Comp. L. 1915, § 13336.

Effect of sale on rights of creditors, see Jud. Act, chap. XXXI, § 54; Comp. L. 1915, § 13311.

Distribution of proceeds of sale in partition, see Jud. Act, chap. XXXI, § 56 et seq.; Comp. L. 1915, § 13313 et seq.

¶ 128. One W. Dennison owned an undivided interest in eighty acres of land, with the defendant. W. Dennison made a cropping arrangement with plaintiff with respect to ten acres, by which W. Dennison was to take the first, fourth, seventh, etc., rows of shocks across the field, while the plaintiff was to have the intervening rows. While the corn was still standing, the defendant, by a partition suit had the ten acres set off to her, and later appropriated Dennison's rows of the shocked corn. In a suit for conversion, held, the title to the corn passed to her by the partition of the land, and she was not liable.—Schultz v. Dennison, 159 Mich. 259.

¶ 129. A sale of a lot in partition proceedings, subject to an easement appurtenant to another lot, was proper where the owner of the lot in question had become the owner of both lots, and subsequently during the continued use of the easement conveyed the two lots to different owners; as the easement which had been merged in the fee was revived.—Wettlaufer v. Ames, 133 Mich. 201.

V. VOLUNTARY PARTITIONS.

§ 32. In general.

Rights of third persons, see post § 33.

Waiver and agreements affecting right, see ante § 6.

Partition by probate court and proceedings therein, see Estates of Decedents, XV.

Partition deeds as basis for estoppel, see Estoppel § 9.

Covenants for title in partition deeds, see Covenants for Title § 8.

¶ 130. Partition may be made by consent; but it is not an incident to a suit for a partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit.—Godfrey v. White, 43 Mich. 171.

¶ 131. Where a part of the heirs have attempted a voluntary partition among themselves, the court, on a bill filed by another, may respect this voluntary partition so far as it does not prejudice the right of complainant.—Thayer v. Lane, W. 200.

¶ 132. Amicable partition of lands by the guardians of infants and incompetents was valid where no advantage was taken, under 1 Terr. Laws 377, reposing ample power in the guardian.—Hunt v. Rabiteay, 125 Mich. 137.

¶ 133. Where the owner of an undivided half interest in land, crops the same and then voluntarily submits to a partition, he does not retain the right to harvest the crops after losing possession.—Schultz v. Dennison, 159 Mich. 259.

§ 33. Rights of third persons.

¶ 134. Where the interest of one of several heirs in certain city lots, constituting a portion of an inheritance, has been sold on execution, the fact that upon a voluntary partition among the heirs, to which the execution purchasers were not made parties, said city lots were set off to others of the heirs than him whose interest has been so sold, cannot prejudice the rights of such purchasers.—Butler v. Roys, 25 Mich. 53.

¶ 135. Whether a partition among tenants in common, to which an execution purchaser of the undivided interest of one of them was not made a party, can affect such purchaser's rights, quære.—Whiting v. Butler, 29 Mich. 122.

¶ 136. Upon a voluntary partition of lands any liens on the undivided interest of either tenant in common will be transferred, as between the parties thereto, to such portion of the premises as is set off to the tenant or the assignee of the tenant against whom the lien stood; and that portion will constitute the primary security for the lien.—Webb v. Rowe, 35 Mich. 58.

PARTNERSHIP.

TREATS of the general law of partnerships, distinguishing and excluding Joint Adventures, which are for a single enterprise or venture and which see, and "partnership associations," which resemble corporations and which are treated in Joint Stock Companies. Voluntary associations for nontrading purposes are treated in Associations. Common ownership of property apart from any engagement of the owners jointly in business is treated in Tenants in Common.

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VIII. Limited and special partners.

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I. IN GENERAL; NATURE, MEMBERSHIP, FORMATION AND EXISTENCE.

[Note.—Limited partnership associations, so called, have been given separate treatment in the topic Joint Stock Companies, which in legal effect they are. The topic Partnership is not intended in any way to cover "partnership associations," and by the term "limited partnership" is meant only such as is contemplated by Comp. L. 1915, chap. 150.]

Banking firms, and their rights and liabilities as bankers, see Banking.

Domicile of firm for purpose of filing its chattel mortgage, see Chattel Mortgages § 30.

As successor to corporation, see Corporations § 218.

Capacity of corporation to be partner or to enter into partnership, see Corporations § 78.

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Judgment as bar or estoppel as to firm and partners, see Former Adjudication § 69.

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Power to hold patent rights in partnership, see Patents ¶ 3.

Validity of firm contract with municipality or the public of which one partner is an officer, see Public Contracts, I, IV.
Nature of neighborhood telephone associations or organizations, see Telegraphs and Telephones.

§ 1. Definition, nature and elements.

Attention is called to the Uniform Partnership Act of 1917 codifying the law upon the subject. Specific references to that act will be found in appropriate places throughout the article.
Intent as test of partnership, see post § 3.
Community of business, profits and losses, see also post §§ 4, 5.
Limited and special partners, see post § 125.

¶ 1. Partnership involves community of interest in some lawful commerce or business for the conduct of which the parties are mutually agents for each other, but with general powers within the scope of the business, which powers they can restrict by agreement to the extent of making one the sole agent of the rest and of the business.—Beecher v. Bush, 45 Mich. 188.

¶ 2. A partnership must contain more than one person.—Stirling v. Heintzman, 42 Mich. 449.

§ 2. Partnership articles or agreement and effect and construction thereof.

Partnership by holding out or estoppel, see post §§ 12, 13.
Burden of proof and evidence as to partnership, see post §§ 14-16.
Jury questions as to partnership, see post § 18.
Certificates of copartnership, see post § 19.
Necessity of agreement to entitle a partner to compensation, see post § 58.
Right of partners to dissolve the partnership, see post § 86.
Offer and assent to offer to form partnership, see Contracts ¶ 156.
Specific enforcement of partnership agreement, see Specific Performance.
Necessity that agreements respecting real estate firms be in writing, see Frauds, Statute of, § 54.

¶ 3. Articles of partnership purporting to be between the complainant on the one part, and the defendant and a minor brother on the other, but which were executed only by the two parties, held not to have made the minor brother a partner.—McGunn v. Hamlin, 29 Mich. 476.

¶ 4. A bill of sale by one partner to a third person of all of his right, title and interest in the partnership property, the vendee assuming the undivided firm debts, constitutes the vendee a partner with the other partner, who consents to such sale, and to the vendee's standing in the place of the vendor in the firm; and the fact that the parties did not then execute articles of copartnership, but agreed to do so thereafter, is not evidence of the nonexistence of such partnership.—Harvey v. Ford, 83 Mich. 506.

¶ 5. Where the question of partnership arises, not with third persons, but between the parties themselves, the agreement out of which the supposed partnership arises is to be construed as any other instrument between the same parties.—Bird v. Hamilton, W. 361.

¶ 6. An agreement which contemplates action to be taken at once and continuously by the contracting parties for their joint benefit creates a present partnership, and not merely one that is to begin in the future.—Kerrick v. Stevens, 55 Mich. 167.

¶ 7. Whether any condition or limitation as to its duration can be ingrafted on the partnership contract as an implication from its nature, quære.—Walker v. Whipple, 58 Mich. 476

¶ 8. While copartnership articles cannot be controverted or varied by the parties thereto, third parties may show who are the real partners and owners of the business and hence may show that G. E. T. was a partner, though he had signed in the name of N. A. T., his parent.—Bishop v. Austin, 66 Mich. 515.

§ 3. Consent and intent of parties.

Intent as to property taken or held in name of partner, see post § 24.
Partnership as to third persons in absence of intent, see post §§ 12, 13.
Reputation as sufficient to establish partnership, see post ¶¶ 88, 89.

¶ 9. Whether persons are partners inter se is to be determined by the understanding and intention of the parties as between themselves; and they cannot be made such without the assent of every member, and his actual intention to become a member.—Gray v. Gibson, 6 Mich. 300.

¶ 10. The test of partnership, as between the parties themselves, is their intent.—Beecher v. Bush, 45 Mich. 188.

¶ 11. A partnership cannot be implied, as matter of law, from a business relation, if the parties thereto have not made or intended to make a partnership contract and if they have done nothing to estop them from denying the existence of a partnership.—Beecher v. Bush, 45 Mich. 188.

¶ 12. To determine whether persons are in fact partners, it is necessary to look at their intention; and this is deducible from their declaration in regard thereto, and from the agreements made with reference to the subject-matter of their dealings.—Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613.

¶ 13. Where the contract under which a business engagement is made contains an express or implied disavowal of an intention to

assume the partnership relation, no partnership will be found to exist, unless such declaration is so inconsistent with the engagement of the parties as to be irreconcilable, in which case the latter must control.—Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613.

¶ 14. The consent of all parties is necessary in order to create a partnership relation, as between the parties, and it may be express or implied, but it must be manifested or signified in some way, by writing, by parol, or by conduct.—Bush v. Haire, 197 Mich. 85.

§ 4. Community of interest in business, property, profits and losses.

Lease for portion of profits, see post § 9.

¶ 15. While it has been held that a partnership exists where there is community of property, community of interest, and community of profits, every one of these elements must be present, and the rule is not applicable if a single one is absent.—Brotherton v. Gilchrist, 144 Mich. 274.

¶ 16. An agreement between two persons to engage in the prosecution of a lawful continuing business, each to furnish a portion of the capital stock and to share in the profits and losses, constitutes them partners in such business.—Kingsbury v. Tharp, 61 Mich. 216.

¶ 17. All partners are coprincipals, but all coprincipals are not partners. Whether they are partners or not depends upon the nature of the act, and the kind and scope of the business in which the act is done; and in determining whether there is a joint interest, the benefit accruing has an important bearing.—Dumanoise v. Townsend, 80 Mich. 302.

¶ 18. A contract by which one party is to furnish money for the purchase of pine lands and the other is to manufacture the timber into lumber and shingles and sell the same and the land, the proceeds remaining after paying the expense of manufacture and sale, and after repaying advances, to be divided between the parties, is an indivisible contract, creates a partnership, and an action cannot be brought on it for the money furnished.—Corey v. Cadwell, 86 Mich. 570.

¶ 19. A contract by which a bridge-manufacturing company appoints a certain person as its agent to contract for the erection of bridges, and to do such other work as it may direct, agreeing to advance the general expenses of the business, and to pay to such person one-half of the net profits as compensation for his services, the same to be ascertained by deducting from the contract price for each bridge the cost of the material and labor entering into its construction, does not create a partnership as between the parties, although it also provides that any losses are to be borne equally; such person not being required to make any cash investment, and it not appearing that he was to own any share in the materials furnished.—Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613.

¶ 20. Parties who advance money for the prosecution of a business, they to make further advances and to receive an interest in the indebtedness thus created and also to receive and apply the profits in liquidating such debt, succeed to the entire proprietorship of the business, and are liable as partners to third persons upon contracts entered into in carrying on the same.—Purvis v. Butler, 87 Mich. 248.

¶ 21. An ostensible partner who has no actual interest in the business and is not entitled to any profits or to any of the firm property, whereas another person is entitled to half the profits and to half the entire firm property on its termination, and to the return of the entire capital invested by him, is not the real partner, the other person being sufficiently shown to be the real partner by the facts thus appearing.—Webb v. Johnson, 95 Mich. 325.

¶ 22. Where A. furnished timber, capital and all his time in the manufacture of shingles, and was to have interest and two-thirds of the net profits, and B. was to have one-third, the agreement formed a partnership.—Wells v. Babcock, 56 Mich. 276.

¶ 23. H. made an agreement with E. whereby he was to look up desirable lands and bid them in at tax sales, E. furnishing the money to pay for them. Both were to control alike the subsequent disposition of the lands, and after E. had been repaid what he had advanced, they were to divide the profits equally. Their community of interest extended to both profit and loss. On a bill by H. to wind up the partnership, this arrangement was admitted by demurrer. Held, that it constituted a partnership, if the parties stood to each other in the relation of principals and not of master and servant: and that the fact that the title to the lands was taken in E.'s name was immaterial.—Hunt v. Erikson, 57 Mich. 330.

¶ 24. An agreement by a land owner and another by which his land was to be set apart on which to build a hotel at joint expense, the remainder of the land to be farmed as a joint venture, requiring from each an equal contribution of money and entitling each to one-half of the profits, and requiring semi-annual accountings, furthermore giving to such other an option to buy the land set apart for a half of an agreed valuation, constitutes them partners.—Johnson v. Fowler, 68 Mich. 1.

¶ 25. In a suit for accounting it was held, that upon the testimony as to the terms of an agreement entered into between defendant and complainant's intestate for the cutting and selling of the timber upon certain lands,

and upon the testimony showing how the business was conducted, the parties were partners in the venture, although their agreement mentioned only profits and a contract was carried in the name of the member advancing the money and credit for the venture, and the other partner who conducted the operations was paid the labor value of his services.—Loveland v. Peter, 108 Mich. 154.

¶ 26. A parol agreement for the sale of a half interest in land pursuant to which each party contributes part of the capital, the rents are divided, and the vendee pays a portion of the improvements, will be enforced as a partnership venture, the part performance having given it definiteness and certainty.—Shearer v. Gibson, 123 Mich. 467.

§ 5. ——Sharing in profits and losses.

Right of partner to participate in profits of separate business of copartner, see post § 59.

Necessity that agreement to share profits and losses of firm be in writing, see Frauds, Statute of, § 15.

Agreements for payment of share of profits as royalties for use of patent rights, see Patents §§ 4, 5.

Sharing of profits and losses as elements in partnership, see Uniform Partnership Act § 7.

¶ 27. To constitute one a partner as to third persons he need not agree to share in the losses of the business; if he shares in the profits he thereby deprives creditors of part of the means of payment, and this is sufficient.—Sager v. Tupper, 38 Mich. 258.

¶ 28. An agreement to carry on business and receive half the profits does not, as an isolated fact, make one a partner.—Wilcox v. Matthews, 44 Mich. 192.

¶ 29. Merely sharing in profits, where third persons have not been legitimately led to believe there was a partnership, does not create one as to them, unless there was one in fact.—Beecher v. Bush, 45 Mich. 188; Colwell v. Britton, 59 Mich. 350.

¶ 30. Participation in the profits does not necessarily make persons copartners.—Scholtz v. Freud, 128 Mich. 72.

¶ 31. An arrangement by which one person is to share the profits of a business with another does not make him a general partner in any such sense as to deprive him of his right to certain additional specific compensation which has been agreed upon.—Hamper's Appeal, 51 Mich. 71.

¶ 32. An arrangement for sharing profits may be shown in proof of partnership, but is not conclusive evidence of it.—Thayer v. Augustine, 55 Mich. 187.

¶ 33. Profit sharing is evidence tending to show partnership, but to constitute one a partner as to third persons it is not necessary that he agree to share in the losses of the business.—Dutcher v. Buck, 96 Mich. 160.

¶ 34. An agreement to share in the profits of a venture does not constitute a partnership as between the parties if contrary to their intention, but it is strong evidence of the intent, and, where there is a community of interests and capital, is sufficient to establish such relation unless rebutted by satisfactory evidence.—Corey v. Cadwell, 86 Mich. 570.

¶ 35. Whether a creditor who takes a share in the profits for the use of money advanced occupies the relation of creditor or partner must be determined by the agreement of the parties as between themselves, and, as to third persons dealing with them, by the rights of such third persons.—Purvis v. Butler, 87 Mich. 248.

¶ 36. Where two agree that one shall go on the other's land, cut logs and bolts, market and sell the same, receive the proceeds, pay expenses, and pay the other so much per thousand for stumpage and per cord for bolts, he to have $20 a month for his services, and his wife $3 a week for boarding the men, each party to supply one team, the rest of the proceeds to be divided equally between the two, they are as to third persons partners in the undertaking, though they had no understanding about bearing losses, except an inference that the operating member should do so.—Dutcher v. Buck, 96 Mich. 160.

¶ 37. A retiring partner and a member of the newly constituted firm succeeding the old one are not partners by virtue of an agreement that the continuing one is a half owner of a certain mortgage and other property at a stated price to be paid when realized, and that the half interest in the continuing one's share in the new firm is owing to the retiring one, to be paid when realized.—Marsh v. Mueller, 96 Mich. 488.

¶ 38. Mere participation in the profits and losses of a business does not necessarily constitute a partnership inter se.—Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613.

§ 6. Particular relations or enterprises as partnerships.

Joint interests or ventures, see post § 8.

Leasing on shares or for portion of profits, see post § 9.

Incomplete or defective incorporation, see post § 11.

Distinguished from voluntary associations, see Associations § 1.

¶ 39. An association in which the conditions of membership are the payment of an entry fee and of pro rata assessments, but which does no business involving profit or loss, is not a partnership, but a combination;

and the members are not personally liable on contracts made by its officers beyond their individual assessments.—Burt v. Lathrop, 52 Mich. 106.

¶ 40. Complainant and defendants entered into a voluntary association as a farmer's union. The union organized a community store, each member contributing a certain sum in cash or by note. The complainant as manager advanced money to keep the business running. On a bill for an accounting, held, that the contract was insufficient to form a partnership.—McDonald v. Flemming, 178 Mich. 206.

¶ 41. A contract for the manufacture by defendants of certain machines to be sold by plaintiff at a price fixed by defendants, with an agreed discount therefrom to plaintiff on machines sold, did not create partnership relations between the parties.—Oliver v. Perkins, 92 Mich. 304.

§ 7. Partnership or employment relation.

Relation of master and servant in general, see Master and Servant.

¶ 42. An agreement which purports on its face to be a copartnership agreement and which provides that the parties thereto shall share equally in expenses, losses, and gains, cannot be treated as a mere contract of employment.—Smith v. Walker, 57 Mich. 456.

¶ 43. Where one owning lands makes an arrangement with another to cut and run the cedar posts on the lands at his own expense on shares, the latter receiving half the posts and paying all the cutting expenses, these expenses cannot be regarded as partnership expenses, nor is the business such as to authorize any necessary inference of partnership.—St. Denis v. Saunders, 36 Mich. 369.

¶ 44. A contract by which a merchant agrees to pay an employee a stated salary and a certain percentage of the profits of the business does not, as matter of law, constitute the parties copartners.—Stockman v. Michell, 109 Mich. 348.

¶ 45. A contract by which one agrees to manage and superintend the business of another for a fixed annual sum and a share of the profits from the business does not make the parties thereto partners, the share of the profits being simply the measure of the compensation for the services.—Morrow v. Murphy, 120 Mich. 204.

¶ 46. An agreement binding one party to get out lumber for the other during a specified season, the latter receiving a fixed proportion of the net profits of the job above expenses, does not constitute the parties partners, if at all, except for the season specified, even though the agreement was made some time before.—Hall v. Edson, 40 Mich. 651.

¶ 47. A subcontract whereby the subcontractor is to receive as compensation a specified percentage of the profit arising from the performance of the portion of the contract entrusted to him is not a partnership contract of which equity has exclusive jurisdiction.—Carpenter v. Lennane, 166 Mich. 610.

§ 8. Mere joint interest or venture.

Definition and nature of joint adventures, see Joint Adventures § 1.

Immateriality of partnership on issue as to joint contract, see Contracts ¶ 1260.

Co-ownership as establishing partnership, see Uniform Partnership Act § 7.

¶ 48. A joint and equal interest in an enterprise does not of itself make the holder a partner.—Edson v. Gates, 44 Mich. 253.

¶ 49. Two persons arranged that one should furnish certain hay and the other transport it to a market to sell it; if the latter sold at not less than a given rate he was to receive a specified sum per ton and pay over the rest; if he sold at more than the minimum, the excess was to be equally divided; and if he failed to sell he was to store the hay for the other and wait till it should be sold for reimbursement for his freight charges; held, that this did not make the parties partners, and that in the absence of any authority to sell on credit, the one who received the hay was liable for all the hay he sold, and if he gave credit did so at his own risk.—Morrison v. Cole, 30 Mich. 102.

¶ 50. Several part owners of a vessel are not regarded as partners unless it distinctly appears that they are such.—Mitchell v. Chambers, 43 Mich. 150.

¶ 51. A. agreed to buy a timber tract, cut and saw the timber, and ship it to B., who was to pay A. the cost of the timber and a certain price per thousand, sell it, and divide the net profits or losses with A. Held, that there was no partnership in unshipped lumber.—Monroe v. Greenhoe, 54 Mich. 9.

¶ 52. The fact that the owners of ferryboats run them as joint property, pay the expenses out of the earnings, and divide the profits according to such ownership, but have no partnership name, and do not understand, as between themselves, that they are partners, will not make them such, whatever their relations may be as to third parties.—Runnels v. Moffat, 73 Mich. 188.

¶ 53. A pooling agreement for traffic purposes by which vessel owners operated their vessels as one line under a traffic manager, but without merging their individual ownerships or destroying their identity as distinct lines under their own names, is not a partnership but a combination or pooling agreement.—White Star Line v. Star Line of Steamers, 141 Mich. 604.

¶ 54. A series of independent transactions wherein W. selects lands and B. supplies money and buys them, and they divide the profits on selling them again, do not in themselves establish a partnership. Nor would an accumulation of such purchases and the holding of the lands for suitable opportunities to sell or for lumbering.—Wells v. Babcock, 56 Mich. 276.

¶ 55. An agreement to buy certain personalty and to sell the same, dividing the proceeds equally, does not constitute a partnership between the parties.—Murphy v. Craig, 76 Mich. 155.

¶ 56. Where two men have discovered a mine and secured an option thereon, after which one of the two makes an agreement with outside persons by which the mine is to be developed, the other discoverer does not, merely by retaining an interest in the option, become a copartner in the enterprise.—Sullivan v. Deiter, 86 Mich. 404.

¶ 57. An agreement whereby a husband and wife lease certain hotel premises and buy certain furniture and fixtures does not necessarily constitute them partners.—Wineman v. Phillips, 93 Mich. 223.

¶ 58. Persons interested in a joint venture are not partners unless one of them has clothed the others with an agency to act on his behalf in the business.—Brotherton v. Gilchrist, 144 Mich. 274.

¶ 59. Where three persons entered into a joint venture, one agreeing to manage the enterprise for which he was to receive a salary, the second to contribute his counsel and advice, and the third to advance the capital, with his liability limited to his advances, and whose connection with the venture was not to be disclosed, but the business carried on in the name of the other two, with an understanding that the profits were to be divided equally except that the third person was to have no return on his advances until all other obligations had been met, and he was to have no authority to make contracts binding the other two, and neither could they bind him, such third person is not in fact a partner.—Brotherton v. Gilchrist, 144 Mich. 274.

§ 9. Lease on shares or for portion of profits.

Sharing in profits as element of partnership, see ante § 5.

¶ 60. An agreement whereby the owner of a farm rents it for a term of years, and furnishes to the tenant the stock on the farm, and one-half the seed grain, and pays one-half the expenses of carrying on the farm, exclusive of charges for labor, which is furnished and paid for by the tenant, the owner receiving from the tenant one-half the products, does not constitute the parties copartners.—Williams v. Rogers, 110 Mich. 418.

¶ 61. Renting a saloon for half the profits of the business does not make the landlord a partner of the tenant.—Thayer v. Augustine, 55 Mich. 187.

¶ 62. An arrangement by which one man "hires the use" of another's building from day to day and opens and keeps it as a hotel, paying the owner daily a sum "equal to one-third of the gross receipts and gross earnings," does not of itself constitute them partners.—Beecher v. Bush, 45 Mich. 188.

§ 10. Continuation in business by personal representatives.

See also post ¶ 70.

Rights and duties of personal representatives of partner, see post § 99.

¶ 63. An administrator of a deceased partner who makes an agreement with the surviving partner to continue the business for an indefinite time with the firm property and for their joint benefit becomes a partner in the business and liable as such.—City Nat. Bank of Lansing v. Stone, 131 Mich. 588.

§ 11. Incomplete or defective incorporation.

Effect of corporate officers conducting business as if they were partners, see also Mines ¶ 61.

¶ 64. Where persons associate themselves under articles, to purchase property and carry on a manufacturing business, and their organization is so defective as to come short of creating a corporation within the statute, they become, in legal effect, partners, and their rights as members of the company, to the property acquired by the company, will be recognized and protected.—Whipple v. Parker, 29 Mich. 369.

¶ 65. Parties associating together in the organization of a corporation under a void law, and sharing the profits and losses of the business equally, according to the money each put in as capital stock, of which they were equal owners, are liable to parties dealing with them as copartners, notwithstanding they acted in good faith and under the advice of counsel.—Eaton v. Walker, 76 Mich. 579.

¶ 66. When fraudulent associates assuming under an invalid statute to act as a corporation may be held as partners, see Cook v. Wheeler, H. 443; Wheeler v. Clinton Canal Bank, H. 449; State of Michigan v. How, 1 Mich. 512.

§ 12. Partnership as to third persons; holding out.

See also post § 13, ¶ 215.

Provisions relating to partnerships as to third persons or by estoppel, see Uniform Partnership Act §§ 7, 16.

¶ 67. There can be no such thing as a partnership as to third persons when there is

none as between the parties themselves, and third persons have not been misled by concealment of facts or by deceptive appearances.—Beecher v. Bush, 45 Mich. 188.

¶ 68. One may become liable as a partner to third persons, though it was not his intention to become a partner, and even though a partnership could not have been made.—Cleveland Paper Co. v. Courier Co., 67 Mich. 152.

¶ 69. When two persons authorize a third to hold himself out as a partner with them, and he does so accordingly, this is as much their holding themselves out as such partners as if the same representations had been made by them in person.—Hinman v. Littell, 23 Mich. 484.

¶ 70. Where, after the death of a partner, one of his survivors has taken no part with the rest in carrying on partnership business, he is not bound by any implication that they constitute a new firm.—Matteson v. Nathanson, 38 Mich. 377.

¶ 71. A firm composed of two women put the husband of one in absolute charge of the business, and he thereafter made purchases on his own credit, and with his wife's knowledge and consent acted in all respects as if he, instead of his wife, was one of the partners. Held that, as to creditors who had no notice to the contrary, he was to be considered as a partner; that his statements to a creditor to that effect were admissible in defense to an action of trover for goods taken on attachment; and that, unless superior equities had arisen, a judgment against the firm concluded the other partner. Such equities could not arise from the purchase alone in favor of the partner whose responsibility did not appear.—Parshall v. Fisher, 43 Mich. 529.

¶ 72. Receipting in a firm name, but in the form used by agents, puts the person making payment on inquiry as to the receiptor's authority to take the money.—Chase v. Buhl Iron Works, 55 Mich. 139.

¶ 73. Persons who are not partners may, nevertheless, be held liable as such for goods furnished them at the request of either, if they have held themselves out as partners, and the bills incurred by one have been acquiesced in by the other.—Kritzer v. Sweet, 57 Mich. 617.

¶ 74. Where, in a suit against two defendants as copartners, it appears that plaintiff had dealt with defendants at a time when it was admitted that a partnership existed; that no notice of dissolution had been given; that the business was being conducted under the firm name at the time the goods, to recover the purchase price of which the suit is brought, were sold, the same as before the time one of the defendants claims to have retired from the firm; and that letters were written with the firm heading, and with said defendant's name appended thereto, as before the alleged dissolution,—said defendant remained as to the world, ostensibly, a partner, and is liable as such to plaintiff.—Morrill v. Bissell, 99 Mich. 409.

¶ 75. Where a vendor sells goods to company, not knowing whether it is dealing with copartners or with a corporation, it cannot sue the members of the corporation as copartners on the theory that it supposed it was dealing with them as individuals.—Newcomb-Endicott Co. v. Fee, 167 Mich. 574.

§ 13. Estoppel to assert or deny partnership.

See also ante § 12.

Admission of partnership by appearance and plea, see post ¶ 397.

General law of estoppel, see Estoppel.

Instruction on estoppel to deny partnership, see also Estoppel ¶ 276.

Estoppel to claim partnership for purpose of charging corporators as partners, see also Corporations § 109.

Provisions as to partnership by estoppel, see Uniform Partnership Act §§ 7, 16.

¶ 76. Where one receives money from another as an individual who was in lawful possession thereof and interested therein, and expressly agrees to account for it, he is estopped by his contract from setting up the rights of any third party therein as a partner when called upon to account.—Sinclair v. Murphy, 14 Mich. 392.

¶ 77. Where a body professing to be a corporation has been dealt with as such, one who has so dealt with it cannot question its corporate existence for the purpose of charging its members individually as if they were partners.—Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779.

¶ 78. Joint defendants are not estopped from denying a joint liability as partners where the facts found do not establish one though they all may be liable for deceit.—Bennett v. Dean, 41 Mich. 472.

¶ 79. An estoppel may arise against a partner from allowing another person to be put forward as the real party in interest and to be represented after dissolution of the firm as the only owner of the business.—Parshall v. Fisher, 43 Mich. 529.

¶ 80. The fact that a third person interested in a joint adventure where the other two were partners had, after the business in which they were engaged ended, announced his intention of paying all outstanding accounts did not enlarge his original obligation when accompanied by no admission of liability and did not make him a partner.—Brotherton v. Gilchrist, 144 Mich. 274.

¶ 81. Irrespective of the actual relationship between them, persons inducing by

fraudulent representations, the sale of the property of an ostensible partnership, held, as against the purchaser, estopped from denying the partnership.—Schwier v. Hurlburt, 184 Mich. 698.

¶ 82. Where a party had failed to perform the preliminary conditions, upon a compliance with which a copartnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and for a short time carried on the business in the name of the proposed firm, it was held that this was no waiver, and could not entitle the defaulting party to the rights of a partner.—Bird v. Hamilton, W. 361.

¶ 83. In an action to charge defendants as copartners with the indebtedness of a banking institution, it is error to hold the defendants estopped from showing that in fact they were not partners, by reason of their having silently allowed the proprietor of the bank to represent them in printed notices, as directors; such representations could not reasonably have misled anyone into believing defendants were partners, or into trusting the bank on that basis; the most anyone could insist upon would be that he had a right to regard the representations as true, and, treating them as true, they do not suggest the existence of a partnership.—Bennett v. Dean, 35 Mich. 306.

§ 14. Burden of proof and presumption as to partnership.

Burden of proof and presumptions in actions by and against firm or its members, see post § 71.

Burden of proof and presumptions in taking account, see post § 111.

¶ 84. One who brings suit as against partners must show the existence of a joint contract or joint promise, express or implied.—Sager v. Tupper, 38 Mich. 258.

¶ 85. The burden to establish a partnership inter se rests upon the partner attempting to prove it.—Bush v. Haire, 197 Mich. 85.

¶ 86. The burden of showing a copartnership between parties is upon him who alleges it.—Fletcher v. Fletcher, 197 Mich. 68.

§ 15. Admissibility of evidence as to partnership.

Weight and sufficiency of evidence as to partnership, see post § 16.

Admissibility of evidence in actions by or against firm or its members, see post §§ 72, 81.

Evidence in proceedings for accounting, see post § 112.

Copartner's acts and declarations as res gestæ, see Evidence § 477.

Parol evidence to convert joint and several instrument into firm contract, see also Evidence § 182, ¶ 1087.

Opinion evidence as to existence, see Evidence § 217.

Best and secondary evidence of partnership, see Evidence § 127, ¶ 639.

Proper cross-examination of witness to existence of firm, see Examination of Witnesses ¶ 474.

¶ 87. The unity of interests in plaintiffs claiming as copartners may be shown by circumstantial evidence.—Hadden v. Shortridge, 27 Mich. 212.

¶ 88. General reputation is inadmissible to prove partnership.—Sager v. Tupper, 38 Mich. 258.

¶ 89. Reputation of a partnership is not sufficient to establish it between the parties.—Fletcher v. Fletcher, 197 Mich. 68.

¶ 90. In an action in which it was sought to charge defendants as partners owning a mill, the plaintiff introduced evidence tending to show that one of them exercised authority about the mill. Held, that by way of rebutting the inference that he was interested as a copartner, it was proper to show that others gave like directions; but not to prove his statements disclaiming such interest.—Sager v. Tupper, 38 Mich. 258.

¶ 91. Where it was claimed in defense to a suit for converted property, that the defendant took it by right of survivorship as partner, testimony that he lacked means was immaterial and had no tendency to disprove the partnership relation, which would have to be made out.—Howard v. Patrick, 43 Mich. 121.

¶ 92. The testimony of those who had dealt with the firm, showing their understanding as to who composed it, and also the whole state of facts as to how the business was done, were admissible, as was also a conversation concerning the payment of a claim, carried on between the husband and the attorney of an attaching creditor, in the wife's absence, but in the presence of a transferee of the firm property, and before the latter had parted with any consideration.—Parshall v. Fisher, 43 Mich. 529.

¶ 93. Evidence that an arrangement for carrying on business for a share of the profits was entered into under an advertisement for a partner is admissible as tending to show a partnership.—Wilcox v. Matthews, 44 Mich. 192.

¶ 94. On an issue whether a sale to defendant, sued for conversion, was ratified, it was claimed that the seller was in partnership. A lawyer testifying as to matters bearing the alleged partnership was asked, on cross-examination, whether the other alleged partner signed any of the business bonds which witness had drawn up for the plaintiff, and he answered negatively. Held,

that the question, though not conclusive, was relevant.—Hake v. Buell, 50 Mich. 89.

¶ 95. Testimony by plaintiffs in suit for deposits against surviving partner of banking firm who denied partnership, that they made deposits in reliance upon information from cashier as to the existence of the firm, and that thereafter they understood that the surviving defendant and his deceased codefendant composed the firm, is admissible.—Wright v. Weimeister, 87 Mich. 594.

¶ 96. The membership of a firm may be shown by the testimony of the manager of its business, not necessarily by one of the partners.—Rice v. City of Muskegon, 150 Mich. 679.

¶ 97. Evidence that one codefendant introduced the other to a salesman as his partner on communication of which fact the salesman's principal shipped goods to the firm is admissible to prove partnership by holding out in favor of that principal, but not in favor of another to whom no such holding out was made.—Armstrong v. Potter, 103 Mich. 409.

¶ 98. Evidence that a salesman for another dealer told plaintiff that defendants were partners and that the salesman had been introduced to them as such, is admissible as evidence that there was a partnership, but not to prove estoppel to deny partnership as against plaintiff.—Armstrong v. Potter, 103 Mich. 409.

¶ 99. Defendant dissolved partnership with one Casper Alpern, the senior member, without giving notice to the public. Casper Alpern thereafter signed the firm name to a note given to a bank; plaintiff indorsed the note, and was compelled to pay it. In a suit to recover the amount paid from defendant, held, evidence was admissible to show that the general understanding in the community was that defendant continued to be a member of the firm.—Culligan v. Alpern, 160 Mich. 241.

¶ 100. The membership of a copartnership cannot be established by the introduction in evidence of city directories.—Bilakos v. Kelley, 200 Mich. 125.

§ 16. Weight and sufficiency of evidence.

See also ante ¶ 44.
Intent as test of partnership, see ante § 3.
Sharing in profits and losses, see ante §§ 4, 5.
Admissibility of evidence as to partnership, see ante § 15.
Weight and sufficiency of evidence in actions by or against firm or its members, see post §§ 73, 81.
Evidence in accounting proceedings, see post § 112.

¶ 101. A partnership inter se must be established by clear and preponderating evidence.—Bush v. Haire, 197 Mich. 85.

¶ 102. Stricter proof of the existence of a copartnership is required between the partners than as against outsiders, especially when the one most interested is dead.—Fletcher v. Fletcher, 197 Mich. 68.

¶ 103. An agreement for the formation of a limited partnership, executed under the laws of another state, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the persons named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners.—Gray v. Gibson, 6 Mich. 300.

¶ 104. Where an attempt is made to hold A. responsible for the acts of B., claimed to be his partner, the partnership must be clearly shown.—Campbell v. Sherman, 49 Mich. 534.

¶ 105. A lawyer proposed to a real estate agent that they should together buy land and subdivide it and that the agent should sell it. It was a question whether the agent should put in any money, and whether he should share profits or sell on commission. There was no common fund, and money was to be advanced as required for individual purchases. Held, that the evidence was too vague to prove a partnership and support a bill by the agent for an accounting as to a parcel of land purchased and taken in the name of a third person.—Pulford v. Morton, 62 Mich. 25.

¶ 106. That two parties have contributed for the joint purchase of a vessel, that a bill of sale is made out to them jointly and that they have agreed to do business in operating the vessel, is evidence to show that a partnership existed for the purchase and running of a vessel.—Groth v. Payment, 79 Mich. 290.

¶ 107. The evidence is sufficient to show that defendants continued as partners after plaintiff had retired from the firm where there is some testimony that one dissenting from the withdrawal, as claimed, continued in the firm after notice of attempted sale to another.—Berridge v. Slawson, 94 Mich. 484.

¶ 108. Evidence that A., with whom a railroad company had contracted for construction work, and B., asked the company to send checks to the laborers; that money was paid to B., and that he signed time-checks, and that A. and B. were present and aided in the settlement of subcontractors' claims, is, sufficient to justify a finding that there was a partnership between A. and B.—Dawson v. Iron Range & H. B. R. Co., 97 Mich. 33, per Grant and Long, JJ., Montgomery, J., concurring in the result.

¶ 109. Evidence that a son used the words "we" and "our" in connection with the business carried on for and with his father, that he contemplated that he would eventually succeed to such business, and that he con-

ducted it after it was transferred to him in the same way as before the transfer, is insufficient to prove that he was a partner, and therefore incapable of taking the property as against creditors.—Hill v. Mallory, 112 Mich. 387.

¶ 110. Evidence of a partnership between husband and wife was negatived by testimony that the wife who was the defendant in an action for goods delivered, and disclaimed liability on the ground that the goods were sold to such partnership, had given many notes during several years to plaintiff signed by her personally; that she had claimed to have purchased the business in question from her husband as administrator of her son and that the business was done in her name and credit was extended to her alone.—Johnson v. Costigan, 122 Mich. 596.

¶ 111. A finding of a copartnership between plaintiff and defendant will be sustained where the parties carried on business jointly and from the evidence an intent to enter into such partnership appeared.—Edwards v. Zuck, 171 Mich. 29.

¶ 112. On bill by the administratrix alleging that a partnership existed between intestate and defendants and praying for an accounting, held, that the evidence fails to establish the existence of the alleged partnership or that the decedent ever owned an interest in certain property as alleged.—Brown v. Brown, 175 Mich. 442.

¶ 113. The allegations of a bill by the administratrix against alleged partners of her intestate for an accounting that they with decedent contributed a certain amount toward the purchase price of a boat and that a cargo purchased by the partners was sold at a profit are not supported where several of the alleged partners testify that decedent had no interest in the boat and cargo and where the administratrix shows no facts or circumstances in corroboration of her claim that decedent put money into the boat and there is no showing that he had the amount alleged to have been contributed, that he was one of the vendees named in the bill of sale, that he furnished money to purchase the cargo or that it was sold at a profit.—Brown v. Brown, 175 Mich. 442.

¶ 114. On bill for an accounting by an executor on the ground that defendant and plaintiff's testator were partners in the purchase and business of conducting a farm where defendant furnished the purchase price, the parties who were experienced business men and old friends made no writing and the evidence is conflicting, held, that the evidence falls short of establishing a partnership.—Miller v. Casey, 176 Mich. 221.

¶ 115. On a bill by one alleged partner against another for an accounting evidence held to sustain a finding that complainant and defendant agreed to be partners and equal owners in whatever stock in two corporations defendant had or they subsequently acquired from the other stockholders.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

¶ 116. In an action by the assignees of fire insurance policies on such policies evidence held insufficient to show that a certain person was not a member of the firm of the insured.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

¶ 117. Evidence held insufficient to establish a general partnership for engaging in the real estate business.—Bush v. Haire, 197 Mich. 85.

¶ 118. Evidence held insufficient to show the existence of a copartnership between plaintiff, his brother, a defendant, and their father, deceased, in a suit against the executors of the decedent's estate, where it appeared that the decedent's intention was that his three children should share equally in his estate at his death and the effect of holding that a copartnership existed between him and two of his children would be to deprive the third child of substantially two-ninths of his estate.—Fletcher v. Fletcher, 197 Mich. 68.

§ 17. ——Holding out and estoppel.

Partnership by holding out and estoppel, see also ante §§ 12, 13.

¶ 119. In the absence of a statute forbidding an individual to use a name signifying an association of persons, like "W. & Co.," the use of such a name does not warrant an assumption that there are partners.—Brennan v. Pardridge, 67 Mich. 449.

¶ 120. Where W. and O. were partners in a merchandising and banking business and dissolved, O. selling out to W. and the business continued under the firm name of W. & Co., A., a brother of W., becoming a partner in the new firm, the announcement of the new partnership being made in the two local newspapers, and A. himself announcing as a partner to various persons, he having been further an employee of the old firm, held to warrant a conclusion that a member of a dissolved firm and A. were not only estopped from denying that they were partners in a new firm, but also that they were partners in fact.—Wright v. Weimeister, 87 Mich. 594.

¶ 121. Liability as a partner on a partnership note given to a bank was established by verdict, where it appeared that prior to the giving of the note the defendant was introduced to one of plaintiff's directors as a partner in the firm; that he was so designated in letterheads; that he wrote to the bank objecting to bonds which had been placed as collateral by the firm; that a letter had been

written by him to the bank stating above the firm signature that he was authorized to sign checks and transact business for the firm and that a statement in his handwriting showed his proportion of the profits of the firm.—Peninsular Savings Bank v. Currie, 123 Mich. 666.

¶ 122. The fact that one of three in a joint venture referred in correspondence with the others to himself as a "silent partner" is not conclusive as to the existence of a partnership in this case, but an instance of the use of inexact words to describe a relation which was other than that of a partner.—Brotherton v. Gilchrist, 144 Mich. 274.

¶ 123. Defendant dissolved partnership with one Casper Alpern, the senior member, without giving notice to the public. Casper Alpern thereafter signed the firm name to a note given to a bank. Plaintiff indorsed the note, and was compelled to pay it. In a suit to recover from defendant the amount paid, it was shown that formerly there was a partnership; that it had been dissolved without notice; that the general understanding in the community was that defendant continued a member; and that the subsequent city directories held him out as a member. Held, the evidence was sufficient to support a verdict against defendant as a partner, by estoppel. —Culligan v. Alpern, 160 Mich. 241.

¶ 124. Persons who have never agreed to become partners in a firm, who have never held themselves out as such, or contributed to its capital or shared in its profits, cannot be considered as partners; and the facts that they held a mortgage upon the firm property, and that one of them, whose son-in-law was a member of the firm, indorsed its paper, do not tend to prove that they were partners. —Hunt v. Oliver, 118 U. S. 211, 30 L. ed. 128, 6 Sup. Ct. Rep. 1083.

§ 18. Jury questions and instructions.

Jury questions in actions by and against firm or members, see post §§ 74, 81.

Instructions not erroneous as failing to point out numerical preponderance of witnesses as to partnership, see Instructions ¶ 535.

General law as to jury questions, see Trial, VI.

¶ 125. Facts tending to show a partnership are for the jury in an action involving partnership liability.—Chamberlain v. Jackson, 44 Mich. 320.

¶ 126. In an action against three persons for goods sold and delivered, in which it was sought to charge two of them as partners of the third, the trial court left the jury to determine, as matter of fact, whether by the understanding and agreement of all three the two were to share in the profits, and, if so, the jury were told they would be liable as partners. Held correct.—Hinman v. Littell, 23 Mich. 484.

¶ 127. In an action on an account stated, evidence that the defendants admitted that they were doing business as partners should be allowed to go to the jury, even if not specifically confined to the time within which the account accrued.—Sager v. Tupper, 38 Mich. 258.

¶ 128. Testimony showing a business relation between parties to have been made under an advertisement for a partner may account for a jury's finding a partnership to exist.—Wilcox v. Matthews, 44 Mich. 192.

¶ 129. Suit on a promissory note was brought against certain persons named Spear, Wetmore and Freeman "as copartners doing business under the firm name of Propeller Ira Chaffee." The note was made payable to "Prop. Ira Chaffee," and was indorsed "Prop. Ira Chaffee, F. B. Spear, ma'g'r, F. B. Spear, W. L. Wetmore." Freeman alone defended, and he pleaded the general issue with an affidavit denying execution. There was evidence tending to show that he and the other defendants owned the propeller, and that the profits from it were shared in the ratio of their interests. Held, that in submitting the case the powers and duties of managing owner and the rights and liabilities of the owners were immaterial, but that the case should be left with the jury with proper instructions dependent on finding a copartnership in fact as the foundation of any right to recover.—First Nat. Bank of Negaunee v. Freeman, 47 Mich. 408.

¶ 130. The existence of a partnership, as between the parties, is a question of fact for a jury. And it is negatived by a verdict permitting recovery if there could be no recovery otherwise.—Densmore v. Mathews, 58 Mich. 616.

¶ 131. Where, in a case involving the question of partnership in fact, there is no dispute as to the terms of the partnership agreement, it is for the court to construe it. —Kingsbury v. Tharp, 61 Mich. 216.

¶ 132. Where in a suit involving the question whether plaintiffs were copartners, so that the agreement of one would bind both, defendant testifies that one plaintiff informed him at the time the contract sued upon was made that plaintiffs were partners in the transaction covered by the contract, and plaintiff referred to is sworn as a witness in the case, and nowhere disputes such testimony, it is error to submit to the jury the question whether he made such statement.—Cook v. Blake, 98 Mich. 389.

¶ 133. Where, in a suit against alleged partners, there is testimony that each defendant has admitted the existence of the partnership, it is proper to submit that question to the jury, even though both defendants deny making such admissions, and testify to facts which, if believed, show that they are

not partners.—Armstrong v. Potter, 103 Mich. 409.

¶ 134. In replevin for live stock claimed by plaintiff as surviving partner, the question of the existence of the partnership was properly left to the jury, where there was evidence from which the jury might have inferred a purpose to make the property common property, although the testimony was quite as consistent with a contrary theory.—Sparling v. Smeltzer, 133 Mich. 454.

¶ 135. Testimony of the seller's salesman that he took an order from one of the alleged partners on a certain day and that the firm was then composed of defendants is sufficient to go to the jury on the existence of the firm against the denial of one of them that he had sold out and never knew of the order.—Smith & Cheney Co. v. Schmidt, 142 Mich. 1.

¶ 136. Where plaintiffs sue as partners, not upon any contract made or dealings had with them as such, nor upon negotiable paper, and the partnership is put in issue, the real question to be submitted to the jury is whether the plaintiffs are partners as between themselves, and not whether they have, in any way, made themselves liable as partners to third persons. And it is erroneous for the court to charge the jury that, if the evidence shows the plaintiffs have made themselves partners as to third persons, they have in fact become general partners, and as such are entitled to maintain the action.—Gray v. Gibson, 6 Mich. 300.

¶ 137. An instruction that the fact that business is carried on in the name of a person "& Co.," is evidence of the existence of a partnership is error, as there is no statute prohibiting an individual from carrying on business under a trade name.—Munton v. Rutherford, 121 Mich. 418.

¶ 138. An instruction that if a person knew that her name had been mentioned in a newspaper as a member of a partnership, that she was bound to deny the partnership, by full publication, or she would be estopped to deny the partnership, is erroneous where the newspaper item was a mere news item, and it was not shown that the person mentioned assented to it, or that credit had been given on the strength of such assent.—Munton v. Rutherford, 121 Mich. 418.

¶ 139. In an action to charge the defendants as partners it is error to instruct that participation in the profits is at least some evidence of partnership where the instruction is preceded by instructions as to joint interest so as to warrant the assumption by the jury that participation in the profits was sufficient to show a partnership without taking into consideration the defense that the profit sharing was in part payment of a loan from one alleged partner to another.—Scholtz v. Freud, 128 Mich. 72.

¶ 140. An instruction in an action in which the question whether the defendant dealt with a partnership was in issue, stating that a partnership could be proven from what the parties held themselves out to be, and what they said about it, etc., was not erroneous on the ground that a partnership cannot be proven by the admission of one of the partners so as to bind the other, where the defendant gave evidence that his contract was made with both.—Weeks v. Hutchinson, 135 Mich. 160.

§ 19. Certificates of copartnership and filing of same.

Failure to file certificate as affecting right to enforce partnership demands, see post § 64.

¶ 141. A certificate filed in compliance with Pub. Acts 1907, No. 101, How. 2nd Ed., § 2626 et seq., is a compliance with the essential provisions of Pub. Acts 1913, No. 164, providing that any copartnership that has filed the certificate required by the former act shall not be required to file the certificate required by the latter act.—Rennie v. Stelter, 196 Mich. 480.

¶ 142. The mere fact that a person dealing with a copartnership knows who the members of such copartnership are does not relieve the firm from the necessity of filing the certificate required by Act 164 of Laws 1913.—Maurer v. Greening Nursery Co., 199 Mich. 522.

¶ 143. Payment under a contract cannot be enforced by a copartnership which, although it does not come within the proviso in Act 164 of Laws 1913, has not filed the certificate required by such act, and the fact that the debtor actually knew who the members of the copartnership were is immaterial.—Maurer v. Greening Nursery Co., 199 Mich. 522.

¶ 144. Innocent parties dealing with a copartnership in ignorance of the fact it has not complied with Pub. Acts 1913, No. 164, do not come within the act and do not lose their rights by reason of such noncompliance.—Springer v. Fuller, 196 Mich. 628.

¶ 145. Where a banking firm has been dissolved and a new one formed, the omission to file with the county clerk the certificate required by How. St. §§ 3128, 3129, showing the names of the new firm, etc., cannot be shown by a surviving member of such new firm in a suit involving the question of the firm's existence in support of a claim that the old firm was not dissolved and that he did not become a partner in the new one.—Wright v. Weimeister, 87 Mich. 594.

§ 20. General or limited, ostensible, dormant and secret partners.

Necessity of joining dormant partners in actions by or against the firm, see post § 69.

Limited or special partners, see generally post § 125.

¶ 146. One who is not a party to the partnership agreement, whose name is not used in the firm, and who is not held out as a partner, but who shares in the profits and losses, is a dormant partner, liable with the other partners for an infringement by the firm of a patent.—Smith v. Ayrault, 71 Mich. 475.

¶ 147. Where a so-called "subpartner" owns the entire interest, including profits and property, he must be considered as the real partner, standing in the place of the ostensible one, and assuming his obligations and liabilities.—Webb v. Johnson, 95 Mich. 325.

¶ 148. A dormant partner is a secret partner; one who becomes such by a secret arrangement while his associate is held out to the world as sole manager and proprietor of the business.—Beecher v. Bush, 45 Mich. 188.

II. FIRM NAME, TRADE-MARK AND GOOD WILL.

§ 21. In general.

General law as to good will, see Good Will.

Use of assumed or fictitious business name, necessity of filing same, and right to sue or defend in such name, see Trade-Marks and Trade Names.

Power of partner to dispose of the good will of the business, see Uniform Partnership Act § 9.

¶ 149. Each member of a firm that has been dissolved has a right, unless otherwise provided to continue in the business in competition with the other, so long as neither can be held on the other's contracts.—Smith v. Walker, 57 Mich. 456.

¶ 150. Though a retiring partner may have assigned his interest in the partnership business, including the good will thereof, to his copartner, he may in the absence of an express agreement to the contrary, engage in the same business in the same locality, and in his own name.—Williams v. Farrand, 88 Mich. 473.

¶ 151. A retiring partner may by newspaper advertisements, cards, circulars, etc., invite the general public to trade with him, and through the same medium advertise his long connection with the old business, and his retirement therefrom.—Williams v. Farrand, 88 Mich. 473.

¶ 152. A retiring partner will not be allowed to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence he cannot advertise himself as its successor.—Williams v. Farrand, 88 Mich. 473.

¶ 153. The purchaser of a dissolved partnership will not in the absence of an express agreement be allowed to continue the business in the name of the old firm.—Williams v. Farrand, 88 Mich. 473.

¶ 154. Complainants and defendant had formerly been competitors in business, and to do away with competition entered into partnership under an agreement that each was to use his utmost endeavors to promote the interests of the firm, and to bring to it the good will and patronage of the firms with which they were formerly connected, and that none of the partners should do any act "by which the interest of said partnership shall be imperiled or prejudiced"; the agreement also provided that complainants could purchase defendant's interest at any time for a certain sum. A subsequent agreement provided that defendant should sell his interest to complainants for an agreed sum, defendant releasing all claims to the profits, and complainants releasing him from his services to the firm; the agreement also provided that the former partnership agreement should "remain in force in every particular except as herein modified." Held, that defendant will be enjoined from competing in business with complainants.—Reber v. Pearson, 155 Mich. 593.

III. FIRM CAPITAL AND PROPERTY.

§ 22. In general; what constitutes.

Certificates of copartnership, see ante § 19.

Power of partner to transfer or incumber the property, see post § 34.

Application of firm assets, see post § 54.

Surviving partner's title to and control of partnership assets, see post § 95.

Validity of agreement that compensation received by one member for public service shall become firm assets, see Contracts § 60, ¶ 243.

Executed or executory nature of agreement to buy or sell interest in firm, see also Contracts § 171.

Mortgages covering partnership property, see Mortgages § 38.

Place to file chattel mortgage, domicile of partnership, see Chattel Mortgages § 30.

Validity and effect of deed to firm by name, see Deeds ¶ 145.

Mode of levying on partnership property, see Executions § 38.

Trade fixtures of merchandise firm as fixtures or movables on land owned by firm as individuals, see Fixtures ¶ 43.

Effect of part performance of parol agreement as to partnership property, see Frauds, Statute of § 139.

Knowledge of partnership relationship as circumstance calling for inquiry respecting title, see Notice and Record of Title § 14.

Provisions defining partnership property, see Uniform Partnership Act § 8.

Provisions as to acquisition and transfer of partnership property, see Uniform Partnership Act § 8.

¶ 155. Where a partner who sells out his interest in a firm to a third person takes securities for the price they form no part of the firm assets, but are his private property.—Glynn v. Phetteplace, 26 Mich. 383.

¶ 156. Machinery bought as partnership property and constituting part of its stock in business is liable to the payment of partnership debts and subject to the adjustment of balances as between the partners; but if it is annexed by the partners to lands also held as partnership property it may become a part of the realty.—Robertson v. Corsett, 39 Mich. 777.

¶ 157. On the death of one partner the surviving partners made an arrangement with his widow to pay her an agreed sum for her husband's interest, and thereafter she did not share in the profits or losses or in the business carried on by the survivors in the old firm's name, but she received interest on said sum, it being treated as a loan to the firm. Held, that on a general assignment by the survivors in the firm name for the benefit of creditors the deceased partner's interest could not be treated as part of the firm's assets and liable for the partnership debts; it having been drawn out.—Sweetzer v. Higby, 63 Mich. 13.

¶ 158. Complainant's deceased bought of defendant a half interest in a livery business for $3,500, payment to be made by certain sums of money, and a certain stock of horses and vehicles pertaining to the business. An oral agreement of partnership was at the same time entered into. Held, the stock conveyed and that held by defendant became partnership assets, and the estate of the deceased was entitled to an accounting therefor in equity.—Drueke v. Boylon, 160 Mich. 522.

§ 23. Real property owned or used by firm.

Conveyance by partner of property to which he holds the title, see post § 34.

¶ 159. Where partners owning land individually agree to put it into the firm, and where, to effect this, each conveys an undivided half to the other, such land becomes firm assets.—Killefer v. McLain, 70 Mich. 508.

¶ 159a. The heirs of a deceased partner hold the legal title to firm real estate in trust for the equitable purposes of the firm. —Merritt v. Dickey, 38 Mich. 41.

¶ 160. A building erected with partnership funds upon land paid for with like funds, and, with the consent of one of the partners, conveyed to his wife and copartner, is not partnership property, and a claim filed by him against his wife's estate for one-half of the insurance written on the building in favor of the estate and the copartner, and paid to them accordingly, is properly rejected.—Winans v. Winans's Estate, 99 Mich. 74.

¶ 161. While the fact that funds of a copartnership were used in paying for the lands when originally purchased, or subsequently is not conclusive of the intent, it is persuasive evidence, and, when accompanied by the entry of the transaction on the firm books as a partnership transaction under circumstances that import a daily declaration that it was so regarded, is convincing. —Lindsay v. Race, 103 Mich. 28.

¶ 162. It is sufficient to show that lands are held individually as tenants in common and not as partnership lands; where a contract for their purchase recites that they shall be held "as copartners and joint owners * * * in the proportions following, to wit, one undivided third thereof to said" A., etc., specifying the aliquot interest of each, where a contemporaneous agreement among themselves limited their liability on the purchase notes correspondingly and provided that if either of them should pay more than his share he should have a lien on the shares of the others, and where furthermore no firm money was used in the purchase, though in fact two of the purchasers were partners in other transactions. —Lindsay v. Race, 103 Mich. 28.

§ 24. Property purchased or held in name of partner.

Conveyance of property held in name of one or more partners, see Uniform Partnership Act § 10.

¶ 163. Land may belong to a partnership although held in the name of one partner. —Williams v. Shelden, 61 Mich. 311.

¶ 164. Whether lands held in the name of one partner or of both are to be deemed copartnership property is generally a question of intent, to be gathered from the manner in which the members of the firm have dealt with them.—Lindsay v. Race, 103 Mich. 28.

¶ 165. Where one partner purchased property for the use of the firm, but in his own name, though with the money of another partner, and the property was actually used as firm assets, held that the case did not fall within the principle of the statute prohibiting resulting trusts, but must be treated as partnership property.—Way v. Stebbins, 47 Mich. 296.

¶ 166. Two out of three partners owned the lands which were occupied for partnership purposes, as tenants in common under the same deed. The partnership articles, which were on record, set forth that it was agreed that upon the fulfilment of certain terms by the third partner, including the payment by him of "one-third of the amount paid by them for the real estate purchased for the purposes of said business," they would convey to him an equal undivided one-third of said real estate. Held, that

the partnership articles did not make the lands partnership property, and if it was meant they should become so on payment by the third partner, they would not come into the accounting, but would remain the property of the partners who held the title; one of the owners could therefore mortgage his interest in them, and in a suit for an accounting they could not be treated as partnership property as against the mortgagees.—Gordon v. Gordon, 49 Mich. 501.

¶ 167. A partner who purchased real estate at an execution sale of a judgment debtor of his copartnership and took the title to such property in his own name, did not hold such title in trust for the grantee of the other two copartners of his firm; where in an action to obtain the title to the undivided two-thirds of such property, it appeared that the partnership business had been carried on for nearly twenty-five years without written accounts as between the partners, each drawing out from the business goods or money as his needs required without question or protest from his copartners, and where the defendant claimed that the firm received from him more than the price the land sold for, which money was never repaid or drawn out by him, and denied that there was any understanding that the property in question was bid in for the benefit of the firm, and denied that there was ever any dissolution of the copartnership, except as they ceased to do business, or that any settlement or adjustment had ever been made between the partners as to the partnership business; even though such grantee claimed to have paid a consideration for his deed executed about one year and a half after the execution of the sheriff's deed.—Fitzsimmons v. Foley, 80 Mich. 518.

¶ 168. Upon a review of the evidence, held, that the purchase of certain lands by defendant partner in his own name was not intended to be made for the benefit of the copartnership existing between himself and complainant, it appearing that it was all done openly and that all dealings respecting the lands were in the name of the purchasing partner and they were paid for by him, although nominally with checks on the account which included firm transactions, and that in stating the firm properties that land was omitted although known.—Hake v. Coach, 107 Mich. 197.

¶ 169. Lumber lands bought by one of the members of a lumbering firm with a view to lumbering operations on them will be held to have been and remained firm property, though the title was taken in the name of the moneyed partner, who arranged a loan to raise nearly all of the purchase price, and though the other and managing partner contributed but little to them and was disqualified by death of the first named partner to testify as to the actual facts of their arrangement.—Bennett v. Hough, 141 Mich. 162.

¶ 170. Lands purchased by a lumbering firm for lumbering purposes is partnership land, though some time afterwards complainant, the surviving member, made a quit-claim deed of such lands to his copartner, expressing "one dollar and other considerations," the grantee remarking at that time to the notary that it was done to facilitate a transfer and that "they would settle the matter among themselves afterwards."—Bennett v. Hough, 141 Mich. 162.

¶ 171. The rights of a firm under a mortgage held by it are not affected by the purchase of the equity of redemption by one of the partners for himself.—Gordon v. Tyler, 53 Mich. 629.

¶ 172. Premises purchased by two brothers in their individual names, with moneys taken from the funds of a brewing business, in which they were copartners, at a time when the firm was entirely solvent, and occupied for years by their families under circumstances indicating that they regarded them as their respective homesteads, will not be held liable as trade assets for the payment of debts contracted by the administrator of the partners, who ran the business to insolvency, although it appears that water for the use of the brewery was procured from a pipe running across the property, that empty beer barrels were at times piled upon the lots, and that employees sometimes boarded with the families.—Frey v. Eisenhardt, 116 Mich. 160.

¶ 173. Land standing in the individual name of a partner may be treated as partnership property even though not purchased with partnership funds, where from their acts and dealings it is clear that such was the intent of the partners.—Johnson v. Hogan, 158 Mich. 635; Cleveland-Cliffs Iron Co. v. Hull, Id.

¶ 174. Real estate, the legal title of which is in the individual name of one or more partners, may be treated in equity, without express agreement, as partnership property, where the general purpose of the parties, the nature of the undertaking, and the manner of dealing with the land indicate an implied agreement so to treat it.—Johnson v. Hogan, 158 Mich. 635; Cleveland-Cliffs Iron Co. v. Hull, Id.

¶ 175. Whether or not land taken in the name of one or more partners is in fact partnership property always depends upon the intent of the parties and the understanding and design under which they acted. Johnson v. Hogan, 158 Mich. 635; Cleveland-Cliffs Iron Co. v. Hull, Id.

¶ 176. Two men and another, one Hull, entered into a partnership to cut and sell

certain timber from land belonging to Hull. The land had no value except for its timber. The two men furnished most of the money for the enterprise. Evidence was introduced showing that all three partners treated the land as partnership property and that Hull in scheduling his personal assets did not include said land. Held, the land was to be treated in equity as partnership property, and not as belonging individually to Hull.—Johnson v. Hogan, 158 Mich. 635; Cleveland-Cliffs Iron Co. v. Hull, Id.

¶ 177. Where title to land purchased by a partnership was taken part in the name of one partner and part in the name of the other, the parties have a joint interest in timber severed from one of the tracts. —Edwards v. Zuck, 171 Mich. 29.

¶ 178. Partnership property held in the name of one partner is held in trust for the partnership.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

§ 25. Equitable conversion.

General law as to equitable conversion, see Equity, II.

Equitable conversion of partnership lands into personalty for firm purposes, see also Equity § 12.

¶ 179. Lands conveyed to the members of a partnership, in satisfaction of a partnership debt, are to be regarded for all purposes of arranging balances between the partners, paying debts and closing up the partnership business, as personal property. —Moran v. Palmer, 13 Mich. 367.

¶ 180. In equity, as between partners themselves, real estate purchased by them with partnership effects is partnership property, and on the dissolution of the firm should be divided as such, each party taking the same share in it as in the personal property, unless at the time of the purchase it was understood not to be a partnership transaction.—Thayer v. Lane, W. 200.

¶ 181. Partnership lands cannot be distinguished from other assets for purposes of accounting and settlement.—Godfrey v. White, 43 Mich. 171.

¶ 182. Partnership lands are in equity affected with the character of personalty for the purpose of accounting and settlement. —Godfrey v. White, 43 Mich. 171; Merritt v. Dickey, 38 Mich. 41.

¶ 183. Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting.—Godfrey v. White, 43 Mich. 171.

¶ 184. Partnership lands must be regarded by a court of equity as personal property for the purpose of settling the affairs of the partnership; and, where the action is brought for the settlement of the partnership affairs, such court is given jurisdiction pro tanto over real estate that is outside of the jurisdiction of the court.—Dunlap v. Byers, 110 Mich. 109.

¶ 185. Partnership property must be first applied to the payment of partnership debts, and real estate owned by a partnership is regarded as personal property for the purpose of paying debts and closing the partnership business.—First Nat. Bank of Cooperstown v. State Sav. Bank of Ionia, 123 Mich. 321.

§ 26. Power of firm to rent its realty.

Leases by surviving partner, see post § 96.

¶ 186. There is no legal presumption that a firm has any less power to rent its realty than anyone else.—Williams v. Shelden, 61 Mich. 311.

§ 27. Nature and extent of partner's interest.

Equitable conversion of partnership property, see ante § 25.

Dower interest in partnership property, see Dower § 11.

Acquisition of homestead in partnership lands, see Homesteads § 14.

Insurable interest in partnership property, see Insurance § 42.

Provisions as to property rights of partner, see Uniform Partnership Act §§ 24-28.

¶ 187. Partners are presumed, in the absence of any showing of their respective interests, to be equal partners.—Northrup v. McGill, 27 Mich. 234; Hutchinson v. Dubois, 45 Mich. 143; Ellis v. Whitehead, 95 Mich. 105; Goldman v. O'Hara, 164 Mich. 612.

¶ 188. Partners do not hold as tenants in common or joint tenants. The firm property constitutes an identical and entire interest.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 189. A partner is not merely part owner of the partnership property; he has an entire as well as a joint interest in the whole of it, and is in some sense a trustee of the partnership assets as a trust fund for the payment of creditors.—Hutchinson v. Dubois, 45 Mich. 143.

¶ 190. A partner's interest is not an interest in specific articles, but in the surplus that remains after the firm debts are paid, and as he has no separate property in the assets of the firm, his share is not separable from that of his partner, and is subject to the final adjustment of accounts between the partners themselves, when it may amount to little or nothing.—Hutchinson v. Dubois, 45 Mich. 143.

¶ 191. In a case where the legal title was an equal tenancy in common the court established the rights of a deceased partner as amounting only to one-third, instead of one-half, and prevented an administrator's sale which would have misrepresented the real interest.—Thayer v. Lane, W. 200.

¶ 192. One member of a firm cannot acquire a homestead interest in partnership property.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

A. IN GENERAL; POWER OF PARTNERS TO BIND FIRM.

§ 28. Obligations and responsibilities of partners in general.

Power of partners to bind firm, see post § 31 et seq.
Liabilities and rights of incoming and outgoing partners, see post § 48 et seq.
What are firm and what individual debts, see post § 52.
Mutual rights and liabilities of partners, see post § 57.
Actions against the firm or its members, see post § 67.
Rights and liabilities of partners after dissolution, see also post VII, D.
Of limited and special partners, see post § 126.
Partnership or corporation having same personnel as party to contract, see Corporations § 108.
Liability of copartner for treble damages for trespass, see Damages ¶ 812.
Partner's liability for unfair competition by firm, see Fraud ¶ 600.
Abortive partnership association as leaving members liable as common law partners, see Joint Stock Companies ¶ 75.
Duty of partnership as lessor, see Landlord and Tenant ¶ 189.
Provisions as to partner's liability, see Uniform Partnership Act §§ 15-17.

¶ 193. At common law the liability of partners on firm contracts is joint and not several.—Stewart v. Terwilliger, 177 Mich. 313.

¶ 194. The partnership name represents the constituents of the firm, and when it is rightly pledged the respective partners are jointly bound.—Gates v. Fisk, 45 Mich. 522.

¶ 195. A lease agreed on and left with the lessee's attorney to be held until an absent partner should approve of it, which he did not do, does not bind the firm.—Simon v. Bewick, 52 Mich. 388.

¶ 196. One partner cannot avoid liability for the firm debts by showing that he was induced to enter the firm by his copartner's false statement as to the value of the firm's property.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 197. One partner, defending as survivor a suit brought against the firm, cannot avoid liability by showing that he disclaimed all interest in the property and assented to its assignment by his copartner as the individual property of the latter for the benefit of the latter's creditors; this is so even where the partnership is one that exists as to third persons only.—Van Kleeck v. McCabe, 87 Mich. 599.

§ 29. Criminal and penal responsibility.

Responsibility criminally for sale of liquor by partner, see Intoxicating Liquors § 48.

¶ 198. Where partners are convicted for allowing a nuisance to exist on partnership property, it is not error to fine them individually.—People v. Kent, 151 Mich. 134.

§ 30. Firms with common members.

¶ 199. A. and B. constituted one firm, A., B. and C. another. Both firms had the same name, but the business of each was kept distinct. A. gave a note in the firm name, and a bank discounted it, relying wholly upon the credit of A. and B., for the use of which firm the discount was procured. Held, that the bank could not hold C. upon the note.—Hastings Nat. Bank v. Hibbard, 48 Mich. 452.

¶ 200. The disposition of equity, when once it acquires jurisdiction of a controversy, to make its examination broad enough to do full and exact justice between the parties, would not necessarily impel it, in a suit involving an indebtedness between firms having a common partner, to go beyond the adjustment of the claim as between the firms, for the purpose of ascertaining, by taking an account of the business of the creditor firm, what, if any, balance could be found in favor of the common partner, in order that such balance might be deducted from the amount of the recovery.—Burrows v. Leech, 116 Mich. 32.

¶ 201. The argument that firms having a common partner cannot sue each other and hence cannot have their controversies adjusted at law, or in equity except upon the basis of individual, as contradistinguished from firm rights, is of no force when invoked by unsecured creditors of the debtor firm in support of a contention that security given to the creditor firm should be applied to the claims of general creditors to the extent that it benefits the common partner.—Burrows v. Leech, 116 Mich. 32.

§ 31. Power of partner to bind firm in general.

See also ante ¶ 17.
Ratification of and estoppel as to acts of partner, see post § 46.

Jury questions as to scope of partnership, see post § 74.
Powers of partners after dissolution, see post § 89.
Powers and duties of surviving partners, see post § 92.
Powers and duties of continuing partner, see post § 102.
General law as to agency, see Agency.
Agency of partner's husband for firm, evidence as to, see Agency ¶ 47.
Capacity of one partner to vary or alter firm contract, see also Contracts § 261.
Request by one member for extension as waiver binding firm not to object to previous default by other party, see also Contracts ¶ 995.
Effect of one partner's agreement for lien on goods, see also Liens ¶ 9.
Provisions as to powers of partners, see Uniform Partnership Act § 9 et seq.

¶ 202. One partner may bind his copartner in all matters within the scope of the copartnership; the implied authority of one partner to bind his copartner is generally limited to such acts as are in their nature essential to the general objects of the copartnership.—Kirby v. Ingersoll, H. 172.

¶ 203. Every member of a partnership, in legal contemplation, without any special powers being conferred upon him by the articles of copartnership, is not only a principal, but a general agent of all the copartners in the transaction of the company business.—Burgan v. Lyell, 2 Mich. 102.

¶ 204. One partner cannot bind his 'copartner by any contract not within the immediate scope of the partnership, unless with such copartner's knowledge and consent.—Barnard v. Lapeer & P. H. Plank Road Co., 6 Mich. 274.

¶ 205. A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure; and the agency does not extend beyond what may be fairly regarded as coming within its reach.—Hotchin v. Kent, 8 Mich. 526.

¶ 206. There is no implied power on the part of one partner to enter into contracts outside of the scope of the business, without the assent of the other partners, but what is within the scope of the business is frequently a question of fact.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

¶ 207. One partner cannot bind his copartner by any contract not within the immediate scope of the partnership unless with such partner's knowledge and consent.—In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200; Smith v. Mosier, Id.

¶ 208. While each partner of a copartnership is the agent of the copartners in the transaction of the business of the copartnership, one partner cannot bind his copartner by any act without the scope of the partnership.—Township of Wexford v. Seeley, 196 Mich. 634.

¶ 209. It is within the authority of the managing partner of a business to authorize dealings with other business establishments, whereby each other's clerks or customers are furnished with goods which are charged to each other; and when so authorized such dealings bind until notice to the contrary.—Cameron v. Blackman, 39 Mich. 108.

¶ 210. A partner is not liable for bonds received without his knowledge by his copartner on special deposit, the receiving of special deposits being no part of the firm's business.—Hatheway's Appeal, 52 Mich. 112.

¶ 211. A partner's consent to the cancellation of an insurance policy in which the firm is interested is conclusive on the firm; and a formal surrender of the policy is unimportant, except as evidence of the cancellation.—Hillock v. Traders' Ins. Co., 54 Mich. 531.

¶ 212. Complainant partners contracted in writing to sell defendant certain land on an instalment basis of payment. One of the partners wrote a letter stating that defendant would be expected to pay the taxes on said land in addition to the full rate of interest on instalments. Held, said partners could not be deemed authorized to bind the partnership by such a letter where his act would result in the making of a usurious and unlawful contract.—Minthorn v. Haines, 169 Mich. 169.

¶ 213. Where a third person does an act for the benefit of a partnership, a subsequent ratification of it, during the partnership, by one of its members, is a ratification by all.—Lyell v. Sanbourn, 2 Mich. 109.

§ 32. Purchase of goods.

Jury questions as to partner's authority to purchase goods, see post § 74.
Partner's assent to purchase of goods by agent, see post ¶ 266.
Ratification of purchase on credit, see post ¶ 282.

¶ 214. A firm is bound by an order for goods given by one of the partners without the knowledge of the other though they were shipped after the latter had withdrawn from the firm.—Smith & Cheney Co. v. Schmidt, 142 Mich. 1.

¶ 215. Where a defendant holds himself out as a partner of another, he is liable as such for purchases made by the latter, and no question need be raised whether defendant made an oral guaranty to pay for the goods, which was within the statute of frauds.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

¶ 216. Where carpets, napkins, curtains, thread, pins, and other like articles were purchased by one of two partners running a hotel, the court cannot say that the purchase of these articles was an act outside the scope of the partnership so as to relieve the other partner of liability.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

¶ 217. Where goods purchased on the partnership account by one of two partners running a hotel are suited to hotel purposes, the other partner is not relieved of liability by the fact that the wife of the partner purchasing them applied them to her own personal use.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

§ 33. Subscription to stock in corporation.

¶ 218. That a plank road will be of incidental benefit to a copartnership engaged in the lumber business will not authorize one partner, without the assent of the other, to bind the firm by a subscription to the stock of a corporation organized for constructing such road.—Barnard v. Lapeer & P. H. Plank Road Co., 6 Mich. 274.

¶ 219. Where one partner subscribed the name of the firm to stock in a corporation, without the assent of a copartner, it was held that the latter did not recognize his relation as stockholder in the corporation, and become liable to pay the subscription, by failing to express his dissent when demand of payment was made upon the firm.—Barnard v. Lapeer & P. H. Plank Road Co., 6 Mich. 274.

§ 34. Assignments, sales, transfers and incumbrances.

Sales, transfers and incumbrances by surviving partner, see post § 96.
Powers of continuing partner, see post § 102.
Trover by partner against purchaser from copartner, see also post ¶ 376.
Assignment for creditors by one partner on behalf of firm, see Assignments for Creditors § 35.
Validity of assignment by one partner of part of a judgment owned by firm, see Judgments § 123.
Power to make assignments for benefit of creditors, see Uniform Partnership Act § 9.
Power of partner to dispose of good will of business, see Uniform Partnership Act § 9.
Power of partner to convey partnership realty, see Uniform Partnership Act § 10.

¶ 220. One partner may transfer a portion of the assets for the purpose of paying or securing debts, or to raise means to carry on the concern; but the power of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of partnership.—Kirby v. Ingersoll, H. 172.

¶ 221. One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of the creditors of the firm without the knowledge or consent of his copartner, especially when he is on the spot and may be consulted.—Kirby v. Ingersoll, H. 172; Kirby v. Ingersoll, 1 D. 477.

¶ 222. It seems that a partner's power to make an assignment for the benefit of creditors may sometimes be implied from circumstances showing that it was intended to be conferred.—Kirby v. Ingersoll, 1 D. 477.

¶ 223. Where an assignment of a partnership claim was made by an agent of the firm, with the consent of one of the partners, to apply on a demand against the agent and the consenting partner, it was held that the objection that the assignment was invalid for want of the assent of all the partners only went to the sufficiency of the consideration as between the partnership and the assignees, and could only be raised by the partners themselves.—Kull v. Thompson, 38 Mich. 685.

¶ 224. The vendee in a bill of sale made by one partner of the partnership property to secure his individual debts cannot maintain trover where the other partner did not sanction the sale, and where there are partnership debts outstanding.—Kingsbury v. Tharp, 61 Mich. 216.

¶ 225. A partner's wife, although the firm has, through her husband, borrowed her money from time to time, must account to the firm for assets which she has received from her husband without consideration and knowing that they belonged to the firm.—Lobdell v. Slawson, 90 Mich. 201.

¶ 226. Where the legal title to partnership realty is vested in the individual members of the firm as tenants in common, a conveyance by one partner of his undivided interest to a bona fide purchaser is valid as against the firm creditors.—Michigan Trust Co. v. Bennett, 106 Mich. 381.

¶ 227. A conveyance by a partner of lands to which he holds the legal title, given as security for a bona fide indebtedness of the partnership, is valid as against the other creditors of the firm, whether the land be individual or partnership property.—Michigan Trust Co. v. Bennett, 106 Mich. 381.

¶ 228. A partner in a firm dealing in farm machinery and also selling threshing machines on commission, has authority to bind the firm by an arrangement that threshing machine sold should not be delivered to the purchaser until the purchase price had been paid.—Brown v. Foster, 137 Mich. 35.

¶ 229. An agreement by a member of a partnership that a threshing machine sold

on commission should not be delivered to the purchaser until the purchase price was paid, is binding on the partnership though the machine was shipped to them in the name of the purchaser.—Brown v. Foster, 137 Mich. 35.

¶ 230. Where, after an agreement by a member of a partnership that certain machinery sold on commission should not be delivered to the purchaser until the purchase price had been paid, the machinery had been delivered, and the partner retakes possession because of the purchaser's failure to give security as agreed, the possession of the partner is the possession of the firm, and delivery by him to another person without authority is a conversion thereof by the partnership.—Brown v. Foster, 137 Mich. 35.

¶ 231. A partner may give a chattel mortgage on the copartnership property, and if a seal be affixed it is a nullity and does not vitiate the mortgage.—Sweetzer v. Mead, 5 Mich. 107.

¶ 232. A partner may execute a chattel mortgage covering all of the partnership property, as security for a firm debt, without the assent of an absent copartner.—Beckman v. Noble, 115 Mich. 523.

¶ 233. One partner has authority to execute a chattel mortgage to pay or secure partnership debts, and in so doing he binds his copartners.—Harvey v. Ford, 83 Mich. 506; Robards v. Waterman, 96 Mich. 233.

¶ 234. How. St. § 7686, providing exemptions for one engaged in business, does not apply as against a chattel mortgage executed by one partner in the firm's name, even though his copartners are unaware of its execution.—Harvey v. Ford, 83 Mich. 506; Robards v. Waterman, 96 Mich. 233.

¶ 235. Where the title to an undivided interest in partnership lands is vested in one member of the firm, a mortgage thereon executed by him to secure a firm debt is valid, and as to such interests has precedence over the claims of general creditors; but such a mortgage, if given to secure the mortgagor's individual obligation must be postponed to the payment of the partnership debts.—Childs v. Pellett, 102 Mich. 558.

§ 35. Borrowing money.

Liability of firm for money borrowed by partner in his individual capacity, see post ¶ 319.

¶ 236. In the absence of an agreement to the contrary, either member of a firm engaged in the wholesale and retail grocery business has the right to borrow money for the purposes of the business.—Coller v. Porter, 88 Mich. 549.

¶ 237. Third parties have a right to rely upon the implied authority of either member of a firm to borrow money for the purpose of the business and if they lend money in good faith to one partner without knowledge or notice of such facts as would lead an ordinarily prudent person to suspect that the loan is made for the individual use of the partner making it, they can recover against the firm.—Coller v. Porter, 88 Mich. 549.

¶ 238. A member of a trading partnership who is entrusted with the transaction of its business has power to borrow money for the firm and to issue notes and draw drafts therefor.—Stevens v. McLachlan, 120 Mich. 285.

§ 36. Powers with respect to negotiable paper.

Power of surviving partner to give firm paper, see post § 92.

Powers of continuing partner as to negotiable paper, see post § 102.

Negotiable paper as firm or individual paper, see post §§ 52, 53.

General law as to negotiable paper, see Negotiable Instruments.

¶ 239. Joint relations as partners or otherwise will not give one any implied authority to authorize the use of another's name as maker or indorser where their apparent interests or legal obligations might be different.—Stroh v. Hinchman, 37 Mich. 490.

¶ 240. The doctrine that each partner may bind the firm by promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships unless it is the common custom or usage of such business to bind the firm, or unless it is necessary for the due transaction thereof.—Dowling v. National Exchange Bank, 145 U. S. 512, 86 L. ed. 795, 12 Sup. Ct. Rep. 928, reversing 30 Fed. 412.

¶ 241. Where partnership articles provide that the managing partner shall not contract debts for the firm without the consent of his copartner, who is to be the firm's only creditor, the managing partner has no power to bind the firm by giving his note to himself as guardian for money belonging to his wards and used in partnership business, which note when past due he indorses to a third party for collection.—Wintermute v. Torrent, 83 Mich. 555.

¶ 242. Where a note or other security is given in the name of the firm by one partner for his private debt, or in a transaction unconnected with the partnership business, to the knowledge of the person taking it, the other partners are not bound unless they have consented thereto; which assent need not be expressed but may be shown by cir-

cumstances, like any other fact.—Towle v. Dunham, 84 Mich. 268.

¶ 243. The managing member of a firm which succeeded to the business of one of the partners was authorized by the articles of partnership to apply the proceeds realized from the prosecution of the new business, in part, in payment of such part of the outstanding, unsecured indebtedness of said partner as might be settled or compromised by him or by him and said managing member, and as said managing member might consider it in the interest of the firm business or of said partner to pay. Held, that, if this provision authorized the managing member to bind his copartners by the purchase of such outstanding indebtedness, it was only when he considered it necessary and chose to do so, and only by way of payment from the proceeds realized from said business; and that he was not authorized to give the firm paper, or bind the firm by giving his own notes, for such a purpose.—Whitla v. Butler's Estate, 99 Mich. 51.

¶ 244. One partner in a non-trading partnership (fruit farming) cannot bind his copartners by a note given by him in the firm name, although for a debt due from the firm, unless he has express authority from his copartners, or the giving of such note is necessary to carry on the firm business, or is usual in similar partnerships; and any liability founded upon a holding out of the partnership relation is necessarily limited by this rule.—McPherson v. Bristol, 115 Mich. 258.

¶ 245. Where persons are engaged as copartners in the business of running a vessel, paper indorsed by any of them in the firm name, if received in the regular course of their business and made payable to the order of the firm, will bind the other partners.—First Nat. Bank of Negaunee v. Freeman, 47 Mich. 408.

¶ 246. The use by one partner of the firm name in indorsing his note given to a bank on renewal of his individual note held by it as security for a loan, the proceeds of which he contributed to the firm's capital in consideration of his admission as a member, is not within the scope of partnership business, and, if so used without his copartners' consent, the bank cannot hold the firm as indorser.—Childs v. Pellett, 102 Mich. 558.

¶ 247. In a suit against a partnership upon an acceptance by one partner in his own name of a bill of exchange drawn on the firm, it is incumbent on plaintiff to prove that the partner who signed his name did so for the firm, and that he was the lawful agent of his copartner for that purpose.—Gooding v. Underwood, 89 Mich. 187.

¶ 248. A trading partnership is not relieved from liability on partnership paper issued by one partner, by renewals of the paper made after another partner had repudiated liability on the paper and informed the holder that the partner issuing the paper had no authority to do so.—Stevens v. McLachlan, 120 Mich. 285.

¶ 249. The managing partner of a firm had authority to bind the firm by the renewal of a note which the firm had endorsed and discounted at a bank, for their own accommodation.—Citizens' Commercial & Sav. Bank v. Platt, 135 Mich. 267.

§ 37. ——Accommodation paper or signatures.

Accommodation paper and signatures in general, see Negotiable Instruments, XI.

¶ 250. A partner is not bound by an accommodation indorsement made in the name of his firm, but without his assent.—Heffron v. Hanaford, 40 Mich. 305.

¶ 251. In an action on a promissory note one partner held not liable upon an accommodation indorsement of a note in the firm name made by another partner with the knowledge of a third.—Mechanics' Bank of Detroit v. Barnes, 86 Mich. 632.

¶ 252. Where a person lends his name to a firm as maker or indorser of a note to raise money to carry on the firm business, either partner authorized to raise money for the purpose may make the terms upon which the accommodation is obtained, and may give such personal security to the maker or indorser as the firm may have to give.—Hopkins v. Thomas, 61 Mich. 389.

¶ 253. The individual promise of one member of a banking firm to release an accommodation indorser from liability on a note held by the firm, and to pay the note from means in his hands belonging to the maker of the note, cannot be construed as the promise of the firm, and will not exonerate the indorser from liability on the note.—Webber v. Alderman, 102 Mich. 638.

§ 38. ——Checks.

¶ 254. Either member of a partnership has the power to protect himself by stipulating that the other member shall not have authority to bind the firm by signing checks, if notice is given to the bank that is the firm's depository.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

§ 39. Bonds and specialties.

Signing official bonds to procure deposits as within scope of banking partnership, see Banking ¶ 151.

¶ 255. As a general rule one partner cannot execute a specialty in the name of the firm, binding, as such, upon the firm.—Fox v. Norton, 9 Mich. 207.

¶ 256. A bond was declared upon as the individual bond of two defendants. The bond offered in evidence was signed by one with the name of a copartnership composed of the two, but there was no evidence that it was executed by the one in the presence of the other, or that the other had previously assented to its execution, or subsequently recognized or ratified it as the act or obligation of the firm. It was held that the action could not be maintained.—Fox v. Norton, 9 Mich. 207.

¶ 257. One partner cannot bind his copartner upon a specialty unless he is authorized under seal, or unless he executes the instrument in the presence of or with his partner's assent, or unless there is prior parol assent and ratification.—Koch v. Endriss, 97 Mich. 444.

¶ 258. A member of a banking partnership is bound by the ratification by his copartner, who has active charge of the business, of the unauthorized act of an employee in signing the official bond of a township treasurer for the purpose of securing a share of the township funds.—Township of Wexford v. Seeley, 196 Mich. 634.

§ 40. Hiring and discharging agents and servants.

Ratification of partner's act in employing attorney, see post ¶ 283.

¶ 259. Where a member of a mining company, who was also one of the managers of the company, employed the plaintiff to work for the company, it was held immaterial whether his powers as manager were general, special or limited, if the plaintiff at the time had no notice of any abridgment of his powers by the articles of copartnership.—Burgan v. Lyell, 2 Mich. 102.

¶ 260. S. and C. having discovered a mine, C. made an agreement with other persons by which they were to furnish money to work the mine, while S. and C. were to work without wages, each, however, receiving an eighth interest in the mine. Held, that C. had authority, if he and his associates were copartners, to hire S. for wages, and such authority could not be repudiated by the members of the firm, notwithstanding the agreement among themselves that S. should work for nothing. Nor would S.'s retaining an eighth interest in the mine as a reward for his discovering the location prevent him from hiring out to the firm for wages.—Sullivan v. Deiter, 86 Mich. 404.

¶ 261. Whether an arrangement made in the firm interest by a member of a firm of liquor dealers, for legal services in prosecuting certain proceedings to secure, for a saloon to which the firm expects to sell stock, authority to sell liquors, is outside of the firm business, quære.—Holmes v. Kortlander, 64 Mich. 591.

¶ 262. A contract by a member of a banking copartnership with another person whereby such person is to receive a commission for the procurement of the signatures of subscribers to stock of the proposed banking corporation, regardless of whether the corporation is in fact formed and the stock sold, is an agreement outside the usual and contemplated scope of its business and is not binding upon the copartners where they have knowledge of such contract, and do not assent to it.—In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200; Smith v. Mosier, Id.

§ 41. Collection and settlement of firm claims or debts.

Power of partner to apply property to payment of firm debts, see also ante § 34.
Submission to arbitration, see post § 42.
Acknowledgment of indebtedness and confession of judgment, see post § 43.
Duty of surviving partner to pay debts, see post § 95.
Allowance on accounting of credit for debts paid, see post § 115.
Knowledge charging firm with assent to account stated, see also Account Stated ¶ 50.
Acceptance of payment in unusual medium by one partner as binding on all, see Payment ¶ 10.
Power of partner to make agreement as depending on whether it was for arbitration or for average adjustment of shipping loss, see Shipping, VII.
Partnership assignments for creditors, see Assignments for Creditors § 35.

¶ 263. What either partner does in the collection of a firm debt is presumptively done with the other's sanction.—Harvey v. McAdams, 32 Mich. 472; Rolfe v. Dudley, 58 Mich. 208.

¶ 264. The assent of one of two partners to what is done by a person serving an execution in favor of the firm is presumptively sufficient to hold both partners liable as for conversion.—Harvey v. McAdams, 32 Mich. 472.

¶ 265. The refusal of one partner to deliver up, when demanded, property taken in execution under a void judgment for a firm debt, is sufficient to bind his copartner.—Rolfe v. Dudley, 58 Mich. 208.

¶ 266. Where one member of a firm has taken a chattel mortgage on a stock of goods to secure a debt to the firm, he has authority, as partner, to take goods in payment of the debt and to create an agency for selling them by putting them in the mortgagor's charge, and if he thinks that keeping up the stock is the best way to sell the goods to advantage, slight evidence

of his partner's assent is enough to make the firm responsible for the agent's acts in purchasing goods for that purpose.—Banner Tobacco Co. v. Jenison, 48 Mich. 459.

¶ 267. Where an absconding debtor has turned over to a creditor firm doing business under a bank name, book-accounts and other choses in action to be collected and applied in payment of their claim, and a member of the firm, acting as cashier of the bank, by the direction of the debtor agrees with other creditors of the debtor to apply any balance realized from such accounts in payment of their claim, such member has authority to bind the firm by such agreement.—Shaw v. Gilmore, 76 Mich. 127.

¶ 268. A settlement of a claim by one partner by giving a note therefor is binding on the other partner although he knew nothing about it, being the act of a partner in the regular course of business of the partnership.—Webber v. Webber, 146 Mich. 31.

¶ 269. In an action by the purchaser of a garage against one buying a car from a company subsequently buying the same garage from the same sellers for conversion of the car, a receipt for a part payment by one of the sellers, who were partners, given the original buyer, is not inadmissible because of lack of evidence of authority of such partner to sign the firm name where both partners were present when the receipt was signed and the partner not signing the receipt received the check and cashed it.—Ward v. Carey, 200 Mich. 217.

§ 42. Submission to arbitration.

Power to adjust firm claims or debts, see ante § 41.

Confession of judgment, see post § 43.

Power to submit to arbitration or reference, see Uniform Partnership Act § 9.

¶ 270. One partner cannot submit partnership matters to arbitration without a special authority for that purpose from his copartners.—Buchoz v. Grandjean, 1 Mich. 367; Backus v. Coyne, 35 Mich. 5.

¶ 271. A submission to arbitration being entered into without special authority, and an award made in pursuance of it in favor of the partnership, it was held that the other party might defeat a suit on the award by objecting such want of authority.—Buchoz v. Grandjean, 1 Mich. 367.

¶ 272. It is beyond the power of one partner not specially authorized for that purpose to submit to a third person the adjustment of a general average claim, where the submission involves the examination of witnesses, imposes duties that are not merely clerical, and requires a decision that is to be conclusive between the parties.—Backus v. Coyne, 35 Mich. 5.

¶ 273. A partner can bind his firm by a submission to arbitration if expressly authorized to do so, and no acknowledged power of attorney is necessary.—Davis v. Berger, 54 Mich. 652.

¶ 274. A replevin in suit was begun by partners and after the partnership was dissolved, but before the settlement, the matter in dispute was submitted to arbitration by one of the partners in the firm name. The other did not repudiate this action, but merely said that he was not to be held liable under it. Held, that he was not prejudiced by the charge of the court in an action of trover based on the award that he was bound by such acts of such partner made on behalf of the firm, unless he repudiated it in the proper way.—McArthur v. Oliver, 53 Mich. 299.

§ 43. Acknowledgment of indebtedness and confession of judgment.

Power of partner to confess judgment, see Uniform Partnership Act § 9.

¶ 275. The acknowledgment by one partner during the continuance of the partnership, of a debt as due by the partnership, will amount to a promise binding on the firm.—Burgan v. Lyell, 2 Mich. 102.

¶ 276. Partners have no implied authority to confess judgment for each other.—Soper v. Fry, 37 Mich. 236.

§ 44. Notice to partner as notice to firm or other partners.

Knowledge of or notice to partner as charging partnership, see Uniform Partnership Act § 12.

¶ 277. A firm must be presumed to have had notice of everything of which any partner had notice.—Hubbardston Lumber Co. v. Bates, 31 Mich. 158; Howland v. Davis, 40 Mich. 545.

¶ 278. Each partner is the general agent of the others in all matters within the scope of the partnership business, and what is known to one is supposed to be known to all.—Moran v. Palmer, 13 Mich. 367.

¶ 279. On the question of acquiescence and undue delay in exercising the right to rescind a contract, the firm must be conclusively held to have notice of every fact or thing material to the question, which any member of the firm knew; and any act of any member, or any letter written by one in their name, with reference to this business, must be treated as the act or letter of the firm.—Hubbardston Lumber Co. v. Bates, 31 Mich. 158.

§ 45. Presumption as to knowledge of copartner's acts.

¶ 280. Whatever is done by one member of a partnership in the course of the business

is presumed to be known to the others.—Osborn v. Osborn, 36 Mich. 48.

¶ 281. Whatever is done by one member of a partnership in the course of the business is presumed to be known to the others; this presumption applies as strongly to the acts of a partner who is the husband of a creditor of the firm, in his dealing with his wife as such creditor, as to his dealings with any other creditor.—Osborn v. Osborn, 36 Mich. 48.

§ 46. Ratification and estoppel.

Jury questions as to ratification, see post § 74.

Ratification of agent's act by active partner, see Agency ¶ 370.

Offer to rescind as ratification of partner's act, see Evidence ¶ 2106.

General law of estoppel, see Estoppel.

¶ 282. A partner's purchase of goods on credit contrary to the firm's rules, known to the seller, cannot be ratified by the act of the purchasing partner in receiving the goods as manager of the firm's business.—Hotchin v. Kent, 8 Mich. 526.

¶ 283. An employment by one member of a firm of an attorney's legal services, in a matter not strictly within the firm's business, but in its interest, is ratified if the other partner pays the attorney money toward his expenses in that matter, with knowledge of its nature, and when so ratified both partners are made liable.—Holmes v. Kortlander, 64 Mich. 591.

¶ 284. In an action against a firm on a note given by one of the partners in payment for goods received before the other partner was taken in, an instruction is proper which states that the mere fact that the latter did not deny his liability on the note when informed that the former had signed it with the firm name, is not of itself a ratification of the note, but might be considered, if found to be a fact, in determining whether he told the former that he might use the firm name.—Michigan Shoe Co. v. Paul, 149 Mich. 695.

¶ 285. Defendant and his partner, engaged in the running of a hotel, arranged for a partnership account with the plaintiff. The wife of defendant's partner, with the knowledge and approval of the defendant, bought goods on the account for her personal use. Held, there was evidence to go to the jury of a ratification of the wife's purchases by the partnership.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

¶ 286. The unauthorized act of a member of a banking partnership in depositing a draft drawn by his bank in favor of another bank in such latter bank in the name of a company in which such partner is interested and in loaning the fund to such company is ratified where the trustee holding title to the banking interest for the partnership makes no objection to such course and the bank accepts the notes of the company, accepts interest when due, renews the notes, and, when they go to protest, takes steps to collect them from the maker and such partner, and, when a trustee in bankruptcy is appointed, upon the bank becoming insolvent, he, with full knowledge of the matter, attempts to collect the notes from such partner, and the bank does not complain of the irregular procedure of the bank receiving the deposit for nearly four years thereafter.—Knisely v. People's Sav. Bank of Saginaw, 199 Mich. 501.

¶ 287. A partner who, with full knowledge that his copartner has used partnership funds to pay the debt of a third person, takes no steps to repudiate the payment for nearly a year, must be held to have ratified it.—Clippinger v. Starr, 130 Mich. 463.

¶ 288. Joinder of partners, in suing out a writ of error to review the judgment on an award of arbitration against the firm, has the effect of affirming the authority delegated to one partner to submit to arbitration.—Davis v. Berger, 54 Mich. 652.

¶ 289. Where money is received by a firm for a conveyance by one member of it of land owned by the firm, the other members of it and their representatives are estopped from repudiating the sale and claiming a title to the land against the bona fide purchaser.—Moran v. Palmer, 13 Mich. 367.

§ 47. Liability for torts of copartner.

Liability for conversion, see also ante ¶¶ 264, 265.

Accountability of attorney for act of partner, see also Attorneys ¶ 227.

Evidence to prove fraudulent execution of mortgage by one member of the firm, see also Chattel Mortgages § 59, ¶ 252.

Right of action under fraudulent mortgage given by one partner on other partner's goods, see Chattel Mortgages ¶ 544.

Wrongful acts of partner as binding partnership, see Uniform Partnership Act §§ 13, 14.

¶ 290. A partnership is liable for slanderous statements made by one partner, the purpose of which is to aid the partnership business by preventing another party from making sales of an article which the partnership is at the time selling.—Haney Mfg. Co. v. Perkins, 78 Mich. 1.

¶ 291. Members of a copartnership are jointly liable for goods fraudulently obtained for the firm by one partner, and by him fraudulently disposed of.—Banner v. Schlessinger, 109 Mich. 262.

¶ 292. The assent of one of two partners to what one who is acting as a deputized

constable does in the service of an execution in favor of the firm is sufficient to bind both.—Harvey v. McAdams, 32 Mich. 472.

¶ 293. Property of another taken by the joint action of two partners as soon as the partnership was formed and work in a quarry was commenced, and used during the continuance of the partnership, made the partnership liable to the owner, and consequently one partner who innocently believed that the property was actually owned by the other partner, was individually liable.—Sunlin v. Skutt, 133 Mich. 208.

¶ 294. If one member of a copartnership enter into a transaction on his own behalf, which is within the scope of the partnership business, his copartners may insist that it is a fraud upon them, and claim the benefits resulting from it. But this is a right which the partners alone can assert, and is not available to third persons, for the purpose of fixing a liability upon the partnership when such claim has not been asserted.—Lockwood v. Beckwith, 6 Mich. 168.

B. INCOMING AND OUTGOING PARTNERS' LIABILITIES OR RIGHTS.

§ 48. In general; rights and liabilities of incoming partner.

Powers and duties of continuing partners, see post § 102.

Rights and liabilities of surviving partner, see post § 92.

Provisions as to liability of incoming partner, see Uniform Partnership Act § 17.

¶ 295. Where one member of a partnership with the assent of his copartners sold out his entire interest in the partnership including its realty to a new partner, and the latter executed back a purchase money mortgage to the retiring partner, and agreed to make up the deficiency created by the mortgage by the payment of money into the concern; and where subsequently all of the partners executed a mortgage to a creditor of the partnership; the interest of the new partnership created by the said transaction was limited to the equity of redemption.—Tobias v. Commercial Sav. Bank, 136 Mich. 135.

§ 49. Rights and liabilities of retiring partner.

Right to continue business in the old name, see ante § 21.

Indemnity bond to retiring partner, see post § 60.

Reimbursement, contribution and indemnity between partners, see post §§ 61, 121, 122.

Estoppel of outgoing partner to deny receipt of money which he enabled third person to collect, see also Estoppel ¶ 142.

¶ 296. A partner's sale of his interest in the assets of the firm does not, it seems, assign his personal indebtedness thereto unless the instrument of transfer expressly includes it.—Gardiner v. Fargo, 58 Mich. 72.

¶ 297. Where goods are ordered by one member of a firm, and the order has not been accepted nor the goods shipped until after notice of its dissolution, and the shipment varies from the terms of the order, the retiring partner will not be bound to it, nor will he be bound if the conditions of the order are waived after the dissolution by the remaining partner.—Goodspeed v. Wiard Plow Co., 45 Mich. 322.

¶ 298. Where, as between two partners, the retiring partner is merely a surety as to certain promissory notes given by the firm, the payee, by extending the time of payment of the notes at the other partner's request, and accepting from him a chattel mortgage to secure said notes, releases said surety from liability on the notes.—Wood Mowing & Reaping Machine Co. v. Oliver, 103 Mich. 326.

§ 50. ——Notice of withdrawal.

Notice of dissolution to make it effectual, see post § 91.

¶ 299. Where a member of a mining copartnership assigns his stock in the company to a third person, he is still liable as a copartner for debts subsequently contracted by the company to a person who had no notice of his withdrawal.—Burgan v. Lyell, 2 Mich. 102.

¶ 300. Where a salesman of a company has notice in the course and within the scope of his agency that a member of a copartnership has withdrawn therefrom and the company subsequently extends credit to the copartnership after the salesman submits a report concerning it such former member cannot be held for the price of the goods for which credit was extended since notice to the agent of his withdrawal was notice to the company.—Westinghouse Elec. & Mfg. Co. v. Hubert, 175 Mich. 568.

¶ 301. Where it is the custom of a salesman of a company in finding out the credit standing of customers to get what facts he can and refer them to the credit department of the company to which such matters are referred, the information was acquired in the course and within the scope of his agency, when such salesman was told that a member of a copartnership which was about to become a customer had withdrawn therefrom.—Westinghouse Elec. & Mfg. Co. v. Hubert, 175 Mich. 568.

¶ 302. Where action is brought for the price of goods sold to a copartnership, against a member who had withdrawn when the sale was made it is immaterial whether the plaintiff extended credit to the partnership upon the strength of the supposed con-

nection of such former member therewith if an agent of plaintiff had actual knowledge of the withdrawal before the sale in the course and within the scope of his agency.—Westinghouse Elec. & Mfg. Co. v. Hubert, 175 Mich. 568.

§ 51. Assumption of debts by partner and release of others.

See also post ¶ 320.

Indemnity bond to retiring partner, see post § 60.

Promise by one partner to pay firm debts as indemnity contract, see Indemnity § 1.

Validity of parol agreement to pay partner's debts, see Frauds, Statute of § 16.

Consideration for assumption of debts by new firm, see Contracts ¶ 453.

General law of novation, see Novation.

¶ 303. The promise of one partner to pay a debt of the firm, if made to the creditor himself, may afford a sufficient consideration for the release of his copartner.—Motley v. Wickoff, 113 Mich. 231.

¶ 304. An agreement between copartners upon the dissolution of the firm, whereby one partner assumes all of the firm debts, will not, of itself, support the subsequent promise of a creditor to release the other partner from liability.—Motley v. Wickoff, 113 Mich. 231.

¶ 305. The mere statement by a partner, after dissolution of the firm, to one of the partnership creditors, that he has agreed with his copartner to pay the firm's indebtedness, and the creditor's reply of "All right; pay as fast as you can," does not establish a privity between them as to the obligation of the former to pay the debt individually.—Motley v. Wickoff, 113 Mich. 231.

¶ 305a. As retiring partners, whose liability for the firm's debt has been assumed by their former copartners, stand as sureties, they are discharged by extensions granted to such copartners by firm creditors who have knowledge of the dissolution of the firm and of the assumption of liabilities.—Smith v. Shelden, 35 Mich. 42; Johnson v. Emerick, 70 Mich. 215.

¶ 306. A proposition by one partner for the purchase of the interest of his copartner, who was to be relieved of all liability excepting a certain described note of the latter, and an acceptance by the copartner providing that he was to be relieved from "all further liability as to the business," constituted a settlement of partnership matters; and the note which had remained in the purchasing partner's possession without any demand by the selling partner for its surrender, was a personal transaction which was not included in the settlement.—Hoskins v. Dickinson, 124 Mich. 11.

¶ 306a. If one of two copartners who had entered into a contract with plaintiff upon which certain advances were made to them, sells out to the other and a third person, the vendees agreeing to save him harmless; and the notes the proceeds of which constituted the advances are renewed and indorsed by the vendees, in an action on the contract for the unpaid advances the renewal of the notes without the retiring partner's assent does not discharge him from liability on the contract, nor would mismanagement on plaintiff's part in the matter of the contract discharge him beyond the extent of the loss by it.—Sample v. Pickard, 74 Mich. 416.

¶ 307. The individual statement by one member of a firm, made after the dissolution of the partnership, that he was to pay certain notes made by the firm for the accommodation of the indorsee will not relieve the indorsee from liability to pay the amounts of the notes to another member of the firm, who afterwards paid the notes, nor will such promise be available to the partner who paid the notes.—Bliss v. Plummer's Estate, 103 Mich. 181.

C. FIRM AND INDIVIDUAL ACTS AND DEBTS, AND APPLICATION OF ASSETS.

§ 52. In general.

Liability of member for proceeds of deposited check charged back on dishonor, see Banking § 16.

Recovery from firm for dishonored check of partner, see Banking ¶ 44.

Note of individual partner as set-off against bank deposit of partnership, see Banking § 82.

Lien of bank on stock of member of a partnership for partnership debt, see Banking ¶ 220.

Validity of mortgage securing both firm and individual debts, see Chattel Mortgages § 14.

Right of partners to exemption in suit against firm, see Exemptions ¶¶ 8-10.

Necessity that agreement to assume partnership debts be in writing, see Frauds, Statute of ¶¶ 38, 46.

Application of payments as between individual and firm debts, see Payment § 42.

¶ 308. Where several persons put up a building as partners, and one of them buys brick for the purpose without an express understanding with the vendor that it is an individual purchase, and the brick is actually used in the building, the partners are liable as such for its value.—Stecker v. Smith, 46 Mich. 14.

¶ 309. Were H. was the general partner in a firm called H. & O., an order drawn on H. as "general partner," and accepted in the firm name, is to be treated as an order on and acceptance of the firm, and not as an individual transaction.—Carney v. Hotchkiss, 48 Mich. 276.

¶ 310. Where two firms have dealt with each other and each with the members of the other under a general understanding that the individual account of any partner should be treated as a matter of firm account against his firm, and dealings and settlements have, from time to time, been made on this basis, the balance found on such a settlement made in good faith was held, as between the parties, to be a legitimate demand on behalf of the creditor firm against the other, for which an action would lie.—Davis v. Dodge, 30 Mich. 267.

¶ 311. The fact that a business firm, not organized for banking purposes, was in the habit of receiving an individual's money and allowing him interest on it does not tend to show that the firm as such was his depositary of securities in the hands of one of the members.—In re Hatheway's Appeal, 52 Mich. 112.

¶ 312. Where the testimony is conflicting as to whether certain claims filed against the estate of a deceased partner are valid demands against the partnership or against one of the surviving partners only, the question should be submitted to the jury.—Whitla v. Butler's Estate, 99 Mich. 51.

¶ 313. A firm note may be valid as against firm creditors, though given for the debt of one of the partners.—Burrows v. Leech, 116 Mich. 32.

¶ 314. The fact that partnership paper is made payable to a member of the firm is no evidence that it is not a partnership transaction.—Stevens v. McLachlan, 120 Mich. 285.

¶ 315. The taker of a note or bill signed in the name of a partnership by one of the partners may lawfully presume that it is a partnership paper issued for partnership purposes.—Stevens v. McLachlan, 120 Mich. 285.

¶ 316. In an action against a wife for goods sold, where the defendant denied liability on the ground that the goods were sold to her and her husband as partners, an instruction stating that "if they were doing business with other people they had the right nevertheless to make this contract" with plaintiffs, although misleading when standing alone, was not error where the jury were also clearly instructed that if the goods were sold to the partnership, plaintiffs could not recover.—Johnson v. Costigan, 122 Mich. 596.

§ 53. Debts contracted in individual capacity.

¶ 317. An action will not lie against a firm upon a note given by one partner without the other's knowledge or assent, and without any consideration to the firm, and if it does not pertain to the firm business and was taken for the private debt of the partner who gave it.—Roberts v. Pepple, 55 Mich. 367.

¶ 318. Plaintiff who individually leased certain premises from defendant which were subsequently occupied by himself and another as a partnership remains personally liable for the rent in the absence of any arrangement releasing him from his liability.—Fryszka v. Prybeski, 139 Mich. 461.

¶ 319. A partnership is not liable for money borrowed by a partner in his individual capacity simply because the money is applied to the use of and inures to the benefit of the firm especially where the money is borrowed before the partnership is formed.—Smith v. Sheridan, 175 Mich. 391.

§ 54. Application of firm assets.

What constitutes firm property and assets, see ante § 22.

Equitable conversion of firm property, see ante § 25.

Assignments for benefit of creditors, see also ante § 34.

Ratification of partner's act in using funds to pay debt of third person, see ante ¶ 287.

Requisites of decree setting aside bankrupt firm's transfers as fraudulent, see Bankruptcy ¶ 64.

Mortgage of partnership chattels to secure firm and individual debt, see Chattel Mortgages § 14.

Executions against shares in firm, see Executions § 20.

Right of creditor to reach assets of partnership fraudulently transferred to wife of partner before his death, see Fraudulent Conveyances ¶ 214.

Transfers of partnership assets to or for benefit of business associates in fraud of creditors, see Fraudulent Conveyances §§ 57, 58, ¶¶ 260, 262, 263.

Invalidity as to creditors of transfer of partnership assets to a third person for inadequate consideration, see Fraudulent Conveyances ¶ 327.

¶ 320. In the absence of any agreement to the contrary, it is fair to presume that a retiring partner does not intend that the partnership property shall be used for the individual benefit of a partner who continues the business, leaving the debts of the firm unpaid; and this was held to be the presumption where the retiring partner transferred the partnership effects to a partner continuing the business, who agreed to pay the partnership debts, and gave bond to that effect.—Topliff v. Vail, H. 340.

¶ 321. After the owner of a manufacturing business had conveyed to his brother upon their becoming partners, an undivided half of lands used in connection with such business, each brother conveyed an undivided sixth of the land to a third person who was

admitted into the firm, it being understood between the partners that the land should be partnership property and that each partner should hold his undivided interest for the purposes of partnership. Held, that the land was subject to the payment of the firm's debts.—Childs v. Pellett, 102 Mich. 558.

¶ 322. Evidence tending to show that money alleged to be a partnership indebtedness represented sums borrowed by the partners individually for the purpose of embarking upon the partnership enterprise, in connection with other circumstances showing that the debt is an individual debt, is sufficient to warrant a setting aside of a transfer of partnership assets to the creditor, as in fraud of firm creditors.—Clark-Jewell-Wells Co. v. Tolsma, 151 Mich. 561.

¶ 323. An attachment creditor of a partnership may follow the interest of one of the firm in the partnership realty into the hands of a fraudulent grantee, notwithstanding the fact that such partner has withdrawn from the firm, and those succeeding to the business have assigned for the benefit of creditors.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

¶ 324. Where it is understood between the parties to a transfer of partnership interests that rights of action are transferred, and they act accordingly without objection, a third party can hardly dispute the completeness of the assignment where there is no evidence of hostile title.—Woods v. Ayres, 39 Mich. 345.

§ 55. ——To individual debts of partner.

See also ante ¶ 320.

Power of partner to apply firm property to payment of individual debts, see also ante § 34.

Fraudulent transfers to or for benefit of business associates, see Fraudulent Conveyances §§ 57, 58.

Weight and sufficiency of evidence of fraudulent transfers to business associates, see Fraudulent Conveyances § 65.

¶ 325. Neither an agent nor a partner has any implied power to apply partnership moneys on private debts; and one who deals with an agent cannot, without the principal's authority or acquiescence, apply money due to the principal upon a private account with the agent.—Chase v. Buhl Iron Works, 55 Mich. 139.

¶ 326. A partner's bill of sale of partnership property to secure his individual debts does not affect a copartner's right unless sanctioned by him; the purchaser takes only the undivided share of the vendor, subject to all the rights of the other parties and to the account to be taken between them, and he cannot change the possession or make any specific division.—Kingsbury v. Tharp, 61 Mich. 216.

¶ 327. A partner's private means are not open to inquiry in an action against the firm, which can only be liable for partnership purposes or for such as are presumably so. And a partner cannot use partnership funds for private purposes.—Roberts v. Pepple, 55 Mich. 367.

¶ 328. It is a fraud upon nonconsenting members for one partner to use a firm note to pay his individual debt.—Towle v. Dunham, 76 Mich. 251.

§ 56. Priorities and preferences between creditors.

Rights of and proceedings by creditors after dissolution, see post § 90.

Priorities of creditors under assignment, see Assignments for Creditors § 23.

¶ 329. The creditors of a partnership have a right to payment out of the partnership effects, in preference to the creditors of an individual partner.—Topliff v. Vail, H. 340.

¶ 330. As between the creditors of a previous firm the separate creditors of a partner who continued the business and was the sole visible owner of the property employed in trade, and where the separate creditors had given credit, relying on the property employed in trade for payment, such creditors should be preferred to the creditors of the firm.—Topliff v. Vail, H. 340.

¶ 331. Those who deal with persons representing themselves as partners in business are entitled to have the property used in that business applied to the payment of their debts in preference to the individual debts of such persons.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 332. A debt owing by the members of the original firm to one B., and not assumed when a new firm was formed, is subject to the firm debts though secured by a mortgage on firm realty given by a partner and a former partner holding each an undivided third of the legal title; but as to claims of the mortgaging partners as creditors of the firm it is superior though they also are secured by liens on the realty.—Childs v. Pellett, 102 Mich. 558.

¶ 333. Creditors of the second of three firms may after exhausting the firm property resort to an undivided third in realty of which one of the partners holds the legal title under an agreement to convey to the third firm on payment to him of the value of his share; since while as between him and the third firm he is a creditor with a lien on the land, as to the creditors of the second he is individually liable after the firm property is exhausted.—Childs v. Pellett, 102 Mich. 558.

¶ 334. Creditors of the second of three firms are superior to a mortgage on an un-

divided third of its realty given by a member of the third firm to a member of the second for a debt owing to him individually by the third firm; since all of the property of the members of the second firm as individuals is liable for debts of their firm after exhausting the firm property, and the equity of the general creditors is therefore superior.—Childs v. Pellett, 102 Mich. 558.

¶ 335. The creditors of an insolvent partnership cannot complain of a transfer of firm assets in payment of a bona fide obligation upon which all of the members of the firm were jointly liable.—Oliver & Roberts Wire Co. v. Wheeler, 106 Mich. 408.

¶ 336. Defendant negotiated the sale of a stock of goods to L., agreeing to take his farm in exchange; but, it appearing that the value of the stock exceeded that of the farm, it was agreed that W. should enter into partnership with L., and a joint note was given by them to defendant for the amount of the excess in value. Several years later, the firm becoming embarrassed, defendant repurchased the stock, turning out the note of W. and L. in part payment. Held, that the transfer was not fraudulent as to the creditors of the firm of W. & L., in the absence of actual fraud in the transaction, although, as between the individual members of the firm, the note was the obligation of W., and L. was merely a surety.—Oliver & Roberts Wire Co. v. Wheeler, 106 Mich. 408.

¶ 337. Firm creditors are entitled to the application of partnership assets to their claims against insolvent copartners, exclusive of creditors of the individual copartners.—Clark-Jewell-Wells Co. v. Tolsma, 151 Mich. 561.

¶ 338. One who has purchased of one of a firm property subject to partnership debts, and has agreed in writing to assume and pay such debts as part of the purchase price, thereby recognizes the equitable lien of the partnership creditors; and it is not necessary that such creditors should put their claims in judgment before filing a bill to compel such payment.—Olson v. Morrison, 29 Mich. 395.

¶ 339. A partner's individual creditors antedating the partnership are entitled to be paid out of his estate's share of the assets before the other partner is reimbursed for his payment of firm debts.—Killefer v. McLain, 70 Mich. 508.

¶ 340. Where an assignment by one partner does not purport to convey any firm property, his assignees take no title to said firm property, nor, said partner having deceased, have they a right to the firm assets against an officer who seizes the same in an action against the surviving partner as such by firm creditors.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 340a. The fact that money placed with sureties on replevin bond as individuals to secure them against loss is deposited in the bank as money belonging to them in their partnership relationship will not prevent the defendant in replevin subrogated to such fund from recovering the fund as against individual creditors of the partners.—Lindsay v. Morse, 129 Mich. 350.

¶ 341. Where one who claims to be a member of a firm draws money therefrom to test the question of his membership, his responsibility to the firm is merely as a firm debtor, but whether such a debt gives the firm or its creditors any preference over a judgment creditor of his, quære.—Hamilton v. Harris, 72 Mich. 56.

V. MUTUAL RIGHTS AND LIABILITIES OF PARTNERS.

§ 57. In general.

Nature and extent of partner's interest in firm property, see ante § 27.

Rights and liabilities of incoming or outgoing partners, see ante § 48 et seq.

Assumption of debts by partner and release of others, see ante § 51.

Actions between partners, see post § 77.

Acts of copartner justifying dissolution, see post § 88.

As between surviving partner and his cosurvivors, see post § 98.

Accounting after dissolution, see post § 103 et seq.

Selection of exempt property by levying officer where several partners claim same property, see Exemptions ¶ 102.

Measure of damages for failure to furnish money for enterprise, see Damages § 51.

Rights and duties of partners in relation to the partnership, see Uniform Partnership Act §§ 18-23.

¶ 342. One member of a partnership which is indebted to two of its four members for money loaned the firm, and agreed to be repaid out of the first net profits realized from the firm business, cannot be held individually liable for a proportionate share of the debt unless something is done to change its form.—Fellows v. Thrall, 85 Mich. 161.

¶ 343. In case of a firm debt to part of its members for a loan a promise contained in a letter written to one of the lending copartners by one member on the sale of his interest in the firm business and assets to a stranger who takes his place in the firm by consent of his copartners except as to liability for said debt, that on receiving payment from such purchaser he will pay to said two partners his share of said debt, is wholly without consideration.—Fellows v. Thrall, 85 Mich. 161.

¶ 344. Complainants and defendant entered into a partnership for the development of mining property. After forming a co-

partnership, a corporation was organized by the same parties, and defendant secured other property than that originally contemplated for development purposes, acquired title in his own name, and transferred it to the company for stock and notes. The proceeds of this transfer he divided according to the terms of the original agreement among complainants and himself. The company had the transaction set aside as to complainants on the ground that they were directors in the company, and had procured a secret profit in fraud of its rights. Held, that the fact that complainants lost the profits of the transaction through a judicial decree did not constitute such failure of consideration as to entitle them to repudiate the agreement by which the division was made, and to recover a different share of the proceeds, more advantageous to themselves. —Newcomb v. Thorpe, 156 Mich. 101.

§ 58. Services to firm and compensation.

See also ante ¶ 31.

Right of surviving partner to compensation, see post § 98.

Services and compensation as items of credit and charge on accounting, see post § 114.

Right of partner to compensation, see Uniform Partnership Act § 18.

¶ 345. A partner must use his best efforts and judgment in promoting the firm business without further compensation than his share in the profits.—Heath v. Waters, 40 Mich. 457.

¶ 346. The sickness of a partner is one of the risks incidental to partnership business, and does not give another partner any claim for personal services in conducting the entire business if the partnership articles do not provide for any.—Heath v. Waters, 40 Mich. 457.

¶ 347. In the absence of an agreement, a partner is not entitled to compensation for his services.—Pierce v. Pierce, 89 Mich. 233.

¶ 348. In the absence of an express stipulation to that effect, a partner is not entitled to compensation for his services in and about the partnership business even though he has taken full charge of affairs. —Major v. Todd, 84 Mich. 85; Pierce v. Pierce, 89 Mich. 233.

¶ 349. In the absence of an express agreement or a settled practice to the contrary, a partner is not entitled to interest on advances made to the firm, or to compensation for his services.—Thompson v. Noble, 108 Mich. 19.

¶ 350. Ordinarily partners are not entitled to compensation for carrying on a business in the absence of an express agreement in relation thereto.—Morton v. DeYoung, 185 Mich. 94.

¶ 351. The fact that one partner performed substantially all the labor of managing the firm's business is a circumstance to be considered in equity, although not controlling, in determining his right to compensation.—Morton v. DeYoung, 185 Mich. 94.

¶ 352. An allowance of one hundred dollars per month to one partner for conducting and managing a business, held sustained by the evidence.—Morton v. DeYoung, 185 Mich. 94.

¶ 353. In the absence of agreement, one partner cannot collect pay for services performed for the partnership, as each partner is presumed to devote his time, skill, and endeavor to the partnership business and this without compensation other than his share of the profits.—Arthur v. McCallum, 195 Mich. 618.

¶ 354. In determining whether an agreement for payment for services rendered a partnership by a partner exists the court may take into consideration all the surrounding facts and circumstances of the case, the course of dealing between the partners, the reasonableness or unreasonableness of the claim made and the probabilities arising out of the conduct of the business.—Arthur v. McCallum, 195 Mich. 618.

¶ 355. In an action by one partner for a partnership accounting and to recover for services rendered the partnership, where it appeared that an agreement for compensation was made; that subsequently the firm moved into premises owned by one of the partners, and later into another building; that plaintiff devoted all of his time to the business, and that the firm was very prosperous, evidence held sufficient to show that the contract was modified by an arrangement whereby plaintiff was to receive no salary in consideration of the furnishing of rent, light and heat free to the partnership only while in defendant's building, and that the original agreement was restored upon leaving defendant's building.—Arthur v. McCallum, 195 Mich. 618.

§ 59. Carrying on separate business.

Debts contracted in individual capacity, see ante § 53.

Profits or earnings from individual transactions as items of charge or credit on accounting, see post § 116.

Duty of tenant in common of mine to give time to operation to exclusion of solely owned mine, see Tenants in Common, II.

¶ 356. Complainant and defendant were jointly interested in certain lumbering operations, the business being conducted in the name of defendant. While so engaged, defendant purchased certain lands in his individual capacity, and lumbered them under contract with third parties. Complainant, contending that the proceeds of the venture

belonged to the partnership, filed a bill for an accounting, upon which it appeared that, prior to the transaction in controversy, the partnership dealings had been confined to lands already owned by the parties, or to specific tracts purchased from time to time by mutual agreement; that the purchase in question was made openly and without concealment; that, while the firm bank account was kept in defendant's name, and checks were drawn against it in payment for the lands, the account was at such times indebted to defendant for advances; and that the payments made were in fact realized from the lands themselves, in connection with defendant's individual credit. Held, that the purchase of the lands was not within the scope of the partnership business; that defendant, therefore, had the right to make the same for his sole benefit.—Hake v. Coach, 107 Mich. 197.

¶ 357. A member of a manufacturing firm who has consented to his copartner's carrying on a mercantile business upon his own account is not entitled to participate in the profits realized by the latter upon goods turned out by him in payment for materials furnished and labor performed for the firm.—Thompson v. Noble, 108 Mich. 19.

§ 60. Indemnity bond to retiring partner.

See also ante ¶ 320.

Rights and liabilities of retiring partners, see ante § 49.

Action on bond given to indemnify retiring partner against liability for debts of firm, see Indemnity § 9.

¶ 358. An indemnifying bond given by a firm to a retiring partner is intended to secure him against debts of the firm to third persons on which he might be held liable if the firm did not pay them. It would not be regarded as meant to cover a credit to the partner himself on the books of the firm, as that would be a debt to himself for which he was himself in part responsible as partner.—Lambert v. Griffith, 50 Mich. 286.

§ 61. Reimbursement and contribution between partners.

Suits in equity between partners, see post § 82.

Contribution and indemnity after dissolution, see post §§ 121, 122.

Right of partner paying off mortgage lien, see Mortgages ¶ 701.

Contribution as between partners liable for torts, see Indemnity ¶ 55.

¶ 359. Where property owned by two partners is subject to a mortgage, and, as between the two, it is the duty of one to discharge it, and the other pays the debt on condition that the mortgage shall inure to his benefit, the latter is entitled to reimbursement, with interest, through the mortgage.—Laylin v. Knox, 41 Mich. 40.

¶ 360. Where it was the duty of one partner to furnish the money required to buy a tract of land for the firm business, the title to which was taken in his name, and for which he paid the purchase price, overlooking, however, a small sum due for interest, which his copartner without express request subsequently paid in order to release the land from encumbrance, it was held, in a suit for such interest money and for other advances, that an implied request to pay the interest might be inferred.—Bates v. Lane, 62 Mich. 132.

¶ 361. There was no such confusion of partnership funds as to make one of the partners accountable to the other for the profits of a lumbering venture, where the evidence showed that all accounts were in one partner's name with his own funds, and while the lands, openly purchased in the name of such partner, were paid for by checks drawn on such account, yet the firm was at all times indebted to him for advances for more than the amount so drawn, and where the lands were really paid for out of the receipts of a lumbering contract made with a third person by the partner in question.—Hake v. Coach, 107 Mich. 197.

¶ 362. Under Comp. L. 1871, §§ 6199, 6201, providing for separate compromises of partnership debts with members of the firm, the copartners who are not parties cannot be held except for their joint ratable proportion, and they cannot be held for more than the balance due a creditor even though their joint ratable proportion exceeds the balance remaining unpaid.—Lowell Nat. Bank v. Train, 2 Mich. Lawy. 27, Fed. Cas. No. 8571.

¶ 363. Under Comp. L. 1871, § 6202, copartners who are not parties to a compromise of partnership debts with individual members of the firm are liable to their partners, who by compromise paid more than their proportion to make contribution; and this shows that their liability to the creditor must be limited to the balance of the debt unpaid when that balance is less than their joint ratable proportion as provided in Comp. L. 1871, §§ 6199, 6201.—Lowell Nat. Bank v. Train, 2 Mich. Lawy. 27, Fed. Cas. No. 8571.

VI. ACTIONS AND SUITS.

A. BY OR AGAINST THE FIRM OR ITS MEMBERS.

Actions between partners, see post VI. B.

Actions by and against surviving partners, see post § 100.

§ 62. By the firm or members thereof jointly.

Actions by trustees or representatives of firm, see post § 65.

Actions by individual partner, see post § 68.

Actions against the firm or its members, see post § 67.

¶ 364. Damages for destruction of business from trespass by unlawful levy against one partner on partnership chattels are recoverable in action by both partners.—Haynes v. Knowles, 36 Mich. 407.

¶ 365. Partners have a joint right of action for the conversion of partnership property under an invalid levy and sale upon an execution issued against one of the partners.—Kunze v. Cox, 113 Mich. 546.

§ 63. ——On acts done in member's individual name.

¶ 366. Where the owner of a store building, with full knowledge that it is desired by a copartnership for the purposes of the firm business, and that it is their intention so to use it if procured, declines to lease it to the firm, but does lease it to one of the partners, and two of the three remaining partners become sureties for the payment of the rent and the performance by the lessee of the other covenants of the lease, an action for damages for the lessor's refusal to deliver possession to the lessee will not lie in favor of the firm.—Burwitz v. Jeffers, 103 Mich. 512.

¶ 367. A partnership may sue in trover for the conversion of goods consigned in the name of one of the partners who acted as traveling agent for the partnership.—Baehr v. Downey, 133 Mich. 163.

¶ 368. A suit lies in the firm name to recover the price of goods belonging to the partnership, and sold by one of the partners without disclosing the joint ownership, subject to the like defenses as if the partner had sued therefor in his own name.—Gilbert v. Lichtenberg, 98 Mich. 417.

§ 64. ——Necessity of certificate on file.

Certificates of copartnership in general, see ante § 19.

¶ 369. Pub. Acts 1913, No. 164, requiring a partnership to file a certificate with the county clerk affects the enforcement by offending partnership of contracts made in the course of carrying on business unlawfully while disability continues.—Bottomley v. Brown, 188 Mich. 134.

¶ 370. A partnership may enforce a contract not to engage in competition in a particular locality made at the time of the sale of a business to the partnership and previous to the passage of Pub. Acts 1913, No. 164, although such partnership has not complied with the provisions of such act requiring a partnership to file a certain written and verified certificate with the county clerk, as such act does not impair the right to enforce a promise made previous to its passage.—Bottomley v. Brown, 188 Mich. 134.

§ 65. By trustees or representatives of the firm.

¶¶ 371, 372. Defendant gave promissory notes to a copartnership banking firm consisting of six partners. Three of the partners were joint obligors with defendant on the notes. In a suit at law, held, that the trustee in bankruptcy of the partnership could not recover on the notes, but was limited to his remedy in equity.—Kalamazoo Trust Co. v. Merrill, 159 Mich. 649.

§ 66. By individual partner.

Actions between partners, see post § 77.

Actions by surviving partners, see post § 100.

Right of infant partner to sue individually to recover firm debt, see Infants ¶ 119.

¶ 373. One partner may bring replevin for partnership property seized on execution for another's individual debt to the execution creditor.—Hutchinson v. Dubois, 45 Mich. 143.

¶ 374. One partner cannot sue alone in trespass for his proportion of damages done to partnership business.—Bigelow v. Reynolds, 68 Mich. 344.

¶ 375. A partner may sue individually for malicious attachment against firm property by defendant in collusion with copartner so that the loss fell on plaintiff and specially injured him.—Grimes v. Bowerman, 92 Mich. 258.

¶ 376. One partner cannot maintain trover against a purchaser from the other partner of the partnership property in fraud of the plaintiff's rights.—Reed v. Gould, 105 Mich. 368.

¶ 377. The fact that a bill of sale to a saloon business was a partnership transaction will not prevent an action against the seller by one of the partners for fraudulent representations and for property not received under the contract where at the time of the institution of the action such partner, by virtue of the purchase of the interest of the other partner, was the only person interested in the business.—Williams v. Green, 201 Mich. 202.

§ 67. Against the firm or its members.

Actions against firm on partner's individual paper, see ante § 53.

Trover by vendee in a bill of sale made by partner without authority, see ante ¶ 224.

Proceedings by creditors after dissolution, see post § 90.

Part payment by one partner as tolling limitations on firm debt, see Limitations § 96.

¶ 378. Presenting a claim against the estate of a deceased partner does not operate as an abandonment of a suit against

the firm.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 379. An action against two partners is, on the death of one, properly revived against the survivor.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 380. The presentation, against the estate of a deceased partner, of a claim against the firm will not operate as an abandonment of a suit begun against the firm on such claim before such partner's death.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 381. Prosecution against surviving partner, after revival against him of a suit previously begun against the firm, is not an abandonment of the suit as against the deceased partner; nor need the plaintiffs prove their claim against the latter's estate or proceed in equity to determine the rights of such estate and creditors.—Van Kleeck v. McCabe, 87 Mich. 599.

§ 68. Attachment or garnishment of firm or members.

General law of attachment, see Attachment.
General law of garnishment, see Garnishment.
Garnishment and attachment in justices' courts, see Justice of the Peace.
Attachability of partnership and firm property, see Attachment § 20.
Averments as to cause of action in attachment affidavit, see Attachment § 24.
Abatement of lien of attachment by revival of action against individual, see Attachment § 97.
Right to move to dissolve attachment, see Attachment § 105.
Garnishment of debt to firm when subject to adjustment by accounting, see Garnishment §§ 24, 106.

¶ 382. In attachment proceedings against a copartnership one of the persons mentioned in the affidavit was not a member of the copartnership and the copartnership was no longer in existence. Held, the affidavit was not so defective as to make the proceedings void on their face.—Belcher-Stine Lumber Co. v. Burns, 159 Mich. 466.

¶ 383. The right of one partner to a partnership fund could not be cut off by garnishment in justice court against only one of such partners, and the service upon such partner alone, of a claimant's notice issued to the partnership.—Stone v. Dowling, 119 Mich. 476.

¶ 384. A firm owed $8,000 to defendant bank. The bank induced the wife of one Baldwin, a partner in the firm, to execute secretly a mortgage for $4,000 on her homestead, to secure such debt. The firm then made a composition with all creditors on a basis of 50 per cent. The bank joined in the composition and represented to other creditors that it was an advantageous settlement. Held, in garnishment proceedings by the other creditors to reach the proceeds realized by the bank from the mortgage, that the bank has a right to get the additional security from Mrs. Baldwin; that the said proceeds never became firm assets; and judgment should be for defendant.—Krolik v. Sault Sav. Bank, 161 Mich. 106; Peck v. Same, Id.; Thomas Briggs Shoe Co. v. Same, Id.

§ 69. Parties to actions and suits.

Parties to actions by and against surviving partners, see post § 100.
General law as to parties, see Parties.
Who may sue on agreement with partner where compensation was divided and copartner assisted in performing services required, see Contracts ¶ 1141.
Partners as parties to creditors' bill, see also Creditors' Suits ¶ 84.
Partners as parties complainant in equity foreclosure suit, see Foreclosure § 61.
Intervention of partnership in proceedings to foreclose mechanics' lien, see Mechanics' Liens ¶ 229.
Right of partner to intervene in interpleader suit against his copartner, see Interpleader ¶ 25.
Disability of partners to join in suing on individual claims, see also Parties ¶ 15.
Name in which one doing business by nominal firm name should sue, see Parties ¶ 30.

¶ 385. A partner suing for his exemption out of firm property need not join his copartners as plaintiffs.—McCoy v. Brennan, 61 Mich. 362.

¶ 386. Dormant partners may be joined or omitted in actions by or against the firm.—Smith v. Ayrault, 71 Mich. 475.

¶ 387. In an action by one partner to recover damages from copartner's vendee of partnership property sold in fraud of plaintiff's rights, nonjoinder of copartner need not be pleaded where the action is not maintainable even in joint names of partners.—Reed v. Gould, 105 Mich. 368.

¶ 388. An action upon a contract entered into after the expiration of a limited partnership by the partners thereof is properly brought in the names of all the partners.—Sarmiento v. The Catherine C., 110 Mich. 120.

¶ 389. An infant, in a suit under his partnership contract upon a completed cause of action for his benefit, should be a plaintiff in his own name and not through another.—Osburn v. Farr, 42 Mich. 134.

¶ 390. Where a certain person put a certain sum of money into plaintiff's business, shared in the profits and in a portion of the losses, but the business was done solely in

plaintiff's name and defendant supposed that he was the sole proprietor, and such person acted as clerk and did not assume to be the proprietor, he was a dormant partner, and an action was properly brought in the sole name of plaintiff.—Seeley v. Savercool, How. N. P. 262.

¶ 391. A married woman's action against a firm wherein her husband is a partner properly impleads him as a defendant.—Benson v. Morgan, 50 Mich. 77.

§ 70. Pleading and offsets.

Set-offs in actions between partners, see post § 80.
General law of pleading, see Pleading.
Mode of pleading nonjoinder of partner, see Pleading § 62.
General law as to set-off, see Set-off.
Common assumpsit for share, see Assumpsit, §§ 30, 31.
Sufficiency of description of firm in alleging assignment by it, see Assignments ¶ 129.
Complaint for arrest of partner as fraudulent debtor, see Civil Arrest § 25.
Needlessness of allegations of partnership in suing for fraud as joint tort feasors, see Fraud § 91.
Sufficiency of informal description in affidavit for replevin to describe "plaintiffs" as individuals, see also Replevin, II.

¶ 392. A declaration on the common counts alone is insufficient in an action by an individual for the price of goods purporting to be sold by a firm in which he was a partner, if there is no showing of any assignment of the claim by the firm to the plaintiff, or of any notice to defendant of the firm's dissolution.—Hatzenbuhler v. Lewis, 51 Mich. 585.

¶ 393. In an action by an attorney, individually, for fees for services rendered while he was a member of a law partnership since dissolved, it was held necessary that he plead and prove an assignment from the copartnership to himself.—McKnight v. Lowitz, 176 Mich. 452.

¶ 394. In an action at law by one partner alone the nonjoinder of the other partner need not be pleaded, where the action cannot be maintained in the joint names of the partners, the remedy being in equity.—Reed v. Gould, 105 Mich. 368.

¶ 395. A partnership turned over a note payable to plaintiff, an individual partner, to defendant for collection. Defendant appropriated the proceeds thereof. In a suit by capias ad respondendum in trover and case for the unlawful conversion of the proceeds, defendant set up that the partnership owed him commissions and there was a running and unsettled account between him and the partnership. Held, defendant was liable unless it appeared the plaintiff authorized him to apply the proceeds of the note in payment of commissions due him from the partnership.—Reed v. McCready, 170 Mich. 532.

¶ 396. An indorsee's count upon a promissory note against copartnership makers need not specially allege the firm's capacity to make notes or set forth facts wherefrom such capacity may be implied.—Carrier v. Cameron, 31 Mich. 373.

¶ 397. Defendants were sued as copartners, naming them, and as doing business under a certain firm name. Held, that by appearance, and by entering a plea entitled in the same manner and with the same firm name, they must be held on error to have admitted the partnership for the purposes of the case presented.—Van Doorn v. Heap, 160 Mich. 199.

¶ 398. It was competent to show authority or a holding out of a partner as one authorized to act for the copartnership in the transaction; where, in an action against such partnership for a team sold to it, the declaration contained a special count alleging the copartnership, the holding out of such partner as manager of its business, with authority to promote the business of the firm, and his purchase of the team on its behalf.—Beckwith v. Mace, 140 Mich. 157.

¶ 399. A partner's private means are not open to inquiry in an action against the firm.—Roberts v. Pepple, 55 Mich. 367.

¶ 400. Where a firm is sued the partners cannot claim set-off of sums due them individually.—Sager v. Tupper, 38 Mich. 258.

§ 71. Burden of proof, presumptions and evidence.

Burden of proof and presumptions as to partnership, see ante § 14.
Evidence as to partnership, see ante §§ 15, 16.
Evidence in actions between partners, see post § 81.
Burden of presumptions on taking account, see post § 111.
General law as to burden of proof, presumptions and evidence, see Evidence.
Burden of proof in actions on partnership paper, see also Negotiable Instruments § 108.
Evidence and burden of proof as to novation of new firm to debts of old one, see Novation § 4.

¶ 401. Where a contract for advertising has been taken by a member of a publishing firm without saying anything about the existence of the partnership, it is not necessary in an action by the firm upon the contract, in which the partnership is shown, to prove that defendant understood when he made the contract that plaintiffs were partners.—Philpott v. Bechtel, 104 Mich. 79.

¶ 402. Where one member of a copartnership gives a note in the firm name, the pre-

sumption is that it was given for partnership purposes; and the burden of proof is upon the copartnership to show the contrary.—Littell v. Fitch, 11 Mich. 525; Carrier v. Cameron, 31 Mich. 373.

§ 72. Admissibility of evidence.

Evidence as to partnership, see ante § 15.

Admissions and declarations of partners as binding each other, see Evidence §§ 420-422.

Opinion evidence as to authority of partner, see Evidence § 217.

¶ 408. Where two persons are engaged as partners in keeping a place for selling liquors and in selling without a license, the selling by one is the act of both, and may be given in evidence against the other in an action against him for the penalty.—Smith v. Village of Adrian, 1 Mich. 495.

¶ 404. In suing an old firm upon dealings continued with its successors, it would be proper to admit in evidence a note payable to and indorsed by the new firm, if it related to the account with the old one.—Botsford v. Kleinhans, 29 Mich. 332.

¶ 405. Where the defense to a partnership note is that it was given in a transaction not within the line of the partnership, considerable latitude should be allowed in the proof of facts tending to show that all the defendants knew that their partnership name was being used in dealings with the plaintiff; the fact that the business and correspondence was carried on in the partnership name is admissible in connection with evidence from which the jury might infer that all the defendants knew that plaintiff understood that he was dealing with the firm.—Mills v. Bunce, 29 Mich. 364.

¶ 406. In an action on partnership paper given mala fide but binding one partner, evidence is admissible to exonerate a copartner.—Freeman v. Ellison, 37 Mich. 459.

¶ 407. A partner's authority to use the firm name in a particular case, and his partner's knowledge of or acquiescence in his doing so, are open to inquiry in an action against the firm based on his act; and direct questions as to his authority and such acquiescence may be asked, subject to full cross-examination.—Roberts v. Pepple, 55 Mich. 367.

¶ 408. Where two persons are sued for money claimed to have been lent to them as partners, an agreement whereby one of them, on the dissolution, agreed to assume and pay all the firm debts, is inadmissible to show ratification of plaintiff's demand as a firm debt by the purchasing partner.—Coller v. Porter, 88 Mich. 549.

¶ 409. Where A. and B. are sued for money claimed to have been lent them as partners in business, but which money A. alleges was, as plaintiff knew, borrowed by B. for his individual use, it is proper to exclude a question asked by the defense of a witness from whom the firm purchased such business, as to what were the indications of the amount of business done by the firm compared with that previously done by him.—Coller v. Porter, 88 Mich. 549.

¶ 410. Where an action of assumpsit for money loaned to one member of a partnership is defended on the theory that the money was borrowed by one partner for his personal use with plaintiff's knowledge, plaintiff may be allowed to testify that he knew nothing of any attempt on such partner's part to defraud his copartner, and that she had no part in any such attempt if there was one.—Coller v. Porter, 88 Mich. 549.

¶ 411. Prior to becoming partners the decedent and the managing partner made advances to the third partner to enable him to carry on the individual business to which the firm succeeded, and the third partner secured them by mortgages upon his property, upon which default had been made at the time of entering into the contract afterwards held to create the partnership relation, and made because it was deemed advisable to carry on the business under an arrangement that would protect the interests of the mortgagees, and insure the payment of the mortgage indebtedness at the earliest possible moment. In a suit based on a firm debt against the estate of one of the partners, held, that the court was not in error in excluding the question, asked the managing partner, whether he made advances to the third partner to carry on the business before the partnership agreement was made.—Michigan Sav. Bank v. Butler's Estate, 98 Mich. 381.

¶ 412. In an action against partners jointly in justice court, evidence of admissions of the only partner served that he bought the goods and that they were accepted and used by the partnership and not paid for is admissible to make a prima facie case for the plaintiff against both partners.—Hirsh v. Fisher, 138 Mich. 95.

¶ 413. In an action against a partnership for the price of a team claimed by the partners to have been purchased of plaintiff and sold by him to the partnership, and for which one of the partners had given his own personal note, a contract admittedly relating to the partnership business signed by the same partner as had signed the note is admissible in evidence as tending to rebut the presumption that the contract in question was an individual contract because signed in the same manner as the partner had signed firm contracts.—Churchill v. Mace, 148 Mich. 456.

¶ 414. In an action against a person, who withdrew from a partnership, for the price of goods sold to such partnership after his withdrawal where he was fully interrogated on a statutory cross-examination as to the arrangement made by him for the payment of bills of the partnership owed at the time of his withdrawal it is not error to permit him to follow up the question and to show in detail what was done in the way of the payment of the debts of the firm at the time he withdrew from it.—Westinghouse Elec. & Mfg. Co. v. Hubert, 175 Mich. 568.

§ 73. Weight and sufficiency of evidence.

As to existence of partnership, see ante § 16.
Sufficiency of evidence in action upon guaranty of partnership debts, see Guaranty § 27.

¶ 415. Plaintiffs sued as partners, and a witness on their behalf testified to admissions by defendants sufficient to make out their liability. The witness said nothing respecting the partnership of the plaintiffs, and was not cross-examined as to his knowledge of them. Defendants put in no evidence. Held, that a judgment for plaintiffs on this evidence should not be disturbed.—Wattles v. Moss, 46 Mich. 52.

¶ 416. Where one who was sued as for goods furnished to him by plaintiffs as copartners, denied the existence of the copartnership and claimed that the goods were received from one of the plaintiffs in payment of a debt due him, and, further, that if such partnership did exist he was ignorant of it and that the other plaintiff knew of and assented to the arrangement under which the goods were furnished, a judgment for defendant, based upon a verdict rendered under proper instructions, was affirmed.—Neely v. Flumerfelt, 116 Mich. 344.

¶ 417. Assent of a partner to the act of his copartner in subscribing to stock in a plank road company must be established by evidence affirmatively showing it, or from which it may be clearly affirmed.—Barnard v. Lapeer & P. H. Plank Road Co., 6 Mich. 274.

¶ 418. For an unsuccessful attempt to uphold, on the basis of a partnership authority, notes issued in the corporate name by one of two sole stockholders of the company, who with his associate acted as president and treasurer, see New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

¶ 419. Evidence held insufficient to show that other members of a banking copartnership either authorized the remaining partner to sign a contract with another person whereby he was to receive commissions for procuring subscriptions to stock of a proposed banking corporation, regardless of whether the corporation was in fact formed and the stock sold, or had knowledge of the details of the one actually signed.—In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200; Smith v. Mosier, Id.

¶ 420. Evidence that the plaintiff purchased a carriage from the defendant and his partner to be paid for in groceries and partly in cash, that he delivered groceries to both partners and subsequently the partnership was dissolved and the defendant assumed all partnership debts, is sufficient to show liability on the part of the defendant for groceries delivered to the other partner as on a partnership debt.—Schroder v. Pinch, 126 Mich. 185.

¶ 421. H., a partner in the saloon business of R. & H., carried on a separate saloon business in his own name, leaving the sole management of the firm business to his partner, R. The latter gave to H. $300 in money, and a note for $200, with which to pay the tax of $500 upon the business of the firm. H. visited the county treasurer, and borrowed $600 from him upon the firm's note, using the loan in paying the tax on his own private business, as well as that of R. & H. In an action on the note, H. testified that his partner did not know that he was going to give the note, and R. testified that he never authorized it, and first learned of it at maturity. Held, that the evidence did not justify a finding that the note was given by the authority of R., so as to make him liable for the full amount to a transferrer after maturity.—Hatch v. Reid, 112 Mich. 430.

¶ 422. Plaintiff proved that defendant was in business with his sons, selling lands; that in the transaction in question the defendant gave the plaintiff, by a letter signed only by himself, an option on certain land in which the sons had no interest. Held, that upon this evidence a judgment for breach of the option contract could not be entered against the father and sons jointly as a partnership, but only against the father individually.—Beuthien v. Alberts, 154 Mich. 142.

§ 74. Questions of law and fact.

As to existence of partnership, see ante § 18.
Jury questions as to ratification, see also ante ¶ 285.
General law as to jury questions, see Trial, VI.

¶ 423. The question whether the carrying on of a specified business is within the scope of a partnership is a question of law rather than of fact.—Banner Tobacco Co. v. Jenison, 48 Mich. 459.

¶ 424. Whether other members of the firm had assented to a transaction entered on the books of the firm by one of the members, and thus presumptively known to them,

is for the jury.—Grant v. Masterton, 55 Mich. 161.

¶ 425. The question whether the copartner has ratified a partner's bill of sale of the partnership property to secure the vendor's private debts is for the jury.—Kingsbury v. Tharp, 61 Mich. 216.

¶ 426. An agreement between two partners, that the firm should pay the expenses of the defense of a suit against one copartner for slander, is binding upon the firm, and the question of whether it was made is for the jury.—Conely v. Wood, 73 Mich. 203.

¶ 427. As to the liability of a new partner on notes given in renewal of notes of the original firm, the question is one of fact to be deduced by the jury from the testimony.—Strobridge Lithographing Co. v. Randall, 78 Mich. 195.

¶ 428. In suit against a firm on notes given to plaintiffs by one partner in the firm name to pay his private debts, evidence showing that though this was known to plaintiffs the other partners had knowledge of it and did not object, and that the latter took such notes into account in settling affairs on the firm's dissolution, was held sufficient to go to the jury on the question of the firm's liability.—Towle v. Dunham, 84 Mich. 268.

¶ 429. Where in a suit against the estate of a deceased dormant copartner upon the personal note of the managing member of the firm, discounted by him, the uncontradicted testimony shows that such member had advanced money on checks drawn on the firm bank account, in the course of its business, to nearly the amount of the note, and had retained the checks until the note was discounted, and then, instéad of depositing the proceeds to the credit of the firm and presenting the checks for payment, had turned them over to the bookkeeper of the firm, and been given credit for the difference between the amount of the checks and the discount on the note and the amount of the note, a verdict is properly directed in plaintiff's favor, on the ground that the evidence shows that the money was in fact borrowed for the copartnership, and went into its business.—Michigan Sav. Bank v. Butler's Estate, 98 Mich. 381.

¶ 430. The question whether the horse in question was necessary to the proper conduct of the business of the defendant partners so that the purchase by one was binding on both, was for the jury.—McPherson v. Bristol, 122 Mich. 354.

¶ 431. The question of a partner's authority to buy goods for the firm was for the jury, in an action against a partnership for a team purchased by such partner; where, the evidence showed that partner was a member of the firm, and there was testimony to show that he was the active manager of its affairs, and was so recognized by his copartners, that the copartnership was engaged in work requiring the use of a team, that the team in question was used by the copartnership, and that it afterwards claimed to own the team through a purchase from such partner.—Beckwith v. Mace, 140 Mich. 157.

¶ 432. On assumpsit, the proof showed that defendants, who were stockholders and directors of a state bank in a neighboring town, opened a private bank, advertised in a local paper that the officer of the state bank were behind the private bank, that the defendants interested the business men of the village in the project and that the profits of the private bank were to be divided. Held, the evidence was sufficient to present to the jury the question as to whether defendants were liable as partners for the debts of the private bank.—Folks v. Burletson, 177 Mich, 6.

¶ 433. Where a noncommercial firm was sued upon promissory notes made by one partner in its name without express authority from his copartners, and not used in the firm's business, the question whether the other partners were estopped to deny the authority to make the notes in the firm's name was held, under the facts of the case, to be for the jury and not for the court.—Dowling v. National Exchange Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. Rep. 928, reversing 30 Fed. 412.

¶ 434. In an action on a note signed by one of the partners in the firm name, without the knowledge of the other, it is proper for the court to instruct the jury not to find a verdict against such other partner because he was careless in omitting to know what use his partner was making of the partnership funds.—Michigan Shoe Co. v. Paul, 149 Mich. 695.

§ 75. Instructions.

See also ante ¶ 75.
As to existence of partnership, see ante § 18.
Instruction as to ratification of note by partner, see ante ¶ 284.
General law of instructions, see Instructions.
Instructions to be construed as a whole, see also Instructions § 19.

¶ 435. In a suit by a firm composed of two members to recover a balance due on a building contract, it was shown that defendant contracted wholly with one partner but that all the bills were rendered to him in the firm name. Held proper to refuse a request for an instruction that before plaintiffs could recover the jury must be satisfied that defendant contracted with the firm.—McDonnell v. Ford, 87 Mich. 198.

¶ 436. One of two partners gave his wife a bill of sale of one-third of the firm assets, being his interest therein, in payment of his personal debt to her. The wife, claiming to have sold said interest to the other partner upon his agreement to pay her the value thereof, sued to recover said value. Defendant denied making any such purchase or agreement, and testified that the arrangement was that a corporation about to be formed was to take the partnership property, and allow so much stock therefor, which was to be issued to the defendant, and its value be by him applied to the settlement of the partnership accounts. Held, that it was important that the jury be instructed as to the effect of a sale by one partner of his interest in the partnership property in payment of his individual debt, and as to the rights of partners in the joint property.—Fountain v. Hutchinson, 108 Mich. 596.

§ 76. Trial, verdict and judgment.

In actions between partners, see post § 81.

Insanity of partner as ground for equitable relief from judgment against partnership, see Judgments ¶ 216.

¶ 437. Defendant gave promissory notes to a copartnership banking firm consisting of six partners. Three of the partners were joint obligors with defendant on the notes. In a suit at law by the trustee in bankruptcy of the partnership, held, the defendant's rights did not amount merely to a set-off, but he had a right to have a court of equity determine the rights between himself and the three partners bound as joint obligors.—Kalamazoo Trust Co. v. Merrill, 159 Mich. 649.

¶ 438. The unlawful levy of an attachment against one member of a firm on specific chattels of the firm is injurious to both partners, and they may sue for such injury jointly and recover a joint judgment if the injury is tangible and the property disturbed or destroyed.—Haynes v. Knowles, 36 Mich. 407.

B. BETWEEN PARTNERS.

§ 77. Actions at law.

By or against third persons, see ante §§ 62-76.

Mutual rights and liabilities of partners, see ante V.

Between the firm and its members, see post § 79.

Actions by individual partner, see ante § 66.

Suits in equity, see post § 82.

Actions by or against surviving partners, see post § 100.

Accounting, contribution or indemnity after dissolution, see post VII, E.

¶ 439. B. and S. agreed that S. should buy and lumber some pine lands on their joint account. B. was to furnish the funds, take the logs at a certain price, and be repaid out of the proceeds of the sale of the logs, the surplus to be equally divided between the two. Held, that S. could maintain assumpsit for the price since it was an ascertainable amount involving no accounting or adjustment of partnership rights.—Bennett v. Smith, 40 Mich. 211.

¶ 440. Where one has transferred his interest in a partnership his transferee and the remaining partners cannot bring an action against him on a balance due to the firm on his private account before the transfer.—Learned v. Ayres, 41 Mich. 677.

¶ 441. An obligation legal in form can be sued at law; and a note by one partner to another, even if made to him as a trustee for the firm's benefit, can be sued at law according to its terms, and the defense that it is a partnership matter must either be made at law or under proceedings brought by defendant in equity to establish it.—Mitchell v. Wells, 54 Mich. 127.

¶ 442. Certain land belonging to an individual partner was included as assets in the partnership articles, and the firm gave a mortgage on it. The owner drew up a deed conveying an undivided half of it to his partner, but it was not recorded, and he afterwards destroyed the deed and took up the mortgage with partnership notes. When he went out of the firm he took a bond from his partner binding the latter to pay all partnership debts, and gave him clear title to the land which the partner bought with the other assets. Held, that by destroying the former deed he would have been estopped from enforcing payment of the notes but for the subsequent conveyance of clear title, after which the notes constituted a liability enforceable by suit on the bond.—Mette v. Feldman, 45 Mich. 25.

¶ 443. Where no assets remain after payment of a firm's debts, the liability of one partner for money advanced to him by the other after dissolution beyond the latter's share of the debts is a simple money demand, which could be settled without any legal obstacle in an ordinary action at law.—Wheeler v. Arnold, 30 Mich. 304.

¶ 444. Where a final statement of accounts is made between two partners, and one recognizes a balance as due the other, an action lies for such balance.—Miner v. Lorman, 59 Mich. 480.

¶ 445. One partner cannot at law sue another, after dissolution of the firm, for the amount which would have been due him on an accounting, unless defendant has expressly promised to pay it, but a payment made after the statute of limitations has run is not such a promise; and a promise then made, though based on a good consid

eration, would be nudum pactum if not in writing.—Miner v. Lorman, 56 Mich. 212.

¶ 446. One who in his partner's absence has paid interest which the latter would have had to pay to discharge a lien on land which it was his duty to obtain for the firm can recover the amount from such partner as money paid at his request.—Bates v. Lane, 62 Mich. 132.

¶ 447. Money furnished by one partner to another to enable him to meet his obligations to the firm is a personal claim, and has nothing to do with a final partnership accounting, unless connected with it by some special dealing, and an action at law lies for its recovery.—Bates v. Lane, 62 Mich. 132.

¶ 448. Where partners have seen fit to deal with each other without reference to the final accounting, the transaction is not subject to the necessity or delay of such an accounting.—Carpenter v. Greenop, 74 Mich. 664.

¶ 449. A partner's independent undertaking to repay to his copartner money advanced may be sued upon at law though the advance was for the purpose of furnishing part of the capital stock.—Smith v. Kemp, 92 Mich. 357.

¶ 450. One who agrees to pay another for an interest in a patent that is to form the basis of a partnership between them may be sued at law for nonpayment, the agreement being entirely distinct from the partnership accounts.—Cook v. Canny, 96 Mich. 398.

¶ 451. Plaintiff and defendant, having been engaged as copartners in manufacturing lumber, and having entered into an agreement by which the former (who owned a sawmill used in the business) was to receive from defendant fifty cents per thousand feet of lumber cut at the mill, in an action for the sawbill the contract is to be regarded as an independent letting, and the jury to be instructed that subsequent dealings of the parties might have been such as to make the matter part of a partnership dealing, and that if the jury so find, the plaintiff cannot recover at law.—Hemenway v. Burnham, 90 Mich. 227.

¶ 452. Where one partner buys the interest of the other but leaves part of the purchase price unpaid, such part being a claim for wages, an action at law lies to enforce the claim.—Cookes v. Lymperis, 178 Mich. 299.

¶ 453. One who accepts a draft in partnership name after he has assigned all claims to his partner and enables another to collect the draft is estopped from denying receipt of the money when sued by the other partner for it.—Bullard v. Hascall, 25 Mich. 132.

¶ 453a. Defendant gave promissory notes to a copartnership banking firm consisting of six partners. Three of the partners were joint obligors with defendant on the notes. In a suit at law, held, the partnership could not recover, but that it was confined to a remedy in equity.—Kalamazoo Trust Co. v. Merrill, 159 Mich. 649.

§ 78. ——By assignees of individuals.

¶ 454. The assignor of a partnership interest cannot be sued by his assignee and the remaining partners on a claim held by the original firm against him.—Learned v. Ayres, 41 Mich. 677.

§ 79. ——Between the firm and its members.

¶ 455. A copartnership may not maintain a suit at law against one of its partners inasmuch as all are necessary parties plaintiff, and to permit the action would present the anomaly of a single individual acting as both plaintiff and defendant in the same suit.—Kalamazoo Trust Co. v. Merrill, 159 Mich. 649.

¶ 456. Neither a partner nor his assignee can maintain an action at law against the firm, even after its dissolution, for the amount of a note made by the firm to the partner and afterwards accidentally destroyed without ever having been indorsed since one cannot sue himself.—Davis v. Merrill, 51 Mich. 480.

¶ 457. The remedy of a partner, or of his assignee, against the firm upon a note given by it to the partner, must be in equity, if anywhere, after the dissolution of the partnership, without an accounting or settlement.—Davis v. Merrill, 51 Mich. 480.

¶ 458. A partner after drawing checks upon the funds of the firm for his personal use, and charging them against himself, was succeeded by another partner, and sold out his interest to the new firm. Held, that the new firm could not sue him at law for the amount of the checks, nor use them as off-set against an action brought by him against the firm since the mutual liabilities of the old firm should be settled by an accounting.—Gardiner v. Fargo, 58 Mich. 72.

¶ 459. The indorsee of a negotiable promissory note, given by a copartnership to one of its members for a loan made by him to the firm, and purchased in good faith, but after maturity, may maintain a suit thereon against the firm, it not appearing that said partner was in any way a debtor to the firm when the note was transferred, or that there were any equities existing against him which did not exist when the note was made.—Carpenter v. Greenop, 74 Mich. 664.

§ 80. ——Set-off of claims at law.

In actions by and against third persons, see ante § 70.

¶ 460. Where one partner has paid firm debts from his private funds at the other's request on the latter's promise to pay half the amount, he may, after dissolution of the firm, offset so much against an independent claim for which his former partner sued him at law; and this though a suit in equity was pending for a partnership accounting.—Cilley v. Van Patten, 58 Mich. 404.

¶ 461. A claim of one partner in a suit against the other upon a contract not connected with the partnership affairs cannot be subjected to a set-off in favor of the other partner arising out of such affairs where there has been no accounting and no balance found due to the other after a final liquidation of the firm's indebtedness.—Randall v. Baird, 66 Mich. 312.

¶ 462. Where one of a firm containing more than two members dies, and there is nothing to show that all the rest stand as one partner only, a balance in the partnership affairs in decedent's favor cannot, in a court of law, be offset against a claim against his estate by the survivors.—In re Elder's Appeal, 39 Mich. 474.

¶ 463. One who has sold stock and leased a store to a firm and has then taken a partnership interest in the business can offset the amount due him on such sale and lease in an action against him by the firm, and need not leave it to a partnership accounting already pending.—Kinney v. Robison, 52 Mich. 389.

§ 81. ——Evidence, trial and judgment.

Weight and sufficiency of evidence as to partnership, see ante § 16.

In actions by or against third persons, see ante §§ 71-76.

Sufficiency of evidence as to amount of partner's compensation, see also ante ¶ 352.

¶ 464. The question of whether a partnership settlement was made is, on conflicting evidence, one for the jury.—Wawrzyniak v. Tobicej, 166 Mich. 188.

¶ 465. In assumpsit against former partners for the amount found due plaintiff on a partnership settlement, and which defendants had promised to pay him, the facts of settlement and of the joint promise to pay were for the jury.—Reynolds v. Patrick, 52 Mich. 590.

§ 82. Suits in equity.

[Note.—A suit in equity between partners is usually a suit for accounting in some form. Such suits are treated post VII. It may also be a suit based on some of the equitable rights other than those of partners as such, and in that event would be foreign to Partnership and proper to such topics as Foreclosure; Trusts; Rescission; and the like.]

Actions at law, see ante § 77 et seq.

Adequacy of legal remedy where one partner sues other for fraud, see also Fraud ¶ 764.

Specific enforcement of partnership agreement, see Specific Performance.

VII. DISSOLUTION, SETTLEMENT AND ACCOUNTING.

A. DISSOLUTION BY OPERATION OF LAW.

Provisions as to dissolution of and winding up partnerships, see Uniform Partnership Act, §§ 29-43.

§ 83. In general; bankruptcy and insolvency.

Dissolution by act of parties, see post § 86.

Dissolution by decree of court, see post § 88.

Effect of dissolution, see post § 89 et seq.

General law of bankruptcy, see Bankruptcy.

Claims provable as firm debts in bankruptcy of firm, see Bankruptcy § 11, ¶ 63.

¶ 466. A partnership is dissolved when it ceases to do the business for which it was organized. So held where a banking firm closed the doors of its bank, and did no business thereafter except to collect its accounts and liquidate its debts.—Potter v. Tolbert, 113 Mich. 486.

¶ 467. The bankruptcy of partners dissolves the partnership. And if, after the bankruptcy, the partners continue the same kind of business under the same partnership name, it is a new partnership.—Atwood v. Gillett, 2 D. 206.

§ 84. Death of partner.

¶ 468. The death of a partner dissolves the partnership.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

¶ 469. A firm is dissolved by the death of a partner unless the partnership articles provide for continuance.—Roberts v. Kelsey, 38 Mich. 602; Jenness v. Carleton, 40 Mich. 343.

§ 85. Marriage of partner.

¶ 470. Partnership relations between a man and a woman are dissolved by their marriage, and his continued use of her property that had been used by the firm is by virtue of a license merely, which ceases at her death.—Bassett v. Shepardson, 52 Mich. 3.

B. DISSOLUTION BY ACT AND VOLITION OF PARTNERS.

§ 86. In general; right to dissolve.

Assumption of debts by partner upon dissolution, see also ante § 51.

Actions by assignees of individual partners, see ante § 78.
Dissolution by operation of law, see ante § 83.
Notice of dissolution to make it effectual, see post § 91.
Dissolution by decree of court, see post § 88.
Rights and liabilities of retiring or incoming partners, see ante § 48 et seq.
Conveyance by partner of his interest as dissolving the partnership, see Uniform Partnership Act § 27.
Proceedings to set aside dissolution and settlement, see post § 124.

¶ 471. A partnership may be dissolved at the will of either party where the agreement is silent as to its duration.—Buck v. Smith, 29 Mich. 166.

¶ 472. Where the term of a partnership is for an indefinite period, it may be dissolved at the will of either party.—Major v. Todd, 84 Mich. 85.

¶ 473. Whether, where the duration of a partnership is not fixed by the agreement therefor, either partner cannot dissolve it at pleasure, quære.—Walker v. Whipple, 58 Mich. 476.

§ 87. What constitutes dissolution.

¶ 474. A firm is not necessarily dissolved by one partner's selling to his copartners his interest in its property.—Lobdell v. Baldwin, 93 Mich. 569.

¶ 475. A partnership is dissolved unless equity can interfere when one of the firm takes exclusive possession and gives notice of dissolution to the others and the public. —Solomon v. Kirkwood, 55 Mich. 256.

¶ 476. A partnership is not dissolved by a sale of its business when induced by the fraud of its members, so as to prevent the purchaser on rescinding the contract from returning the property to one of the partners so as to bind the other.—Schwier v. Hurlburt, 184 Mich. 698.

C. DISSOLUTION BY DECREE OF COURT.

§ 88. In general; right, remedy, and procedure.
Dissolution by operation of law, see ante § 83.
Dissolution by act of parties, see ante § 86.
Proceedings to set aside dissolution and settlement, see post § 124.
Appealable decrees and orders in settlement and dissolution proceedings, see Appeal, III, B.

¶ 477. The denial by one partner of all rights of his copartner in the partnership property, and his claim of the right of exclusive possession and use, entitle his copartner to a dissolution and to an accounting.—Groth v. Payment, 79 Mich. 290.

¶ 478. Where one member of a partnership for the running of a vessel ejects the other partner's agent from the vessel and claims the exclusive use thereof, the other partner is entitled to a dissolution and an accounting.—Groth v. Payment, 79 Mich. 290.

¶ 479. The fact that a partner has sold his interest to a third person, and agreed to receive from him a certain sum per month until he is fully paid, and then to become owner of such interest, does not deprive him of his right to file a bill against his copartner for a dissolution of the firm and a settlement of the partnership transactions.—Russell v. White, 63 Mich. 409.

¶ 480. Probate proceedings for discovery do not bar an otherwise proper suit in equity for winding up the partnership concerns.—Perrin v. Lepper, 49 Mich. 347.

¶ 481. A petition for the dissolution of a partnership, which clearly sets up the fact that certain lands in another state were purchased with partnership funds and for partnership purposes, is sufficient to confer jurisdiction upon the court, having equity powers, to enter a decree of accounting as to such lands, notwithstanding they are not specifically described.—Dunlap v. Byers, 110 Mich. 109.

¶ 482. Where a complainant brings a bill to dissolve a partnership and for an accounting and the conflicting testimony read in its entirety fails clearly to prove the existence of a partnership, it is proper to dismiss the bill without prejudice and leave complainant to his legal actions.—Schmidt v. Schmidt, 164 Mich. 579.

¶ 483. Where a partnership creditor commenced proceedings against a firm in a foreign state prior to the appointment of a receiver on a bill to dissolve the partnership, such creditor did not become a party to the latter proceedings so as to affect the action commenced by him until the filing of a decree in the dissolution proceedings on the order to creditors to present claims.—Rickman v. Rickman, 180 Mich. 224.

D. EFFECT OF DISSOLUTION.

1. In General.

Termination of firm contract by change in composition of firm, see Contracts § 230.
Accountability of corporation to predecessor partners, see Corporations § 42.

§ 89. Power of partners after dissolution.
Powers of partners to bind firm in general, see ante § 31 et seq.
Rights and liabilities of retiring and incoming partners, see ante § 48 et seq.

Powers and duties of surviving partners, see post § 92.
Powers and rights of continuing or liquidating partners, see post § 102.
Admissions of fact by partner after dissolution, effect to bind others, see Evidence § 421.

¶ 484. Where two persons who have entered into a contract for a copartnership rescind it, one of them has no power afterwards to bind the other by ratifying a contract previously made by them, and which was void under the statute of frauds when made.—Chamberlain v. Dow, 10 Mich. 319.

¶ 485. A dissolution of partners puts an end to the authority of one partner to bind the other by contracts. If the firm has been discharged from its debts in bankruptcy he cannot revive a debt afterwards by acknowledgment of it.—Atwood v. Gillett, 2 D. 206.

¶ 486. A firm dissolved after ordering a lot of merchandise, but it was all forwarded before the consignors knew of the dissolution, and after they learned of it they took a note, made in the firm name by the remaining partner, for the amount due. They afterwards brought suit against both partners on the common counts and on the note. Held, (1) that the retiring partner could not be held upon the note against his objection, as after the dissolution the other could not bind him; but (2) that an action on the common count for goods sold and delivered would lie against both for the debt.—Goodspeed v. South Bend Plow Co., 45 Mich. 237.

§ 90. Rights of and proceedings by creditors.

Priorities and preferences between creditors in general, see ante § 56.
Appointment of receiver, see post § 101.
Liability of corporate successor for partnership debts, see Corporations § 42.
Creditors' suits generally, see Creditors' Suits.

¶ 487. A firm cannot be released from its debts by any agreement with a stranger firm to which it sells out, that the latter shall pay the debts, unless the creditors accept the subrogation.—Hayes v. Knox, 41 Mich. 529.

¶ 488. A purchase of partnership assets and assumption of responsibility to outgoing partners does not bring the purchasers into contract relations with the firm's creditors so as to enable them to take advantage of a contract partly performed by it.—Ayres v. Gallup, 44 Mich. 13.

¶ 489. Where dealings with outsiders pass from a firm to its successors, the liability of the old firm is not ended unless the outsiders have agreed to accept the liability of the new firm in its place.—Botsford v. Kleinhans, 29 Mich. 332.

¶ 490. Those who continue dealing with a firm after its composition has been changed, the new firm assuming the rights and obligations of the old one, have a right to assume that the business of the two will be kept separate, and cannot be bound without their knowledge, consent or acquiescence, by the transfer of the old account to the books of the new firm, and by the continuance of the old accounts after the dissolution of the old firm; nor is it allowable in a suit by them against the old firm to inquire into their separate dealings with the new one.—Botsford v. Kleinhans, 29 Mich. 332.

¶ 491. The equitable lien of a firm creditor on its assets is lost by accepting the agreement of the continuing partner to assume and pay the debts of the firm.—Johnson v. Emerick, 70 Mich. 215.

¶ 492. The common count for goods sold and delivered lies against partners after dissolution of the firm for goods ordered before the dissolution and forwarded before the vendors knew of it.—Goodspeed v. South Bend Chilled Plow Co., 45 Mich. 237.

§ 91. Notice of dissolution to make it effectual.

Notice of withdrawal of partner to relieve him of liability, see ante § 50.

¶ 493. In order to relieve a retiring partner from liability on firm notes executed after the dissolution by the general manager of the firm in payment for goods furnished by a customer of whom the firm through such manager had been in the habit of buying goods in the usual course of its business, notice of the retirement of such partner must have been given previously to such customer.—Hall v. Heck, 92 Mich. 458.

¶ 494. Notice of a partner's retirement published in the newspaper at a firm's place of residence is not sufficient notice to those who, living in a distant city, have had dealings with the firm, unless it is in fact seen by such persons or unless they get knowledge in some other way.—Sibley v. Parsons, 93 Mich. 538.

¶ 495. A dealer in merchandise which had sold goods to a firm on order given by it while the firm continued is entitled to actual notice of a dissolution.—Smith & Cheney Co. v. Schmidt, 142 Mich. 1.

¶ 496. Persons having no knowledge of a partnership are not entitled to notice of a dissolution.—Chamberlain v. Dow, 10 Mich. 319.

¶ 497. Such notice of the dissolution of a partnership is sufficient as is likely to make the fact generally known in the locality concerned, and to those with whom business is done.—Solomon v. Kirkwood, 55 Mich. 256.

¶ 498. Defendant dissolved partnership with one Casper Alpern, the senior member, without giving notice to the public. Casper Alpern thereafter signed the firm name to a note given to a bank; plaintiff indorsed the note, and was compelled to pay it. In a suit to recover the amount paid from defendant, held, that city directories issued subsequent to the dissolution and showing that defendant was named therein as a partner might be introduced on the question whether sufficient notice of dissolution had been given.—Culligan v. Alpern, 160 Mich. 241.

2. As to Surviving and Deceased Partners.

§ 92. Powers, duties and rights of surviving partner in general.

Rights and liabilities of retiring partner, see ante § 49.
Rights of deceased partner's representatives, see post § 99.
Actions by and against, see post § 100.
Powers and duties of continuing partner, see post § 102.
Claim of surviving partner for his advance to pay firm debts in excess of his proportion, see Estates of Decedents ¶ 451.
Provisions as to vesting of partner's property rights upon his death, see Uniform Partnership Act § 25.

¶ 499. The acts of a surviving partner and the result of suits brought against him as a survivor are binding upon representatives of the deceased partner so long as they are conducted in good faith.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 500. A member of a firm that has been dissolved by the death of a partner cannot bind the survivors by indorsing a note in the firm name unless they ratify his act, even though the note may have been given for a debt of the firm.—Carleton v. Jenness, 42 Mich. 110.

¶ 501. A surviving partner has no power to continue to give firm paper after the dissolution of the firm by the death of one of the partners, even in renewal of a firm debt, and one accepting such paper in renewal of a partnership debt must be assumed to have elected to hold the individual surviving partner rather than the estate of the deceased member of the firm.—First Nat. Bank of Cooperstown v. State Savings Bank of Ionia, 130 Mich. 332.

¶ 502. The surviving partner is not discharged from obligation to complete a contract made between the decedent as an individual and the firm, whereby the firm was to cut and manufacture into lumber a large quantity of standing timber, by the death of the partner who made such contract with the firm; though the partnership agreement contained no provision for continuing the business after death of either party and though the will of the decedent, which nominated the surviving partner as executor, contained no provision that the business should be carried on; and this is especially true where the surviving partner has himself construed the contract to that effect.—Porter v. Long, 124 Mich. 584.

¶ 503. The duties and obligations imposed upon a surviving partner who is also the executor of the last will and testament of his deceased partner, and appointed to stand in loco parentis to his son, the sole beneficiary, require him to see to the personal needs, comfort, and welfare of this son, to proceed with the exercise of the office of executor, to keep an account of the property, to collect the assets and pay the debts of the estate, to have his accounts in such a shape as to enable him to show the condition of the estate to any interested person on application, to work for the best interests of the estate, and, if the son die during his administration, to apply to the court for instructions as to what next lies before him to do.—Perrin v. Lepper, 72 Mich. 454.

§ 93. ——As to cosurvivors.

¶ 504. A surviving partner cannot, without express authority, bind cosurvivors by a time note in the firm name, even for an indebtedness that occurred before the firm was dissolved by the death of one of its members.—Matteson v. Nathanson, 38 Mich. 377.

¶ 505. A surviving partner cannot bind cosurvivors by signing the firm name without their express authority or ratification.—Jenness v. Carleton, 40 Mich. 343.

¶ 506. Where one of several partners dies, and the business is carried on by the survivors without the assent of his representatives, they have, as a general rule, the election to demand interest on the amount of the share of the deceased, or to take a share of the profits.—Ramsdell v. Millerd, H. 373.

¶ 507. Where the interest of the deceased partner had become vested in one of the surviving partners, who assented to the continuance of the copartnership, his only right was to share as a partner.—Ramsdell v. Millerd, H. 373.

§ 94. Liquidating and winding up partnership business.

Equitable conversion as applied to partnership lands, see ante § 25.
Right to compensation for winding up business, see post § 98.

¶ 508. After dissolution by the death of a partner the settlement of partnership affairs is left to the survivor, who may, at a proper time, be required to account to decedent's personal representative.—Roberts v. Kelsey, 38 Mich. 602.

¶ 509. The right and duty to wind up the business of a partnership after it has been dissolved by death is an incident of the partnership and rests with the survivor as a result of survivorship.—Loomis v. Armstrong, 49 Mich. 521.

¶ 510. A surviving partner has a right to continue a business, and to wind it up at his discretion.—Gaskill v. Weeks, 154 Mich. 223.

¶ 511. Where two persons became partners in a project to collect from the government claims in favor of certain Indians, whereby they were to receive a contingent fee, it was the duty of the survivor, on the death of one of the partners, to collect the assets, pay the debts, and wind up the concern.—Cowham v. Shipman, 151 Mich. 673.

¶ 512. Where two persons become partners in a venture having for its object the collection of claims from the government, in favor of certain Indians, after final defeat in the effort, and all hope of obtaining anything for his clients under appropriations already made were ended by the disbursement of the fund, the survivor was under no legal obligation to the Indians, or to his copartner's representative, to proceed further with the contract authorizing the collection of claims, since he could not do so with any expectation that he would thereby be able to have any portion of the expense allowed against the estate, in case he should fail in his efforts.—Cowham v. Shipman, 151 Mich. 673.

¶ 513. Where partners engaged in a project to collect from the federal government for certain Indians, their share of annuities due them under a treaty with their tribe, the surviving partner, upon the death of his copartner, properly continues to make efforts to collect the claims under contracts held by the partnership, although the time limited by the terms of such contracts has expired, where the contracts were still being acted upon by the parties.—Cowham v. Shipman, 151 Mich. 673.

¶ 514. Where two persons become partners in an enterprise having for its object the collection from the government of claims in favor of certain Indians, and the terms of the contracts under which they were acting in the prosecution of the claims had expired at the time of the death of one of the partners, but the contracts were still being acted upon by the parties, it was proper for the survivor to continue to make efforts to collect under them.—Cowham v. Shipman, 151 Mich. 673.

¶ 515. The dissolution of the partnership by the death of a member makes it the duty of defendant as surviving partner to wind up the business and account as trustee to the representatives of the estate.—Drueke v. Boylon, 160 Mich. 522.

§ 95. ——Title to, collection and control of assets.

¶ 516. The surviving partner (or partners) holds the entire legal title to all the partnership assets.—Barry v. Briggs, 22 Mich. 201; Bassett v. Miller, 39 Mich. 133; Blodgett v. City of Muskegon, 60 Mich. 580.

¶ 517. Partnership property vests in the surviving partner, subject to the firm debts, and the heirs of a deceased partner in whose name it was purchased cannot retain it until payment of such debts.—Way v. Stebbins, 47 Mich. 296.

¶ 518. Upon the death of one partner, it is the duty of the survivor to collect the assets, pay the debts, and wind up the concern.—Cowham v. Shipman, 151 Mich. 673.

¶ 519. As a general rule the surviving partner is entitled to possession of the partnership assets to adjust and settle up the affairs of the concern.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

¶ 520. A surviving partner having the legal right to the possession of the partnership lands, a court of equity will not deprive him of that right, unless upon proof of mismanagement or danger to the partnership effects.—Connor v. Allen, H. 371.

¶ 521. A surviving partner is entitled to use the partnership real estate as firm assets so far as needed to settle the affairs of the firm, and the heirs of a deceased partner hold the legal estate as trustees for the equitable purposes of the firm.—Merritt v. Dickey, 38 Mich. 41.

¶ 522. A surviving partner is entitled to the proceeds of the sale of his deceased partner's interest in partnership lands disposed of by an administrator; and where he has bid off the interest himself without paying the price to the administrator, bondsmen of the latter cannot be held liable for the administrator's failure to collect the bid, the remedy of the estate being against the surviving partner, as such, to compel a faithful settlement of the firm business out of the assets, all of which he is entitled to control.—Merritt v. Dickey, 38 Mich. 41.

§ 96. ——Lease, sale, incumbrance and disposition of assets.

Validity of lease for more than a year made by surviving partner without written authority, see Frauds, Statute of § 72.

¶ 523. A surviving partner, in the absence of a necessity to do so in closing up the affairs of the firm, cannot renew a lease of landed rights owned by him and the deceased partner; and an attempted lease for a renewal term of five years without any written authority from the heirs of the de-

ceased partner is void, except in so far as they may have assented to it as a lease for one year by accepting rentals under it.—Oliver v. Olmstead, 112 Mich. 488.

¶ 524. Where, after one partner's death his survivor attempts to renew for a term of years a lease, it seems, that acceptance by such survivor and by decedent's heirs of the rent for the year in which the renewal is attempted, makes the renewal good for that year.—Oliver v. Olmstead, 112 Mich. 483.

¶ 525. A sole surviving partner has a right, acting honestly and with reasonable discretion and diligence, to dispose of the assets as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form.—Barry v. Briggs, 22 Mich. 201.

¶ 526. A surviving partner, though legally vested with title to all firm assets, is also trustee to dispose of them for the best interests of decedent's estate; and is bound to keep its representative fully informed of their condition.—Heath v. Waters, 40 Mich. 457.

¶ 527. After all the debts are paid the partnership real estate assumes the characteristics of real estate again and should be partitioned rather than sold by the administering partners and the proceeds divided; the personal property should be partitioned only in the event of an agreement between the surviving partners and the personal representative of the deceased, otherwise the surviving partners have the right to sell and to distribute the proceeds.—Comstock v. McDonald, 126 Mich. 142.

¶ 528. Where a partnership asset consists in a contract with certain Indians to collect their claims against the national government, it is the duty of the surviving partner, upon the dissolution of a firm by the death of one of the partners, to dispose of such asset if possible, and if it is worth anything in the market, and, in case he appropriates it to his own use, to recompense the estate for it or to permit it to share in the proceeds.—Cowham v. Shipman, 151 Mich. 673.

¶ 528a. As against the heirs of a deceased partner a surviving partner cannot mortgage the decedent's interest even in partnership lands for his own individual debts, or for any purpose except to close up the business and pay partnership debts, and such a mortgage cannot be enforced by one who took it under circumstances that put him on inquiry.—Brown v. Watson, 66 Mich. 223.

¶ 529. A surviving partner has no power to renew a lease, executed by the firm, for a term of years, unless such action is necessary to close out the partnership business.—Oliver v. Olmstead, 112 Mich. 483.

¶ 530. A surviving partner who is closing up the firm business is bound to pay over to the decedent's estate, as fast as realized, its share of all money not needed to pay debts.—Heath v. Waters, 40 Mich. 457.

§ 97. Duty to keep accounts.

¶ 531. A surviving partner becomes a trustee for the representatives of the deceased partner, for the firm creditors and for himself, and is held strictly as such, and his conduct in discharging his trust is carefully looked after by courts of equity; it is his duty as trustee to keep correct and accurate books of account, which shall show what property he holds in trust and what disposition he makes of the same.—Killefer v. McLain, 78 Mich. 249.

§ 98. Right of surviving partner to compensation.

Right of partners to compensation, see ante ¶ 58.

Compensation as item or charge on accounting, see post § 114.

Right of surviving partner to compensation, see Uniform Partnership Act § 18.

¶ 532. A surviving partner cannot claim compensation from the estate of a deceased partner for his personal services in winding up the business after the partnership has been dissolved by the latter's death, unless it has been agreed that he shall be compensated.—Loomis v. Armstrong, 49 Mich. 521; Loomis v. Armstrong, 63 Mich. 355.

¶ 533. A surviving partner may recover for work necessarily performed in completing a firm contract after the death of his copartner.—O'Connell v. Schwanabeck, 76 Mich. 517.

¶ 534. A partner who survives and carries on the business by virtue of the terms under which the firm acquired it and undertook its prosecution by contract between the firm as one party and the deceased partner as the other party, cannot have compensation on accounting for the services rendered in so carrying it on.—Porter v. Long, 124 Mich. 584.

¶ 535. The fact that a resident and managing partner, whose duty it was to so reside and manage the business, did so and performed no other services after the death of the other partner than he did before such death is a circumstance against allowing him any compensation for services as surviving partner in winding up the business.—Porter v. Long, 124 Mich. 584.

¶ 536. The fact that each partner received an annual salary does not justify an allowance of salary for the surviving partners for winding up the partnership affairs upon dissolution on account of the death of one partner.—Comstock v. McDonald, 126 Mich. 142.

§ 99. Rights of deceased partner's representatives.

See also ante ¶¶ 517, 521.

Continuation in business by personal representative as constituting him partner, see ante § 10.

Right of surviving partner to mortgage decedent's interest as against heirs, see ante ¶ 528a.

Right to and proceedings for accounting, see post § 108 et seq.

General law as to executors and administrators, see Estates of Decedents.

Inventory by representative of deceased partner, see Estates of Decedents § 104.

¶ 537. Until the partnership has been settled and the debts paid the representatives of the deceased partner have merely an equitable interest in the firm property, and this does not make them at law tenants in common with the surviving partner or give him any right of possession.—Pfeffer v. Steiner, 27 Mich. 537.

¶ 538. The representatives of a deceased partner have no right of possession, and nothing but an equitable interest in the partnership property, until the business of the partnership has been settled and its debts paid; and though this equitable interest may, in equity, make them tenants in common with the surviving partner, subject to the debts of the firm and a final settlement, it does not constitute them tenants in common at law.—Pfeffer v. Steiner, 27 Mich. 537.

¶ 539. The administrator of a deceased partner cannot compel the surviving partner to do more than settle the business and divide the proceeds when ready for distribution; his only remedy is an accounting at the proper season.—Roberts v. Kelsey, 38 Mich. 602.

¶ 540. The personal representative of a deceased partner is entitled to be kept fully informed by the surviving partner of the condition of the assets.—Heath v. Waters, 40 Mich. 457.

¶ 541. A surviving partner procured from the executrix of the deceased the transference to him of a certain partnership claim, in compensation for his services in conducting the entire business during decedent's illness, and suppressed this claim from the inventory of the partnership estate. Held, that this transaction operated as a fraud in law.—Heath v. Waters, 40 Mich. 457.

¶ 542. In a litigation between two estates as to the right to property which defendant's intestate claimed as surviving partner, a question at issue was the amount of livestock kept by the decedents at the death of plaintiff's intestate. Held, that evidence as to how many cattle there were before the building of a certain shed that had been put up in the lifetime of plaintiff's intestate, and as to how they had been cared for the winters before and after his death, was not material.—Howard v. Patrick, 43 Mich. 121.

¶ 543. Where the settlement of partnership affairs is limited to an adjustment of matters between the surviving partner and the estate of the other partner, the former should not exclude the executor or administrator from participation in the partnership assets so far as the latter has occasion to make use of them, but the former has no authority to set off any definite portion of them to the latter and retain any other definite portion to himself, except by some act to which the representative becomes a consenting party.—Chittenden v. Witbeck, 50 Mich. 401.

¶ 544. Where a partnership is terminated by the death of one partner his executor or administrator cannot of right demand admission in his place.—Roberts v. Kelsey, 38 Mich. 602; Chittenden v. Witbeck, 50 Mich. 401.

¶ 545. A. and B. were partners in carrying on a hotel. Pending negotiations for a renewal of the lease under which they held the property A. became insane, and his death appeared imminent. B. negotiated for a lease to be taken by himself in case A. should die or should not recover his reason, and upon A.'s death, which soon occurred, B. took a lease. Held, that A.'s representatives had no interest therein, nor had they in the good-will of the business, for the reason that the good-will was incident to the use of the property; that they could claim no interest in the profits of the business after A.'s death and pending a settlement, because of B.'s use of the furniture in the hotel, they having objected to its use but enjoined its removal; that they could hold B. liable only for its deterioration while so used; and that they could not charge B. for losses to the business during alterations and improvements made before A.'s death, and which both A. and B. contemplated would be made up by increased profits under the new lease.—Chittenden v. Witbeck, 50 Mich. 401; Witbeck v. Chittenden, 50 Mich. 426.

¶ 546. Beyond making inquiry and seeing that no waste or fraud is committed, the personal representative of a deceased partner has no concern in the firm assets, which are properly in the hands of the surviving partner for the purpose of closing up the partnership affairs, until the intestate's share in the surplus is turned over to the

administrator.—Merritt v. Dickey, 38 Mich. 41; Loomis v. Armstrong, 63 Mich. 355.

¶ 546a. The estate of a deceased partner is liable for its proportionate share of the taxes upon the firm's real estate until the business is wound up; and on the administrator's accounting his payment of such share is allowed in his favor.—Loomis v. Armstrong, 63 Mich. 355.

¶ 547. If the business partner of a testator, having been made executor under the will and placed in loco parentis to the testator's son, the sole beneficiary, keeps the latter in ignorance of business affairs generally and procures from him, to his own advantage, an agreement based on the assumption that the testator's interest in the firm is worthless, the agreement is to be regarded as fraudulent on its appearing that such interest is very valuable.—Perrin v. Lepper, 72 Mich. 454.

¶ 548. On the death of a surviving partner, who was also executor of the estate of his deceased partner, the representative of the former has no more right to the exclusive control of the copartnership books, papers and property of the partnership estate than has the representative of the deceased partner.—Perrin v. Lepper, 72 Mich. 454.

§ 100. Actions by and against.

See also ante ¶ 197.

Actions between partnership or its members and third persons, see ante § 62 et seq.

Actions between partners, see ante § 77 et seq.

Proceeding for contribution, see post § 121.

Bill to set aside foreclosure sale for fraud and irregularity by the administratrix of a deceased partner against the surviving partner, see Chattel Mortgages ¶ 511.

Want of knowledge or notice as excusing delay of persons claiming under deceased partner for accounting of trust property, see Equity § 56, ¶ 204.

¶ 549. Upon the death of one partner a cause of action belonging to the firm survives in favor of the other.—Teller v. Wetherell, 9 Mich. 464.

¶ 550. The presentation to and allowance by commissioners on the estate of a deceased partner of a partnership debt does not make it necessary, in an action by the creditor against the surviving partners for the same debt, to show that he has exhausted his remedy against the estate of the deceased partner.—Manning v. Williams, 2 Mich. 105.

¶ 551. The right of action at law for any trespass on the property of a firm, a member of which has died, rests solely in the survivor.—Pfeffer v. Steiner, 27 Mich. 537.

¶ 552. A court of equity has no jurisdiction of a suit against a surviving partner by the heirs of the deceased partner where, while the bill prays for an accounting, no accounting is in fact had and all the relief sought is a money decree, which a court of law can as well award as a court of equity.—Lee v. Hedenskoog, 200 Mich. 427.

¶ 553. Surviving partners can sue in their own names without joining decedent's representatives for the price of firm goods sold by them.—Bassett v. Miller, 39 Mich. 133.

¶ 554. An administrator of one partner cannot recover as to partnership property in proceedings against the estate of another, where the proceedings are not brought to settle partnership affairs.—Howard v. Patrick, 38 Mich. 795.

¶ 555. One cannot sue as surviving partner upon a cause of action that arose out of a transaction which did not take place until after the firm was dissolved by his copartner's death.—Mead v. Raymond, 52 Mich. 14.

¶ 556. Surviving partners can recover in their own names for goods belonging to the firm, but sold by them, without joining the representatives of the deceased partner, or obtaining an assignment or organizing a new firm.—Bassett v. Miller, 39 Mich. 133.

¶ 557. In an action against a surviving partner a debt which became due from himself separately, before or after his partner's death, may be included.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 558. After the death of a managing member of a firm his son engaged actively in the business under the old style, without new partnership articles, and a promissory note in the firm name was given to a party in the regular course of business. Held, that the surviving partner and the son were liable on the note in the hands of a bona fide holder without notice, even though another person has meanwhile taken the place of the surviving original partner in the business, and has assumed and promised to indemnify him against claims against the old firm.—Swift v. Mead, 62 Mich. 313.

¶ 559. Where a surviving partner declares in tort upon a false warranty to his firm, and proves a cause of action that did not arise until after the firm was dissolved by his copartner's death, the variance is fatal.—Mead v. Raymond, 52 Mich. 14.

¶ 560. In a suit against the estate of a deceased partner for wood sold to the partnership, where defendant administratrix admits the liability of the estate if the alleged contract of sale was in fact made, and where no claim is made by her that any of the amount involved has been paid, it is prejudicial error to permit her to testify as to

the amount of other claims not an issue and as to payments made on said claims. —In re Meeker's Estate, 169 Mich. 303, 135 N. W. 248.

¶ 561. A partner after the firm's dissolution, whereof a creditor had not yet learned, sent him his individual note for the firm's debt, receiving surrender of certain acceptances, and afterwards sent him notice to the effect that he had bought out the business, and would make some turn to adjust the firm's liabilities and save the creditor from loss. Subsequently the latter extended the note, all the time pressing for payment, and the maker, dying insolvent, sued the surviving partner on open account. Held, that whether the notice to plaintiff charged him with knowledge that the maker assumed the firm's liabilities—in which case defendant stood as surety and was discharged by the extension—was for the jury.—Johnson v. Emerick, 70 Mich. 215.

¶ 562. On the day of the death and again a day or two after the death of W., who, though without a partner, had been carrying on business under the name of W. & Co., defendant went to his store and bought goods. All of them were delivered to him on the third day, he then making payment by check at first drawn to W. & Co., but afterwards changed by defendant, at the request of W.'s former clerk, so as to be payable to bearer, this being done on account of W.'s death. The check was cashed by W.'s clerk, who paid over the money to W.'s widow. She refused to pay over to W.'s administrator, who then brought trover against defendant for the goods. Defendant, who had previously had dealings with W., claimed that he supposed when he bought the goods that he was buying from a surviving partner of W., being misled by the name under which the business was done. Held, that defendant was put on notice and was liable.—Brennan v. Pardridge, 67 Mich. 449.

§ 101. Receivership and other equitable relief.

Receivership on accounting, see post § 120.

Appointment of receiver at instance of judgment creditor, see Uniform Partnership Act § 28.

¶ 563. A receivership will not be granted to deprive a surviving partner of the possession of the firm property, unless upon proof of mismanagement or danger to the partnership effects.—Connor v. Allen, H. 371.

¶ 564. The only grounds for appointing a receiver to interfere with the possession of a sole surviving partner are his grievous misconduct or incapacity.—Barry v. Briggs, 22 Mich. 201.

¶ 565. An intestate's partner was his administrator, and was charged with confusing the partnership property with his own, and seeking to defraud those who were concerned in the intestate estate. The administrator died, and in his turn had an administrator, who filed a bill for an accounting and settlement as between the several estates. It did not appear that the partnership estate was being wasted, or that there was any hindrance to the investigation of its affairs, and there was evidence to the contrary. Held, that there was no ground for appointing, pendente lite and on defendant's prayer, a receiver whose custody should cover the deceased administrator's property.—Perrin v. Lepper, 56 Mich. 351.

¶ 566. A receiver of partnership property should not be appointed against the objection of surviving partners, at the solicitation of the representatives of a deceased partner, against whom a suit has been instituted by the survivors for an accounting and to enable them to purchase the share of the deceased, where the survivors are abundantly responsible, and able to do justice on a final accounting, and there is no tangible evidence that they are wronging the representatives of the deceased, though there has been delay, of an understandable nature however, in closing the firm settlements.—Comstock v. McDonald, 113 Mich. 626.

¶ 567. The administrator of the estate of a deceased partner and the widow of said deceased, who after having refused to join with the surviving partners in a sale of partnership lumber lands at a stated price, without the knowledge of the surviving partners received a bonus for consenting to the sale, were required to account to the surviving partners for the amount so received. —Comstock v. McDonald, 136 Mich. 489.

¶ 568. A surviving partner, by misrepresentations and fraudulent dealing, procured from the decedent's administratrix, who was also, as he knew, trustee for decedent's children, a conveyance of partnership interests belonging to decedent's estate for much less than their actual value. Held, that the use of the property thus wrongfully appropriated must be regarded as a continued use of the partnership assets never accounted for, which the survivor might properly be decreed to make good to the administratrix on a bill brought by her for an accounting.—Heath v. Waters, 40 Mich. 457.

3. As to Continuing or Liquidating Partners.

§ 102. In general; powers and duties of continuing partner.

Power of partner to bind firm in general, see ante § 31.

Rights and liabilities of incoming and outgoing partners, see ante § 48 et seq.

Powers and duties of surviving partners, see ante § 92 et seq.

Limitation of action against liquidating partner for share of assets, see Limitations § 64.

¶ 569. On the dissolution of a copartnership the partner intrusted with the winding up of the business has no authority to give notes of the firm in settlement of partnership debts so as to bind the other partners to an extension of time of payment with an increased rate of interest. And this is so whatever may be the rule as to giving a mere acknowledgment of the amount due in the form of a due-bill or I. O. U.—Smith v. Shelden, 35 Mich. 42.

¶ 570. Where a partnership involves but a single transaction, one partner in closing it up has no implied authority three years afterwards to take from the firm's debtor a note payable to himself individually for his own use, and extend the time of payment without interest, and the partnership can sue on the original debt before the extension expires.—Lemiette v. Starr, 66 Mich. 539.

¶ 571. Continuing partners as between a retiring partner and themselves cannot treat his undivided interest in real estate as partnership property for the purpose of adjusting accounts between themselves without discharging his lien upon it for the price at which it was to pass to the new firm.—Childs v. Pellett, 102 Mich. 558.

¶ 572. Where a member of a banking firm which had ceased doing business sent to the cashier of a bank that held commercial paper indorsed by the firm a writing authorizing his copartner to use his name "as one of the firm of * * * as indorsers on paper sent you (the cashier) for renewals," it was held, that the intent was to authorize the continuance of the use of the firm name as indorser, and that such authority was not to be construed as confined to the renewal of the particular notes held by the bank when it was given, but as vesting the copartner with discretion to continue renewals until the paper was retired by collection.—First Commercial Bank v. Talbert, 103 Mich. 625.

¶ 573. The partner intrusted with a settlement of the partnership affairs after the dissolution of the firm is not authorized to give notes in settlement of partnership debts, unless such right is conferred upon him by the other partners.—Potter v. Tolbert, 113 Mich. 486.

¶ 574. Upon the dissolution of a partnership by one member's executing an assignment for the benefit of his creditors, the solvent partner, under the general authority vested in him to wind up the affairs of the concern, may mortgage its entire assets to secure certain of its creditors, being accountable only for the observance of good faith.—Thompson v. Noble, 108 Mich. 19.

¶ 575. A sale by one partner of all his "right, title and interest in and to all the assets of the copartnership," includes his own note and mortgage to the other partners; and, since it constitutes a final adjustment of the partnership accounts, lodges in the remaining partners the power to proceed to foreclose the mortgage.—Campbell v. Bane, 119 Mich. 40.

E. ACCOUNTING, CONTRIBUTION AND INDEMNITY.

§ 103. In general; right to and necessity for accounting.

See also ante ¶ 158.
Equitable conversion as applied to partnership lands, see ante § 25.
Duty of surviving partner to keep accounts, see ante § 97.
Receivership on accounting, see post § 120.
Voluntary settlements and accounting, see post § 123.
General law as to accounting, see Accounting Suits.
Liability of representative for not accounting for proceeds of sale of partnership property used to satisfy firm debts, see Estates of Decedents ¶ 419.
Accounting as prerequisite to partition of partnership property, see Partition ¶ 18.
Provisions as to accounting by partners, see Uniform Partnership Act, §§ 21, 22.
Right of assignee to require an account, see Uniform Partnership Act § 27.

¶ 576. Where partnership articles provided that the partnership should expire by limitation, but the business was allowed to run on until a later date when a new firm was formed, leaving out one of the original partners, and bringing in another, it was held that the partner who was dropped had a right to an accounting from the members of the new firm.—Near v. Lowe, 49 Mich. 482.

¶ 577. The fact that a partner has sold his interest to a third person and has agreed to receive from him a certain sum until he is fully paid, at which time such person should become owner of the interest, does not deprive him of his right to file a bill against his copartner for dissolution and accounting.—Russell v. White, 63 Mich. 409.

¶ 578. Where a partnership business had been carried on for nearly twenty-five years without written accounts as between the partners, the evidence of their dealings resting in parol, and each drawing out from the business goods or money as his needs required without question or protest from his copartners, as there could not be any satisfactory accounting, the partners should be left as they were when business was discontinued.—Fitzsimons v. Foley, 80 Mich. 518.

¶ 579. Where one partner has sold to his copartners his interest in the firm's property, reserving from such sale his right to commissions for sales of goods previously made by him, he is not under such reservation entitled to an accounting, especially if the

commissions have been paid to him in full. —Lobdell v. Baldwin, 93 Mich. 569.

¶ 580. A defendant in a suit for a partnership accounting who denies the existence of the partnership is nevertheless entitled to a just statement of the account in case the partnership relation is established.—Thompson v. Noble, 108 Mich. 19.

¶ 581. The right of a member of a partnership to an accounting with a copartner in respect to the partnership business, and in respect to transactions before the formation of the partnership whereby the amount to be paid by the former for his interest was to be determined, is not defeated by a sale of their respective interests in the firm property and business to a third person, where neither contemplated that such right would be lost by the sale.—Feige v. Babcock, 111 Mich. 538.

¶ 582. A bill for an accounting will lie where two partners have agreed to dissolve partnership, one has given a bill of sale of his interest in the partnership assets to the other, the price to be fixed by arbitrators and the arbitrators have failed to reach an agreement.—Horton v. Hayden, 129 Mich. 374.

¶ 583. Where one executor is interested as a legatee and the other as a member of a partnership in which the testator was also interested, the executors need not be removed before the remaining legatees may file a bill in equity in their own behalf against the surviving partners on the ground of the undervaluation of the testator's interest in the business.—In re Sloman's Estate, 186 Mich. 434.

¶ 584. In a bill brought by the estate of a deceased partner for a settlement of his interest, an accounting must be taken where the assets of the partnership are in a complicated condition.—Drueke v. Boylon, 160 Mich. 522.

§ 104. Partnerships for illegal objects.

As affecting contribution between partners, see post § 121.

¶ 584a. The law avoiding sales of liquors was aimed at sales in the ordinary sense and not at the mutual liabilities of partners dealing in liquors, when such liabilities being adjusted on dissolution involve payments made by to which the other should contribute.—Jacobs v. Stokes, 12 Mich. 381.

¶ 585. Where articles of partnership contemplated the sale of liquors, and the stock, on dissolution, contained them, and on settlement one partner was charged the price of them and authorized to pay certain debts incurred in their purchase, it was held that the other partner, when sued for contribution, could not set up the liquor law in defense against the items paid for such debts. —McGunn v. Hanlin, 29 Mich. 476.

¶ 586. Where copartners agreed to engage in the retail liquor business, each to have a half interest, but only one of them taking out a license and filing a bond, it was held that the business being illegal equity would deny an accounting.—Beemer v. Hughes, 179 Mich. 110.

§ 105. Time to sue, limitations and laches.

General law as to limitations, see Limitations of Actions.

General law as to laches, see Equity, IV.

Limitation of action for accounting, see Limitations § 20.

¶ 587. A partner did not lose his equitable rights in the property of the firm by failure to exercise them for a period of five years; where, in an action against the participating partner for an accounting, it appears that his copartner, without the participation of complainant, acquired, by foreclosure of a mortgage previously executed by such partners to secure creditors of the firm, possession of the assets of the partnership, under an agreement with the creditors of such firm that upon the payment of their claims, the assets of the firm should be returned to such participating partner.—Lamb v. Lamb, 140 Mich. 85.

¶ 588. On accounting a nonactive and excluded partner was entitled to have treated as an interest for the benefit of the partnership whatever interest the active partner had in a corporation, where such corporation had been formed for their security by the creditors of the partnership with the active partner, taking the assets of the partnership as capital, acquired by the foreclosure of a mortgage previously executed by such partners to secure creditors of the firm; even though such nonparticipating partner has for five years slept upon his rights.—Lamb v. Lamb, 140 Mich. 85.

¶ 589. A bill by the surviving member for an accounting of the value of firm lands held in the name of the other partner from 1890 until sale by him in 1901, is not barred by laches, where he died in 1902 and the bill was heard on appeal in the early part of 1905.—Bennett v. Hough, 141 Mich. 162.

¶ 590. In this state the right to have a partnership accounting is cut off in six years, unless the partnership agreement was under seal; and then, in ten years.—Dowse v. Gaynor, 155 Mich. 38.

¶ 591. Complainant and decedent sold a partnership business located on certain real estate to one Williams. Complainant and another shortly thereafter bought back the business and for some sixteen years paid the decedent rental for the premises. During this period complainant took no steps

to enforce any claim against the decedent to the said real estate as being partnership property. In a bill to establish an interest in the same, held, complainant's claim was barred by laches.—Abbott v. Jones, 164 Mich. 598.

¶ 592. Complainant and decedent conducted a partnership business for twenty years on land owned by the decedent. The business was then sold to a third person and was in a short time bought back by complainant and another. Two years thereafter the decedent conveyed the real estate to a third person who conveyed to the decedent and his wife as joint tenants. Complainant continued thereafter to pay a rental to decedent for the premises. No regular books had been kept of the partnership business during the twenty years and there was no competent evidence to show that the real estate had been purchased by partnership funds or that it was treated as partnership property, nor was there any evidence that the decedent or his surviving widow had acted fraudulently. Held, complainant's bill to establish an interest in the partnership would not lie.—Abbott v. Jones, 164 Mich. 598.

§ 106. Jurisdiction and form of remedy.

See also ante ¶ 552.

Jurisdiction of suits for contribution, see post § 121.

¶ 593. The settlement of claims as between a firm and single partners, where there are more than two, belongs to a court of equity, and in case of a claim by the firm against one of them should be disposed of on a general accounting.—Learned v. Ayres, 41 Mich. 677.

¶ 594. Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty. Lands may be involved, but the locality of the lands does not affect the jurisdiction of the court, which depends upon the residence of the parties.—Godfrey v. White, 43 Mich. 171.

¶ 595. The adjustment of the partnership affairs of complainants in a suit to compel the discharge of mortgages executed by the firm cannot be made in the suit, where the mortgagee is the only defendant.—Beardslee v. Citizens' Commercial & Sav. Bank, 112 Mich. 377.

¶ 596. While partnership accounts could not be settled in a suit on a contract by one partner to buy another's share in the firm for a price, yet where there was a theory of defense that there was no such contract but instead an agreement to form a corporation and transfer all the firm property to it through the defendant who was then to take the corporate stock and use it to satisfy the firm debts, and that the firm was insolvent, such facts could be considered as bearing on the probability of the contract being as alleged.—Fountain v. Hutchinson, 108 Mich. 596.

§ 107. Parties.

In actions between firm or its members and third persons, see ante § 69.

Parties to actions by or against surviving partners, see ante § 100.

General law as to parties, see Parties.

¶ 597. After a partner has sold out his interest in a firm his former copartner has the right, as against him, to have the concern wound up, but this can be done only by bringing in all parties concerned, and by seeking a distribution and an accounting. The purchasers from the retiring partner take such interest as he would have had and no more, and that would ordinarily be subject to the final settlement, and the purchasers therefore become parties.—Glynn v. Phetteplace, 26 Mich. 383.

¶ 598. On a bill for an accounting involving the interests of a deceased partner the latter must be represented in court.—Jenness v. Smith, 58 Mich. 280.

¶ 599. A wife of a deceased partner is a proper party to a bill filed for an accounting, inasmuch as she has a contingent right of dower in the firm realty.—Free v. Beatley, 95 Mich. 426.

¶ 600. In a suit by a surviving partner against the other's estate to have the proceeds of the sale of timber the contract for which ran to the partners by their individual names decreed to be partnership property, the rights of a third person who by subsequent agreement with the partners had an interest in such proceeds when received by them are not affected, and he need not be joined as a defendant.—Lindsay v. Race, 103 Mich. 28.

¶ 601. An insurance company which has approved of an arrangement whereby its general agent took a copartner, who was to have an interest in the renewal commissions on business secured by the firm, is a proper party to a bill filed by the incoming partner for an accounting as to such commissions, his relations with the company having been dissolved by its direction.—Houghton v. State Mut. Life Assur. Co., 110 Mich. 306.

¶ 602. The administrator of a deceased partner is a necessary party to a bill against the partnership for an accounting, and the rule is not affected by the fact that the individual complainant is one member of the partnership and the defendant partnership another.—Carpenter v. St. Clair Circuit Judge, 122 Mich. 323.

§ 108. Pleading.

In actions between the firm or its members and third persons, see ante § 70.

General law of pleading, see Pleading.
Pleading in equity, see Equity, VII.
Construction of allegations in accounting bill, see also Equity ¶ 593.

¶ 603. To get relief against an heir holding a partnership interest in trust it is not enough to state in a general way the partnership character of the interest.—Jenness v. Smith, 58 Mich. 280.

¶ 604. A bill by one partner setting out a substantial fraud practiced on him by his copartners in the purchase of his interest in the firm assets and business, and a right to an accounting for a fund reserved by them to abide the result of threatened litigation, states recognized grounds of equitable jurisdiction, and a general demurrer is properly overruled.—Shaw v. Chase, 77 Mich. 436.

¶ 605. A bill is good, which alleges a copartnership between plaintiff and defendant in an insurance agency, assented to by the company which is joined as a defendant, and that by custom which was a part of the contract a percentage on future renewal premiums should accrue to the agents, that thereafter the insurance company directed its codefendant to dissolve his relations with plaintiff, which was done, that plaintiff has an interest in renewal premiums of a certain value, and that by pretense of defendants plaintiff was dismissed for claimed inefficiency, and praying a discovery of the names of policies on which renewals shall accrue to plaintiff with a statement thereof and the satisfaction of them as realized, and a decree for the payment of a sum originally paid for admission as a copartner and that such sum be adjudged a lien on renewal commissions.—Houghton v. State Mut. Life Assur. Co., 110 Mich. 308.

§ 109. ——Cross-bill.
Cross-bills generally, see Equity, VII.

¶ 606. One whose rights in a partnership business have been violated by a sale of the firm property by his copartners, in whose names it stood, may file a cross-bill to obtain affirmative relief in respect to such interests in a suit instituted by one of the partners for an accounting.—Feige v. Babcock, 111 Mich. 538.

¶ 607. A defendant in a bill for a partnership accounting may set up by way of cross-bill, after denying the partnership, a claim that, as a result of the dealings between the parties, a large amount is due him from complainant as trustee, where the transactions are the same as those referred to in the original bill, and may bring in complainant's wife as a defendant to the cross-bill, where she is in privity with the complainant.—Griffin v. Griffin, 112 Mich. 87.

¶ 608. Complainant's decedent bought of defendant a half interest in a livery business for $3,500, payment to be made by certain sums of money and a certain stock of horses and vehicles pertaining to the business. An oral agreement of partnership was at the same time entered into. The scrivener who drew the agreement testified that the parties did not intend the stock traded in by the deceased and that owned by her to be partnership property, and that the inclusion of the same as such in the schedule was a mutual mistake. The course of dealing of the parties afterwards indicated the contrary. In a bill by the administrators of the deceased for an accounting, held, a cross-bill under this evidence would not lie to reform the agreement as to the alleged mistake.—Drueke v. Boylon, 160 Mich. 522.

§ 110. Issues, proof and variance.
General law as to issues, proof and variance, see Pleading.
Bill for accounting in certain partnership and proof of other kind or object of partnership, see Equity ¶ 821.

¶ 609. Where the parties to a suit for a partnership accounting have agreed by their pleadings that their firm was dissolved before suit was brought, neither can afterward claim the contrary, especially if he has made no application to the court for leave to change his pleading but has given evidence in its support.—Candler v. Stange, 53 Mich. 479.

¶ 610. Neither party to a suit for a partnership accounting can be made to submit to an overhauling of his accounts for any period that is not within the issue.—Candler v. Stange, 53 Mich. 479.

¶ 611. Neither partner need submit to an overhauling of his business and accounts for a period not within the time fixed by their pleadings and consent decree.—Candler v. Stange, 53 Mich. 479.

¶ 612. Where, in a suit by a surviving partner against the estate of the deceased partner to secure, among other things, a determination that the proceeds arising from the sale by the firm of certain timber, the contract for which ran to the partners in their individual names, are partnership property, it is agreed that that is the only question to be litigated, and the subject of an accounting is not gone into by the estate, a determination as to whether the estate is indebted to complainant should not be made until the accounting is completed.—Lindsay v. Race, 103 Mich. 28.

§ 111. Burden of proof and presumptions on taking account.
In actions between firm or its members and third persons, see ante § 71.

¶ 613. Where a credit to a partner appeared upon the books of the firm and was distinctly ascertained, it was regarded as

having been included in the partnership settlement, which was evidently meant to leave nothing unprovided for.—Lambert v. Griffith, 50 Mich. 286.

¶ 614. Upon a bill by a surviving partner against the estate of a deceased partner to subject certain lands to the payment of partnership debts and for an accounting, the burden of proof rests upon complainant to remove the strong presumption which arises from written instruments (the contract of purchase in severalty and a contemporaneous agreement between the vendees therein fixing their respective liabilities) and the fact that no firm money was used, that the parties did not intend such purchase as a firm transaction.—Lindsay v. Race, 103 Mich. 28.

¶ 615. Where an agreement for a settlement of partnership accounts provided that sums found due to either party should be added to, or deducted from, an agreed sum to be paid to one of them, the party claiming the benefit of any such additions or reductions has the burden of proving that the amount has been received and not accounted for, or paid out and not credited.—Lambert v. Griffith, 44 Mich. 65.

§ 112. Admissibility, weight and sufficiency of evidence on accounting.

In actions between the firm or its members and third persons, see ante §§ 72, 73.
In suits for contribution, see post § 121.
Sufficiency of evidence on appeal from accounting, see Appeal § 429.
General law as to evidence, see Evidence.
Admissibility of firm or individual books, see Evidence § 523.
Written as over-weighing oral evidence as to mutual rights, see also Evidence § 607.

¶ 616. Statements by a surviving partner when asked for information by the administrator of a deceased partner, to the effect that the deceased had "a third interest" in certain lands, were not regarded—in view of the fact that it is not uncommon for partners, in speaking of their interest in copartnership of property, to refer to their ownership as an aliquot part corresponding to their interest in the copartnership,—as assertions that the firm creditors were not concerned in the lands or that no accounting was due.—Lindsay v. Race, 103 Mich. 28.

¶ 617. Cash book entries are not conclusive in a settlement of partnership matters if there is countervailing evidence. But if there is not, the settlement should be in accordance with the prima facie showing made by the books.—Lambert v. Griffith, 44 Mich. 65.

¶ 618. Evidence of the purchase of a partnership interest by the two remaining partners in conjunction with their younger brother for $300,000, to be paid for partly in cash and partly in notes, both cash and notes having been subsequently paid out of firm property, is held sufficient in a bill for an accounting against the estate of the younger brother to show, notwithstanding conflicting book entries, that the younger brother was supposed to pay one third of the purchase price of the previous partner's interest and not to have it as a gift.—Comstock v. McDonald, 126 Mich. 142.

¶ 619. Where the elder of two brothers attended to the principal financial affairs of the firm, but consulted his brother, who at times handled the firm money, and who had knowledge of his brother's failure to keep regular books of account, but made no effort to correct the neglect and kept none himself. Held, in an accounting, items plainly proved were properly allowed to the accounting elder partner.—Mitchell v. Mitchell, 92 Mich. 618.

¶ 620. Upon an issue as to the shares that parties were entitled to from the proceeds of partnership property, the fact that the avails of the property upon a sale were divided without dissent or serious objection upon a certain basis, is almost conclusive evidence that that was the basis agreed upon.—Newcomb v. Thorpe, 156 Mich. 101.

¶ 621. The question of whether a shipment of stock was an individual or a partnership transaction is one of fact upon which the finding of the trial court will not be interfered with, where the supreme court, upon examination of the evidence, is satisfied that the decision of the trial judge was correct.—Dant v. Hall, 154 Mich. 120.

¶ 622. On an accounting by a partner an item which the plaintiff denies receiving, and which the referees disallowed, may nevertheless be allowed, where it appears that the disallowance was probably based on a conclusion that the item was not a proper charge and not on a disbelief of the testimony of plaintiff, where it otherwise appears by the accountant's testimony that he himself furnished the goods represented by such item and plaintiff's testimony later shows doubt as to what he did receive and an admission that he received some goods of that kind.—Young v. Barras, 74 Mich. 343.

§ 113. Basis and contents of account; items of charge and credit.

Right of partner to compensation, see ante § 58.
Right of surviving partner to compensation, see ante § 98.

¶ 623. Where, on division of partnership assets, one partner has taken certain accounts at their face, and been charged with them as moneys he could collect, it is not error, on a subsequent accounting in equity between the parties, to allow such partner for money received from debtors during the partnership by a representative of the other partner, and not credited on the books, these payments reducing the real amount of the

accounts below what they had appeared to be.—McGunn v. Hanlin, 29 Mich. 476.

¶ 624. Upon a bill for partnership accounting it appeared that no loss had occurred in the business, but that defendant had kept no such books as would enable full accounts to be stated. Held proper to require defendant to account for all the money put into the business by complainant.—Robertson v. Gibb, 38 Mich. 165.

¶ 625. Any reasonable expense incurred by either member of a firm, with or without the consent of the rest, in the legitimate prosecution of the partnership business, and for the benefit of the parties, should be allowed upon a partnership accounting. So held of the expense of exploring premises leased to the firm for mining.—Sweeney v. Neely, 53 Mich. 421.

¶ 626. Where one partner furnished timbered land to be lumbered by the firm, and also furnished tools and outfit for the work, and was to be paid interest upon his moneys invested, the agreed cost of the timber was properly taken as the cost of the land, less its value as stripped and returned to him, since the land itself was not to be used; and land from which no timber was taken should not be considered in an accounting, nor should the firm be charged with taxes on land for which he received credit. And it was proper to allow for outfit at the difference between its first cost and the value of what was left when the firm dissolved, the wear and tear being in some degree a consumption of it and consequent diminution of profits.—Wells v. Babcock, 56 Mich. 276.

¶ 627. In a suit in equity for an accounting an independent claim of one copartner against the firm cannot be applied on the amount found due him from the firm.—Kinney v. Tabor, 62 Mich. 517.

¶ 628. Complainant, after a dissolution of partnership between himself and defendant, obtained a temporary injunction restraining defendant from disposing of the firm's assets, but afterwards the injunction was modified by requiring both parties to file a bond to account for the assets, and allowing either to dispose of the assets, but not below cost. Without filing bond complainant obtained possession of a large part of the firm property, and sold it for less than cost, without authority from defendant. Held, that on an accounting complainant was not entitled to an allowance in his favor of the losses on the assets that went into his hands, and that his irregular and unauthorized conduct precluded him from relief.—Kinney v. Robinson, 66 Mich. 113.

¶ 629. Where one partner holds exclusive possession of the partnership property, and wrongfully refuses to let in the other partner, he will be accountable in a court of equity to such partner for his share of the profits made, which accounting will cover the time during which the partnership assets are used in making them.—Major v. Todd, 84 Mich. 85.

¶ 630. On accounting of a lumbering and land venture the partner who did the sawing and kept the mill culls will not be charged for them, where they were not at first reckoned to be of any value and later the parties in their settlements took no account of them until many years later when objection was made that they should be accounted for, the original agreement having been silent as to them.—Loveland v. Peter, 108 Mich. 154.

¶ 631. In an action for an accounting of a partnership for cutting and sawing timber on land owned by complainant, defendant cannot recover profits which might have resulted from the successful operation of the enterprise, where its success was prevented by his failure to furnish funds according to his agreement, and by his forbidding complainant to sell any of the lumber in order to raise the necessary funds.—Snyder v. O'Beirne, 132 Mich. 340.

¶ 632. Although a literal construction of the contract by which the partner acquired his interest would permit him to be charged in an accounting with a given proportion only of the cost of the partnership property as shown by vouchers, moneys actually paid out in the business prior to the sale to him, for which no vouchers can be produced, but of which there is legal evidence, may be considered in the adjustment, if it appears from the whole contract that both parties intended that the amount to be paid should be determined by the sum so invested.—Feige v. Babcock, 111 Mich. 538.

¶ 633. In stating a partnership account, it was proper to exclude credits claimed by one of the partners for alleged payments for labor and supplies in connection with lumbering operations of the firm which were under his management, where, owing to the fact that the bills were not itemized, there was no means of determining to what extent such payments were legitimate, and it was apparent that parts thereof were embraced within the itemized accounts.—Hake v. Coach, 114 Mich. 558.

¶ 634. Upon a review of the evidence in a suit for a partnership accounting, held, that complainant had failed to establish his claim that there was a shortage in defendant's accounts with respect to the logs handled by him as the managing partner in the lumbering operations of the firm, an apparent discrepancy between the woods scale and the amount of lumber produced being explainable by loss and cullage due to logs lying too long in the water.—Hake v. Coach, 114 Mich. 558.

¶ 635. Upon a bill for an accounting between partners, bills which are unpaid should not be charged to either party but should be paid by the receiver out of the assets.—Snyder v. O'Beirne, 132 Mich. 340.

¶ 636. In the settlement of partnership accounts a note given the firm which has carelessly been permitted to become barred by the statute of limitations by the surviving partner is properly charged against him. —Webber v. Webber, 146 Mich. 31.

¶ 637. In making a division of the assets of a partnership at dissolution, defendants, who continued the business, retained a certain amount of the money coming to plaintiff, the retiring partner, as his share of an amount for which the firm was contingently liable as indorser of a note. Held, that when such note became outlawed the money so retained by defendants became the property of plaintiff, and defendants could not defeat plaintiff's claim upon it by asserting that the privilege of pleading the statute of limitations in a suit upon the note would be a personal privilege, belonging only to defendants.—Young v. Potter, 150 Mich. 375.

§ 114. ——Personal expenses and compensation for services.

¶ 638. Expenses incurred by one partner of a mining firm in exploring premises leased to the firm for mining should be allowed upon a partnership accounting.—Sweeney v. Neeley, 53 Mich. 421.

¶ 639. A claim by one partner for personal expenses was properly disallowed; it appearing that he had made no attempt to keep an account of his expenses, and that he was engaged in business on his own account during the continuance of the partnership.—Hake v. Coach, 114 Mich. 558.

¶ 640. Failure in duty as a partner may be a ground for dissolving the partnership, but not a claim by diligent partners for compensation.—Godfrey v. White, 43 Mich. 171.

¶ 641. Partners cannot ordinarily claim allowances for services exceeding those of their associates; but where those who do not expect to be personally charged with the business of the firm perform special services, it is proper to allow them compensation beyond their share of the profits if they had an understanding with the others that they were to be compensated for them.—Godfrey v. White, 43 Mich. 171.

¶ 642. Where two partners each owning four-ninths of a business and one partner owning one-ninth were credited respectively with $4,000, $4,000 and $1,000 each year, the evidence shows this to be salary, and upon dissolution of the partnership by the death of one partner during the year they are entitled to be credited with a proportionate share of this salary based upon the number of months the partnership was in existence. —Comstock v. McDonald, 126 Mich. 142.

¶ 643. Complainant's partner acted as attorney for certain Indians in a claim against the United States and recovered judgment. Through an error in identification the money was paid in some cases to the wrong persons. Defendant then got an appropriation from congress for those who failed to receive payment. Some of the names in the appropriation schedule were the same as those originally employing defendant. In a bill for accounting, held, complainant was entitled to his share of commissions on all the money secured and paid to the Indians.—Cowham v. Shipman, 164 Mich. 419.

§ 115. ——Credit for debts paid or money advanced.

Power of partner to collect and settle firm claims or debts, see ante § 41.

¶ 644. A member of a partnership is entitled, upon an accounting after a sale of the interests of both partners, to a credit for the amount of the firm debts paid by him in excess of the amount assumed by the purchaser of their interests.—Feige v. Babcock, 111 Mich. 538.

¶ 645. In a suit between partners for an accounting an item for the payment of labor, if admitted by the complainant, may be allowed, although not appearing in the defendant's account filed.—Young v. Barras, 74 Mich. 343.

¶ 646. One member of a firm who executes a note shortly after the partners have reached an adjustment of their accounts by which they become equal partners, which note is executed for the firm's benefit, and indorsed by the other partner, is entitled in a subsequent accounting to credit for interest thereon paid by him, although before the adjustment the maker of such note was to furnish the necessary money to conduct the partnership business.—Hake v. Coach, 114 Mich. 558.

¶ 647. In a suit for an accounting under an arrangement for the lumbering of certain lands, it was held that interest upon advances made by defendant was properly charged to the accounting partner individually rather than to the firm where such had been the usage between them theretofore under their arrangement.—Loveland v. Peter, 108 Mich. 154.

¶ 648. Complainant and defendant formed a partnership to buy the property of a corporation at a bankruptcy sale. Defendant contracted to pay a creditor of the bankrupt a certain bonus for said creditor's claim on machinery sold to the bankrupt. Complainant brought a bill for an accounting of the profits made in the partnership transaction. Held, defendant was entitled to

charge complainant with one-half of the money paid by defendant as said bonus, whether defendant made the contract to pay it before or after the formation of the partnership.—Goldman v. O'Hara, 164 Mich. 612.

¶ 649. A partner who draws money from his personal account and deposits it to the credit of the firm is entitled to credit therefor in a partnership accounting.—Arthur v. McCallum, 195 Mich. 618.

¶ 650. A partner is entitled, on paying to the creditors of the partnership, such sums as are due them, to receive from them an assignment of their stock in a corporation and to hold such subject to an accounting between the partners; where, in an action for an accounting, it appears that the other partner and such creditors of the partnership, excluding him, formed a corporation, with the assets of the partnership as capital, and to secure them issued to such creditors various amounts of stock, aggregating the great majority of the stock of such corporation.—Lamb v. Lamb, 140 Mich. 85.

¶ 651. Where a partner had turned over to the firm certain securities to be used in paying for property purchased by them, and the firm credited him with them and guaranteed them to the party to whom they were given, and when a deficiency afterwards arose the partner who had been credited took back the title to a part of the mortgaged premises, it was to that extent proper to charge back the securities to him.—Harrison v. Dewey, 46 Mich. 173.

§ 116. ——Profits or earnings from individual transactions.

¶ 652. A member of a partnership cannot compel another member to account for profits from the purchase and sale of a lot, where the transaction was an entirely individual one on the part of the latter.—Mack v. Engel, 165 Mich. 540.

§ 117. ——Allowance of interest and discount.

Allowance of credit for interest paid, see ante § 115.

General law of interest, see Interest.

Allowance of deductions for excessive interest charged partner on his monthly balances, see Usury.

Provisions as to interest, see Uniform Partnership Act § 18.

¶ 653. Compound interest was properly allowed in a decree for partnership accounting by way of damages for persistently and wrongfully refusing to account.—Heath v. Waters, 40 Mich. 457.

¶ 654. Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed.—Godfrey v. White, 43 Mich. 171.

¶ 655. Discount and interest charges are inseparably connected with the principal sum, and properly allowed on an accounting against surviving partners in connection with charges for moneys borrowed by the deceased member of the firm.—Bundy v. Youmans, 44 Mich. 376.

¶ 656. Surviving partner held for interest on amount of deterioration or destruction of firm property used in his own business.—Chittenden v. Witbeck, 50 Mich. 401.

¶ 657. Interest is not allowed in a partnership accounting upon moneys owing between the firm and either of the partners, or between each other, in partnership transactions before dissolution, unless by virtue of some understanding or usage or some equity implying an agreement to pay it.—Sweeney v. Neely, 53 Mich. 421.

¶ 658. Monthly balances in a partnership accounting do not fairly represent new principal, and interest on them should be compounded.—Wells v. Babcock, 56 Mich. 276.

¶ 659. Where one of the parties to an accounting has the proceeds of the business in his hands on dissolution of the firm, interest is properly allowed against him on so much as remains due from him after dissolution.—Wells v. Babcock, 56 Mich. 276.

¶ 660. A partner who is to be paid interest on moneys advanced, but who receives most of the money arising from the business as it comes in, cannot justly draw interest on funds in his own possession that are practically identical with his advances; but an arrangement by which he is allowed interest on the excess of advances over receipts, without compounding, is proper.—Wells v. Babcock, 56 Mich. 276.

¶ 661. Where a surviving partner has proceeded with the partnership business, and become his deceased partner's administrator, and then neglects to account for assets, he may be charged with their highest value which the proofs show, and for all rents and profits which he might by judicious management have received without neglect or default; or he may be charged with interest upon the deceased partner's capital.—Killefer v. McLain, 78 Mich. 249.

¶ 662. Where one partner's interest is purchased by the two remaining partners in conjunction with a third person and the purchase price is paid by the firm's cash and notes of the three succeeding partners, which notes with interest are subsequently paid by the firm, in an action for an accounting against the estate of the third person, the interest on the notes will be held to be a part of the purchase price of the partnership interest and subject to be charged pro

rata against the estate.—Comstock v. McDonald, 126 Mich. 142.

¶ 663. Where partners in appropriating notes owned by the firm bearing interest, charged themselves with the amount of the accrued interest and also appropriated to themselves notes bearing no interest, they should be allowed on accounting a discount upon such notes as bore no interest and were not due when appropriated.—Comstock v. McDonald, 126 Mich. 142.

¶ 664. The rule that a surviving partner who appropriates the funds of the concern to his own use, is chargeable with interest, applies where a surviving partner defrauded the estate of the deceased partner through short scaling of lumber and wrongfully paid himself salary.—Porter v. Long, 136 Mich. 150.

¶ 665. The rule that a partner is not chargeable with interest until dissolution, upon sums withdrawn from the partnership funds, has no application where the sums in question were taken as surviving partner under a claim that they were such partner's own.—Porter v. Long, 136 Mich. 150.

¶ 666. The item of interest on a note given by one partner in settlement of a partnership claim is a proper charge against the surviving partner in the settlement of accounts where it appears that interest was not charged the payee of the note on overdrafts made and which the firm had carried for a long period.—Webber v. Webber, 146 Mich. 31.

¶ 667. Where the continuing partners of a firm retain a part of the amount due the retiring partner, and hold it as his portion of a contingent liability of the firm as indorser upon a note, without any agreement as to interest on the amount so retained, such interest will begin to run from the day the note became outlawed by the statute of limitations.—Young v. Potter, 150 Mich. 375.

¶ 668. In the absence of an agreement in writing to pay more than five per cent interest for money advanced by a member to a limited partnership, nothing above that rate can be collected, under Act No. 207, Pub. Acts 1899.—Mack v. Engel, 165 Mich. 540.

§ 118. ——Matters antedating partnership.

¶ 669. No allowance should be made in a partnership accounting for matters antedating the partnership, even though relevant as evidence.—Wells v. Babcock, 56 Mich. 276.

¶ 670. A debt originally incurred by the complainant partner to raise his contribution to the capital, and by him indorsed unwarrantably in the firm name to the lender, will be charged to him as his individual debt on an accounting.—Childs v. Pellett, 102 Mich. 558.

§ 119. Decree and relief awarded.

Equitable conversion of partnership lands, see ante § 25.

Right to have partition as incident to suit for partnership accounting, see Partition ¶ 130.

Enforcement of foreign accounting decree, see Foreign Judgments § 14.

¶ 671. A decree against surviving partners for an accounting for assets of which they had jointly taken possession should be against them jointly for the whole amount, and not severally for the sums into which they divided it between themselves.—Bundy v. Youmans, 44 Mich. 376.

¶ 672. The decree in a suit for accounting cannot provide for partition unless by consent. The partners have a right to have the assets disposed of, if they desire; and lands not sold are left as a distinct tenancy in common.—Godfrey v. White, 43 Mich. 171.

¶ 673. Where partners in the platting, improving, and selling lots from a tract of land orally agreed that a certain lot should be withheld from partnership control, but made no arrangements as to terms upon which the withdrawal should be made, equity requires on accounting that the arrangement be carried out upon a reasonable division of values as they existed at the time of the arrangement.—Chase v. Angell, 148 Mich. 1.

¶ 674. Where two partners are to all intents and purposes cotenants in a legal title to realty, but not technically so, equity will compel such conveyances as the necessity of the business and the rights of the partner require, as incident to an accounting and partition.—Chase v. Angell, 148 Mich. 1.

¶ 675. Land owned by partners as part of their firm assets where each has a legal title is held in common subject to a liability to have it applied to partnership obligations and accounting; each has a lien on the interest of his copartner for any balance due him, and when the firm is dissolved, or can no longer continue in business, real estate constituting part of the assets may be divided by compulsory partition where it is shown that it will not be required to satisfy liabilities of the firm.—Chase v. Angell, 148 Mich. 1.

¶ 676. On a bill for a partnership accounting and for specific enforcement of an option to complainant to purchase the land contributed by defendant at a half of its agreed value, a half of the net profits as ascertained should be adjudged to defendant and a lien in his favor decreed upon the land; where it appears that the parties were to contribute equally to the building of a hotel on the land and that the managing partner, complainant, applied all of the profits towards the erection of the buildings without any accounting or division of them, and

where no other assets remain.—Johnson v. Fowler, 68 Mich. 1.

¶ 677. Where the share of a deceased partner as of the time of his death is known or can be ascertained with reasonable certainty, the court will apply the well-known rule that a cestui que trust may either follow the fund, and take it and the profits, or take the fund, with interest, in lieu of profits, to be computed in such manner and at such rate as will, in view of all the facts and circumstances, be in accordance with the principles of equity and justice. In such a case the surviving partner, if he has been made executor and trustee of the other, and has proved unfaithful, must be held to have elected, in taking the course he did, that this rule might be applied in case equity should be resorted to in the settlement of his accounts, and his estate must abide thereby. But in giving such summary relief the court will not omit to take into consideration the consequences of its decree, and will consider them in connection with the other circumstances in the case, and see to it that an oppressive or unjust result shall not be reached.—Perrin v. Lepper, 72 Mich. 454.

¶ 678. Shares in a corporation formed out of the assets of a partnership by one of the partners acting with its creditors for the purpose of securing them by conducting the business and gradually paying their claims, may be regarded as equitably the property of the firm, subject to the payment of such debts, and accordingly as subject to an equity of the other partner, who did not participate in forming the corporation or managing it; and on a partnership accounting the rights of the partners may be worked out by directing an assignment of such shares subject to the prior equities.—Lamb v. Lamb, 140 Mich. 85.

¶ 679. A decree for the settlement of partnership accounts was affirmed on the facts where it seemed substantially correct and exact justice was impossible for want of proper bookkeeping.—Wingarden v. Verhage, 68 Mich. 14.

¶ 680. Upon an appeal in a partnership accounting case, it appearing that the accounting made by the court below was full and fair as between the parties, and purely a question of fact, the decree was affirmed.—Eames v. Miller, 108 Mich. 406.

¶ 681. Where a relative of a person, who having been made trustee by his partner has proved unfaithful, has claimed to have been a partner and asked for an accounting, and it appears that he contributed no capital to the firm, and participated in most of the fraudulent devices by which the representatives of the deceased partner were sought to be defrauded, the latter are not to be embarrassed by the vexation, expense and delay in the determination of his rights, if any; but their claim is to be first paid, and the bill may be retained for such further proceedings as are necessary to adjudicate his claim, if he so desires, against the trustee's estate.—Perrin v. Lepper, 72 Mich. 454.

¶ 682. A surviving partner, who was also executor of the deceased partner, was guilty of gross fraud in the administration of his trust. He filed a false inventory in the probate court, converted the entire assets of the firm, and most of the individual estate of the decedent, to his own use, and covered up his fraud by false entries in books, and by suppression and destruction of books, papers and documents. He trafficked with the assets, and made large profits, though, on account of his manipulations of the books, the exact amount thereof could not be ascertained. When the heir filed a bill against him for an accounting, he answered with a statement, showing that nothing was due, and after the heir's death substantially repeated these statements in his answer to a bill brought by the heir's widow and sole devisee. He persistently evaded and resisted judicial investigation in the probate court, and elsewhere, and died fifteen years after his partner, without having accounted. His administrator, after resisting for years all attempts to get at the true state of the firm's books in the probate court, filed a bill offering to account with the representatives of the deceased partner, but attached no account of his intestate's administration. A demurrer to his bill on this ground having been sustained by the supreme court, he presented accounts which were found to be false and fraudulent, and insufficient to be made the basis of an accounting. Held, that no further accounting is necessary, and the representatives of the deceased partner are entitled to summary relief; the facts justify the entry of a decree for the amount of the deceased partner's interest in the firm at the time of his death, with ten per cent interest thereon to the time of the trustee's death, and seven per cent interest from that time to the date of the decree, and a heavy counsel fee.—Perrin v. Lepper, 72 Mich. 454.

§ 120. Receivership.

Receivership as to property in hands of surviving partner, see ante § 101.

Germaneness of supplemental bill to bill for partnership accounting brought by receiver of the firm, see Equity ¶¶ 931, 932.

General law as to receivers, see Receivers.

¶ 683. On a bill for an accounting by one partner against another, and for the appointment of a receiver for two corporations, the stock of which constituted the partnership assets, and for an injunction against the officers of the corporations to prevent their control or management or disposal of the corporate assets, held that although a receiver could not properly be appointed and the corporate affairs would not be in-

terfered with except to restrain the corporation and the officers from disposing of, incumbering, or sequestering the corporate assets, still, under the prayer for general relief a decree ordering the winding up of the affairs of the partnership and the placing of the stock of the two corporations in the hands of a receiver, was proper.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

¶ 683a. It is no objection to the appointing of a receiver to take charge of partnership effects that one of the partners has assigned his interest therein to a third person.—Kirby v. Ingersoll, 1 D. 477.

¶ 684. Where a member of a partnership filed a bill in equity against his copartners and certain creditors of the firm, and the defendant copartners, in their answer, asked the appointment of a receiver, and it appeared from the pleadings and affidavits that several mortgagees and unsecured creditors were interested, and that the partners themselves were unable to agree, a receiver was properly appointed.—Rolfe v. Burnham, 110 Mich. 660.

¶ 685. The appointment of a receiver pendente lite held proper, on a bill for an accounting, appointment of a receiver pendente lite and for an injunction restraining defendant from collecting money on outstanding land contracts on portions of certain real estate purchased, subdivided and improved, where it appeared that title was taken to the entire tract of land in defendant's name and defendant was claiming that he was the owner of the property and solely entitled to the profits arising from the purchase of the land and that a partnership and equal division of profits applied only to the construction of houses upon the land, and the trial court found in accordance with complainant's contention that complainant and defendant were joint owners of all the property, land and houses, and were tenants in common of the land.—Geer v. Finn, 196 Mich. 738.

§ 121. Contribution and recovery thereof.

Contribution and reimbursement between partners, see also ante § 61.

General law of contribution, see Indemnity and Contribution.

¶ 686. A bill filed against a retiring partner to obtain contribution toward joint debts, but not framed as a bill against all persons interested, nor for the purpose of winding up the business, can be maintained, if at all, only by showing the specific liabilities for which contribution is sought.—Glynn v. Phetteplace, 26 Mich. 383.

¶ 687. A suit for contribution lies as well in equity as at law, and the remedies are at least concurrent, but a suit at law will not lie to enforce contribution towards partnership debts not yet paid; and where a settlement is sought which will embrace all debts, paid and unpaid, a bill in equity is the appropriate remedy.—McGunn v. Hanlin, 29 Mich. 476.

¶ 688. Proof by a surviving partner that he had furnished more than his share of the capital, that the capital was all absorbed, leaving large debts and no assets, and that he had paid debts at the request of the deceased partner, would authorize a recovery against the latter's estate for contribution.—Wheeler v. Arnold, 30 Mich. 304.

¶ 689. Contribution between partners in respect to a partnership transaction cannot be defeated on the ground of illegality unless the partnership is itself an illegal one, or unless the act relied on as the basis of the claim is not only illegal but has been committed by the partner seeking contribution when he knew or should have known of its illegality.—Smith v. Ayrault, 71 Mich. 475.

¶ 690. Partners against whom, after the firm's dissolution, a judgment has been rendered for an unintentional infringement by the firm of a patent, and who have paid such judgment, can enforce contribution from another partner in proportion to his interest in the partnership business and profits.—Smith v. Ayrault, 71 Mich. 475.

¶ 691. In an action between partners for contribution on account of a judgment for the firm's infringing a patent, plaintiffs may prove the violation of the patent right by introducing the patents and assignments under which the injured person claimed, and by showing sales in the latter's territory; and they may also show that they were ignorant of intentional wrong in making the sales, and that they paid the judgment.—Smith v. Ayrault, 71 Mich. 475.

¶ 692. A cause of action in an administrator's favor against a surviving partner who, pending administration, collects a partnership debt, accrues when the money is collected.—Daniells v. Daniells, 92 Mich. 208.

¶ 693. Contribution can be enforced at law between parties who have dissolved partnership; and where there have been no such dealings with assets and no such private relations with the firm as to make a settlement difficult, there would be no occasion for an accounting in equity, in view of the statutes granting discovery at law through the examination of parties as witnesses.—Wheeler v. Arnold, 30 Mich. 304.

¶ 694. If partners agree to purchase 120 acres of land, 80 acres to be in the name of one and 40 acres in name of the other for convenience, the parties have an undivided interest in the 40 acres, and when the title holder is compelled to pay taxes, and to settle for a joint trespass on the

"40," he is entitled to contribution.—Edwards v. Zuck, 171 Mich. 29.

¶ 695. Where land had been sold for taxes and bid in by the state before being purchased by partners, and timber was cut by them before paying the taxes, for which trespass plaintiff paid the state, he can compel contribution from the defendant, his copartner, for the money so paid, even though they were joint wrongdoers, when it appears that he cut the timber in good faith, because the money so paid was for a partnership matter, and the proceeds of the trespass increased the partnership fund.—Edwards v. Zuck, 171 Mich. 29.

§ 122. Indemnity.

Implied contract that one partner will indemnify the other for payments made on his behalf, see Implied Contracts ¶ 117.

General law of indemnity, see Indemnity.

Provisions as to indemnity to partners, see Uniform Partnership Act § 18.

¶ 696. Where on the dissolution of a copartnership one partner purchases the interest of his copartners, agreeing to pay all the partnership liabilities, the partner thus retiring may still be held liable by the creditors. But if he is compelled to pay he is entitled to indemnity from the other partner, and is therefore as to such other partner a surety merely upon the partnership obligation.—Smith v. Shelden, 35 Mich. 42.

¶ 697. One member of a copartnership sold his interest to his copartner and a third party, who orally agreed "to see that all the debts of the old firm were paid, and that he, the retiring partner, should not be called upon for any of those debts." Held to be a mere contract of indemnity, upon which the party's remedy was at law.—Bonebright v. Pease, 3 Mich. 318.

§ 123. Voluntary settlements and accountings.

See also post § 124.

Evidence of fraud in procuring execution of settlement agreement, see Fraud § 50.

Evidence of fraud in settlement agreements, see Fraud § 54.

¶ 698. A settlement between partners which does not seem to have been unfair will not be disturbed at the instance of one who has not within a reasonable time repudiated its terms, nor taken any steps to rescind it.—McGunn v. Hanlin, 29 Mich. 476.

¶ 699. A settlement participated in and acted on by several firms dealing with the same individual cannot, after a reasonable time has lapsed without objection, be disturbed at the instance of one of the firms, of which only one member was present at the settlement, unless it is impeached for fraud or mistake; such a firm is estopped by much less negligence than would be pardonable where the rights of third parties are not involved.—Stewart v. Milliken, 30 Mich. 503.

¶ 700. On a bill for an accounting between partners a fair settlement deliberately made between the partners will not be disturbed on appeal, whether such settlement was a better or worse one than complainant was entitled to ask.—Harrison v. Dewey, 46 Mich. 173.

¶ 701. Where the representative of a surviving partner, who was also trustee under the deceased partner's will, files a bill offering to account for his intestate's administration of the firm assets, but the account he presents is so imperfect, confused and manifestly fraudulent as to be an insufficient basis for accounting, and unfit for judicial investigation, and it appears that the surviving partner trafficked with the firm assets, and made large profits therewith, but has destroyed or suppressed the evidence, so that the amount of such profits cannot be ascertained with any degree of certainty, the rules of equity will not require the share of the deceased partner to be ascertained from such fragmentary and imperfect evidence as remains, or as the trustee or his representative may furnish.—Perrin v. Lepper, 72 Mich. 454.

§ 124. Proceedings to set aside dissolution and settlement.

See also ante § 123.

¶ 702. One who has been defrauded must act promptly on discovery of the fraud; so held where complainant had delayed bringing suit to set aside a partnership settlement, made by a firm of lawyers, until defendant had prosecuted to a successful issue in the supreme court an action in which he recovered a very large fee for services whose value complainant alleges was fraudulently concealed by defendant in the settlement.—Gilchrist v. Kelley, 85 Mich. 413.

¶ 703. The dissolution of a partnership will not be declared fraudulent and void in a suit by the assignee for creditors of a new firm organized by the continuing partner and another, where neither the creditors of the retiring partner nor those of the original firm are represented in the suit.—Michigan Trust Co. v. Webber, 109 Mich. 87.

VIII. LIMITED AND SPECIAL PARTNERS.

§ 125. In general.

General, ostensible, dormant and secret partners, see ante § 20.

Partnership associations, see Joint Stock Companies.

Parties to suits by or against limited partnerships, when general partners may sue or be sued and when special partners should join or be joined, see Jud. Act, chap. XII, § 4; Comp. L. 1915, § 12355; also Comp. L. 1915, § 7943.

¶ 704. Under the statute (see How. St. § 2350) requiring a notice of special partnership to be published in two newspapers published in the senatorial district in which the business shall be carried on, held, that the territory of a city, village or township—one part of it as much as another—is the place of publication within the meaning of the statute.—Hinchman v. Barns, 21 Mich. 556.

¶ 705. At the expiration of the period covered by articles of special partnership, like articles were signed, reciting that the special partner had "contributed to the capital stock of the firm the sum of $10,000." The affidavit of one of the general partners recited that the special partner had actually, in good faith, contributed such sum in cash to the capital stock. At the expiration of the period covered by the new articles, the firm went out of business, and a sale of the partnership property under a mortgage failed to bring enough to pay unsecured creditors. In an action by a creditor for goods sold to the firm, it was contended that the certificate and affidavit were false in that they stated the contribution of the special partner to be in cash, whereas it consisted of his interest in the partnership which had expired, and that, in consequence of the alleged false statement, the special partner was liable under How. St. § 2349, for all the engagements of the general partners. Held, that the execution of the new articles was in effect a renewal of the former partnership in accordance with How. St. § 2352, and that the statement in the renewal affidavit should be referred to the time of the formation of the partnership.—Hogan v. Hadzsits, 113 Mich. 568.

¶ 706. Under Comp. L. 1871, § 1575, providing that no limited partnerships shall be deemed to have been formed unless the prescribed certificate, acknowledgment and affidavit shall have been filed as directed, a limited partnership is not formed where the certificate is not acknowledged, since the acknowledgment thus could not be filed.—Fox v. Graham, How. N. P. 90.

¶ 707. Under Comp. L. 1871, § 1579, providing that every alteration in the names of the partners of a limited partnership, if the partnership is carried on afterwards, shall constitute it a general partnership, unless the limited partnership is renewed in the manner provided by the statute, if three persons form a limited partnership and one partner buys out the interest of one of the others, and the remaining partners do not make the renewal, but continue in business, a general partnership is created.—Fox v. Graham, How. N. P. 90.

¶ 708. Where the attempt to prove a limited partnership was ineffectual because of failure to comply with the statute, and, after the withdrawal of one of the partners, the business was continued by the other two, it was a question for the jury, in an action by a member of the firm as indorser against the payee of a note signed by the reputed firm as originally constituted, what the true relations of the members of the alleged partnership, as finally constituted, were.—Fox v. Graham, How. N. P. 90.

§ 126. Liabilities of the partners.

Rights and liabilities of partners in general, see ante § 28 et seq.

¶ 709. To render a special partner liable for firm debts on account of his withdrawal of interest or profits, one of the conditions prescribed by How. St. § 2355, to wit, the reduction of the capital stock below the sum stated in the certificate, or the insufficiency of the assets to pay the partnership debts, must exist.—Hogan v. Hadzsits, 113 Mich. 568.

¶ 710. Whether a special partner becomes liable as a general partner by a change in the nature of the business without his knowledge, quære.—Hinchman v. Barns, 21 Mich. 556.

§ 127. Foreign limited partnerships.

¶ 711. The payment of debts to person within this state is not a transaction of business by a foreign unauthorized limited partnership in violation of the statute.—Tidey v. Kent Circuit Judge, 179 Mich. 580.

PARTRIDGES to PARTY EMBLEMS.

Cross-References.

Partridges—
Game laws and regulations, see Fish and Game.
Party Emblems—
On official ballot, see Elections §§ 34, 35.

PARTY WALLS.

TREATS of building walls upon or at the dividing line between two parcels and of the rights of parties therein. It excludes lines of ownership (see Boundaries) and rights of adjoiners (see Adjoining Owners).

Analysis.

§ 1. In general; relative rights.
§ 2. Contribution to cost and expenses.

§ 3. Injuries to or by wall.
§ 4. Extinction or loss of rights.

§ 1. In general; relative rights.

General rights of adjoining owners, see Adjoining Owners.

Nature of rights in common stairways, see Easements § 3.

Location of party wall as evidence of boundary, see Boundaries ¶ 199.

¶ 1. The builder of a party wall, under an agreement entitling him to peaceable possession thereof until his co-owner should build, and providing that each owner should have the right to use such wall according to the custom of partition walls, could not enjoin his co-owner from using the outside of such wall facing his premises for proper advertising purposes, on the ground that he had the absolute possession and control of such wall until the other party should build.—Lappan v. Glunz, 140 Mich. 609.

¶ 2. Where one of two tenants in common was not a party to a party wall agreement with the owner of the adjacent lot, while such tenant and her heirs, by using the wall as a party wall may be found to so consider it, her interest in the land being subject to such restrictions as are imposed by the fact that a party wall exists, the mere existence of such wall would not prevent her from extending her building on her own land to the lot line, notwithstanding restrictions in the contract.—Powers v. Halladay, 179 Mich. 314.

¶ 3. Where a wall has supported two buildings, and both buildings have been standing for nearly forty years, and there is no evidence of change in the use of the wall, it must be presumed that its use as a party wall has been continued during such period.—Weadock v. Champe, 193 Mich. 553.

¶ 4. A contract by adjacent lot owners relative to the construction of a party wall and the rights of the parties thereto, which provides for an extension of the wall in case either party wishes to rebuild, but is silent on the question as to the front line of the building, cannot be held to prohibit one party from building nearer to the front lot line than the other.—Powers v. Halladay, 179 Mich. 314.

§ 2. Contribution to cost and expenses.

¶ 5. A. having contracted to build a house for B. on B.'s land, C., the owner of an adjoining lot, agreed with the parties that if they would furnish the materials and build a party wall he would pay $205 therefor. A. furnished the materials, did the work, and received the $205. Held, that B. was not entitled to have such sum credited on the contract price of his house.—Phelps v. Beebe, 71 Mich. 554.

¶ 6. Under an agreement for a party wall whereby one party builds the wall at his own expense with the agreement that the other party or his successors may use the wall at any time by paying the first party, "his heirs, executors, administrators or assigns," one half the cost, the grantees of the first party are entitled to the payment for the one half cost provided in the agreement as against one who claims as assignee of the agreement.—Adams v. Noble, 120 Mich. 545.

§ 3. Injuries to or by wall.

¶ 7. A., having put up a brick building, sold to the adjoining owner, B., a half interest in a side wall to be used as a party wall in a building which B. was putting up. C. was also building next beyond B., and the new buildings went up together as one. Their foundation was laid before the sale of the wall was made. After the new buildings were finished A. sued C. for injuries resulting to A.'s building from alleged defects in the construction of C.'s. The trial judge charged that there could be no recovery if the defect was in this general foundation, nor unless it was in the foundation of a vault that was in C.'s building. The defense claimed that A.'s building was in the same condition before C.'s was erected as afterward. Verdict was for defendant. Held, (1) that the instruction was too broad, as A. and C. had no contract relations which would preclude A. from suing; and (2) that, as there was some evidence, though slight, that the injury was in part due to a defect in the foundation proper of C.'s building, the instruction could not be said to be harmless on the ground that the verdict covered all defects.—Feige v. First Nat. Bank of East Saginaw, 58 Mich. 164.

¶ 8. Where a division wall between two buildings has for a period longer than that of the statute of limitations been used for the support of both buildings, it becomes in effect a party wall, whether it was originally constructed as such or not, and without any express agreement between the owners of the buildings, and one who purchases one of such buildings takes title subject of such party wall rights.—Weadock v. Champe, 193 Mich. 553.

§ 4. Extinction or loss of rights.

¶ 9. Where two buildings were erected by different owners and had a common party wall, the vesting of title to both buildings in another person does not extinguish the easement, and the sale of one of such buildings passes the title subject to such easement.—Weadock v. Champe, 193 Mich. 553.

PASSAGEWAYS to PATENT AMBIGUITIES.

Cross-References.

Passageways—
- In buildings, duty of care and negligence, see Buildings § 4; Master and Servant, III, B.
- Easements of passage, see Easements; Highways, XV (private ways).
- Rights and liabilities of landlords and tenants, see Landlord and Tenant, IV.

Passenger Elevators—
- See Buildings § 5; Master and Servant, III, B.

Passengers—
- Carriage of, see Carriers, IV.

Passes—
- See Carriers, I, IV, A.

Passing of Title—
- See Sales, IV; Vendors and Purchasers, VIII; Executions, VII, C; Foreclosure, IV.
- Effect of recovery in conversion, see Conversion, § 44.

Passion or Prejudice—
- Entering into verdict as grounds for new trial, see New Trial, II.
- In locality as ground for change of venue, see Venue, II.
- Arguments to jury appealing to passion or prejudices, see Argument of Counsel § 18 et seq.; Indictment § 375 et seq.

Passive Trusts—
- See Trusts.

Past Consideration—
- See Contracts, V, B.

Pastors—
- See Religious Societies, II.
- Privilege against disclosure as witness of confidential communications, see Witnesses, V, C.
- Actionable defamation of ministers and priests, see Libel, II.

Pasturage—
- Rights in highways, see Highways §§ 159, 163.
- Agistment contracts and liens, see Animals § 24.
- Use of land as evidence of possession or title, see Adverse Possession § 22.

Patent Ambiguities—
- Rules of construction, see Contracts, VI, A; Deeds, III, A; Wills, VI; Statutes, V.
- Inadmissibility of explanatory evidence, see Evidence § 165.

PATENTS AND INVENTIONS.

TREATS of property and contract rights in inventions and under patents giving the exclusive right to make and vend them, also of rights in secret processes and formulæ for production of commodities.

Analysis.

§ 1. In general; state and federal concerns.
§ 2. Effect and validity; estoppel to question.
§ 3. Assignments and transfers.
§ 4. Licenses and agreements for use.
§ 5. Royalty or compensation for use.
§ 6. Sales of patented articles; rights of parties.
§ 7. Secret processes and formulæ.

Patents for title to lands, see Public Lands.

§ 1. In general; state and federal concerns.

Effect and validity of patent and estoppel to question, see post § 2.

Assignments and agreements for licenses and royalties, see post §§ 3-5.

Validity of law requiring notes for patent rights to state what they are for, see post ¶ 18.

Relative state and federal jurisdiction in patent cases, see Courts § 100.

Involvement of patent in litigation as making federal question, see Removal of Causes, ¶ 7.

State laws in derogation of patent rights, see also Constitutional Law § 126.

¶ 1. The patent laws confer exclusive rights, but do not determine personal capacity to contract, or prescribe the requisites for sales of patented articles, or impose the customary restrictions which are supposed to be important to the protection of public morals. These matters are left to state law. —City of Coldwater v. Russell, 49 Mich. 617.

¶ 2. A municipal ordinance requiring peddlers to obtain a license is no interference with rights conferred by letters patent

under United States laws, even though the peddler be the manufacturer and patentee of the article he sells.—City of Coldwater v. Russell, 49 Mich. 617.

¶ 3. Patent rights may be held in partnership, and are governed by the general law of partnerships and the agreement of the parties.—Freeman v. Lowell Specialty Co., 174 Mich. 59.

§ 2. Effect and validity; estoppel to question.

See also post ¶ 35.

Invalidity of patent as affecting contemptuous disobedience of injunction in patent case, see Contempt § 10.

¶ 4. It is essential to the validity of a patent that it be granted on the application, supported by the oath of the original and first inventor.—Paul v. Collins, 191 Mich. 113.

¶ 5. A patent is prima facie evidence that the grantee was the inventor of the patented device, with the exclusive right to make, sell and use it.—Paul v. Collins, 191 Mich. 113.

¶ 6. Reissue of a patent is to cure defects, and cannot destroy vested rights; and under a reissue to persons other than the original patentees, purchasers who have notice of previous equities are bound by them. (U. S. Rev. St. §§ 4898, 4899.)—Harrison v. Ingersoll, 56 Mich. 36.

¶ 7. The decision of the patent office commissioner as to priority of invention, when not appealed from, is controlling in any subsequent suit between the same parties unless the contrary is established by testimony which carries thorough conviction.—Paul v. Collins, 191 Mich. 113.

¶ 8. Where all rights under a patent were disposed of by attorneys in fact in fraud of one of the original joint owners, and he sued in assumpsit for his share of the payment made for a particular territorial right, it was no error to allow him to state that he was the inventor, as his patent could not have issued without such showing and nothing immaterial or prejudicially appealing to sympathy was aroused.—Harrison v. Ingersoll, 56 Mich. 36.

¶ 9. One who has contracted for the right to manufacture under a certain patent is in no position, when sued on the contract, to set up rights under a subsequent patent as a justification for nonperformance, or to question the validity of the first patent, especially if fraud in the contract or infringement of patent is not alleged.—Forncrook Mfg. Co. v. E. T. Barnum Wire & Iron Works, 54 Mich. 552.

¶ 10. Where a contract for the exclusive right to sell a patented article on payment of a royalty is made by a person who owns a conflicting patent, and the agreement is made for the express purpose of avoiding any conflict and for dividing the royalty, he cannot, in an action against him on the contract, question the validity of the plaintiffs' patent.—Hall Mfg. Co. of Grand Rapids v. American Ry. Supply Co., 48 Mich. 331.

¶ 11. Where a machine is leased under a contract containing a recital as to the number of patents owned by the lessor and such recital is followed by a clause providing that the lease shall continue in force until the expiration of all the letters patent then or afterwards owned by the lessor, the latter, in an action to recover royalties for a period extending beyond the expiration of the designated patents, on the ground that the lease is still in force, is estopped by such recital from introducing as evidence of the duration of the lease patents then owned by it but not disclosed in such recital.—Thomson Elec. Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496.

§ 3. Assignments and transfers.

Licensing agreements, see post § 4.

General law of assignments, see Assignments.

Salability under judicial "process," see also Corporations ¶ 983.

Issuance of corporate stock for patent rights and inventions, see Corporations § 268.

Specific enforceability of agreements for interests in patents and inventions, see Specific Performance, II.

Measure of damages for fraud in sale of patent rights, see Damages § 123.

¶ 12. U. S. Rev. Stat. § 4898, requiring assignments of patents to be recorded, is only for the purpose of protecting innocent purchasers.—Harrison v. Ingersoll, 56 Mich. 36.

¶ 13. A. agreed to sell to B. an interest in two inventions, for the former of which only a patent had been obtained. A deed was duly executed by A. conveying his interest in this patent. Subsequently A. obtained a patent for the second invention. Held, that the deed could not be construed so as to include A.'s interest in the second invention. —Warren v. Cole, 15 Mich. 265.

¶ 14. Where a defendant contracts to sell a half interest in a patent to plaintiff, a mere suspicion on his part that plaintiff intends to steal his invention and his ideas, does not justify him in breaking the contract.—Barthel v. Crippen, 162 Mich. 150.

¶ 15. An agreement to assign all future patents is enforceable if the subject-matter of the inventions is described and made definite.—Zagelmeyer v. Laughray Concrete Brick Co., 169 Mich. 589.

¶ 16. In a suit to enforce an interest in a patent device, transferred to a purchaser with notice of complainant's equities, com-

plainant is not entitled to a conditional money decree against the purchaser.—Caulkins v. Lavigne, 156 Mich. 89.

¶ 17. Complainants and defendant entered into an agreement whereby the former were to advance money for placing an invention on the market, and the latter was to do the work. Subsequently complainants became dissatisfied and agreed that defendant should sell the machine and patents in such way that complainants could get back their money which they had advanced. Defendant sold the machine to a company, joined as a codefendant, which had notice of complainants' equities, defendant receiving stock in the company in payment. Held, that complainants were entitled to a lien upon the machine and an interest in the patents transferred to the defendant company, and also to a lien upon the stock representing the purchase price.—Caulkins v. Lavigne, 156 Mich. 89.

¶ 18. A state statute requiring notes given for patent rights to show that fact, and making it a misdemeanor to take or transfer such notes otherwise, is invalid.—Cranson v. Smith, 37 Mich. 309.

§ 4. Licenses and agreements for use.

Estoppel of licensee to set up later patent to justify breach of agreement, see ante ¶ 9.
Power to license dealers in patented articles, see ante ¶¶ 1, 2.
Assignments in whole or in part, see ante § 3.
Construction of royalty provisions, see post § 5.
Implication of covenant to defend patent, see also post ¶ 36.
General law of contracts, see Contracts.
Construction of leasing contract as to duration, see Contracts ¶ 812.
Accounting for profits of "Keeley cure," see also Accounting Suits ¶ 32.

¶ 19. A license to use an improvement covered by a patent need not be in writing.—Nichols, Shepard & Co. v. Marsh, 61 Mich. 509. Writ of error dismissed in 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

¶ 20. A contract to allow one to use a patented improvement is broken by suing out and serving an injunction to restrain him from doing so.—Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

¶ 21. Licenses to manufacture and sell given back by the purchaser of a patent to the sellers for a consideration are individual and independent and not undivided, though the interests of the sellers in the patent were common and undivided.—Gordon v. O'Neill, 174 Mich. 575.

¶ 22. A contract whereby the owners of the right to use a patent pavement are to receive from a city a certain royalty for the use of the pavement will not prevent their contracting to lay the pavement; nor would the paving contract affect or modify the royalty contract unless it contained apt words for that purpose.—City of Detroit v. Robinson, 42 Mich. 198.

¶ 23. By written contract defendants were licensed to make and sell a patented article, the license to be terminable on notice by the licensor upon the licensees' failure to pay the agreed royalty; royalty due at the time of service of notice not to be discharged. Held, that the licensees also could terminate the license by written notice, and were not liable—under the contract—for subsequent use of the invention.—Garver v. Bement, 69 Mich. 149.

¶ 24. Under a contract granting the right to manufacture and sell patented devices, under which the patentee agreed to defend his own letters patent against attack by others, the duty was not imposed upon the patentee to protect the manufacturer from the unlawful manufacture and sale of like devices by other manufacturers.—Kline v. M. Garland Co., 135 Mich. 313.

¶ 25. One who, in consideration of the transfer to him of an exclusive right in a patent improved cheese-safe, agrees to use all reasonable diligence in the manufacture and sale, and to pay a royalty on each of such safes sold, is not bound to use extra efforts to dispose of such safes, or to withhold other safes from competition.—Forncrook Mfg. Co. v. E. T. Barnum Wire & Iron Works, 63 Mich. 195.

¶ 26. An assignment of an invention and an application for a patent to a company, in which the inventor was a stockholder, is not a breach of his contract granting an exclusive license under his patent.—Agnew v. Kelsey Wheel Co., 185 Mich. 340.

¶ 27. Whether the defendant waived his right to terminate a contract for the payment of royalties for articles to be manufactured on a machine, because of its failure to work properly, held a question for the jury.—Agnew v. Kelsey Wheel Co., 185 Mich. 340.

¶ 28. Where an exclusive license was granted under a pending application for a domestic patent as well as under future patents issued in the United States or Canada, the fact that the domestic application was rejected does not constitute a breach of the contract where the Canadian patent was granted, and another domestic application was pending, and the defendant did not elect to terminate the contract in the manner provided for.—Agnew v. Kelsey Wheel Co., 185 Mich. 340.

§ 5. Royalty or compensation for use.

Liability after termination of agreement, see also ante ¶ 23.

Duty to push sales to earn royalties, see ante ¶ 25.
Agreements and assignments out of which right to royalty grows, see ante §§ 3, 4.
What amounts to a "sale" within agreement for royalty on each sale, see post ¶ 41.
Estoppel by royalty agreement to question validity of patent, see also ante § 2.
Want of patentable right as failure of consideration for royalty agreement, see Contracts § 134.
Partial or total failure of consideration for royalty agreement, see Contracts § 136.
Admissibility of parol agreement to change royalty agreement, see Evidence § 204.
Contract to lay patented pavement as modification of royalty agreement for use of the patent, see also Contracts ¶ 1060.
Modification of royalty terms as discharge of original contract, see also Contracts ¶ 1096.
Acceptance of check for royalties due from another as agreement to conditions imposed, see Contracts § 23, ¶ 111.
Evidence as to termination of royalty contract, see also Contracts ¶ 1396.

¶ 29. Where one agrees to pay a royalty on each sale by him of a patented article, such royalties "to cease if the patent is declared void," he must pay the royalties, whether or not the patent is valid for what it distinctly claims, until it is declared invalid in the federal courts.—Forncrook Mfg. Co. v. E. T. Barnum Wire & Iron Works, 63 Mich. 195.

¶ 30. One who agrees to pay royalties on sales of cheese-safes containing a patented wire-cloth curtain which accommodates itself by means of certain devices to the change of direction from "vertical to horizontal position" is not subject to such royalty for selling safes using for a like function "curtains of slats fastened to a cloth backing."—Forncrook Mfg. Co. v. E. T. Barnum Wire & Iron Works, 63 Mich. 195.

¶ 31. One who, in consideration of the exclusive right of sale of a device, contracts to pay the inventor a royalty of $1 each "on not less than 1,000" of such articles for each year, is bound to pay royalties of at least $1,000 a year, regardless of the number of articles sold.—Hamilton v. Park & McKay Co., 112 Mich. 138.

¶ 32. The termination of a contract pursuant to its terms for failure to pay royalties stipulated therein does not, in the absence of agreement, destroy the right to recover royalties already earned.—Hamilton v. Park & McKay Co., 112 Mich. 138.

¶ 33. A patentee, who dealt in the patented heaters, made a license agreement with another manufacturer calling for specific royalties. Thereafter they made a new contract reducing the amount of royalties on certain sizes numbered 1 to 11, and fixing prices at a certain rate of discount from catalogue list prices on which list prices the patentee was to have a special discount on such as he purchased from the licensee, as well as five per cent on sales made to others. This was based on a certain catalogue and the numbers and prices therein appearing. Afterwards the licensee made a new catalogue advancing the list prices for each number to that of the next higher priced number as shown in the former list. The effect was that what he purchased cost more under the new catalogue than the old. Held, that the reduced royalty, not being dependent on the numbers, was not affected by changing the numbers, in the new catalogue; and hence the new contract did not restrict the right to change prices, allowing the former discounts on them as increased.—Mouat v. Bamlet, 123 Mich. 345.

¶ 34. Under a contract providing that the patentee of a process for the manufacture of furniture should assign to a manufacturing company his title to the patents in consideration of the company's agreement to manufacture and market the furniture thereunder, and providing, further, that an annual inventory should be taken of all the property and liabilities of the business, and that "of the profits and losses over and above all expenses which may have accrued during the year" the patentee should be credited or charged with 25 per cent., a pro rata share of the general expenses of the company, it being a manufacturer of other lines of goods, for rent, superintendence, office expenses, use of machinery, insurance, etc., cannot be charged to the furniture business, the same not having been caused by or incurred on account thereof.—Van Norman v. Grand Rapids Piano Case Co., 110 Mich. 424.

¶ 35. Under a contract granting the right to sell devices patented under two patents of different dates, which were not issued upon a single piece but upon all in combination to accomplish certain results, the manufacturer could not, upon the expiration of the first patent, continue to manufacture the devices covered by the second patent, and refuse to pay the royalties.—Kline v. M. Garland Co., 135 Mich. 313.

¶ 36. The fact that a patentee complied with the requests of the manufacturer to whom he had by contract sold the exclusive right to manufacture and sell his patented devices, to write to infringing parties calling for explanations and notifying them not to infringe upon the patents which were owned by such manufacturer, did not read into the contract of sale a covenant to protect the manufacturer against such infringements.—Kline v. Garland Co., 135 Mich. 313.

¶ 37. Complainant, the inventor of a kiln, having applied for a patent on same, made

a contract with defendant by which the patent was to be issued to them jointly, and defendant was to have the right to license others to construct kilns for their own use and the right to itself build and sell the kilns. Defendant was given the right to determine the price of the license fee and agreed to promote the business in an endeavor to make it successful and profitable. It agreed to turn over immediately one-half of the "net proceeds" to complainant. Held, complainant was entitled under the contract only to receive one-half of the net profits after the expenses of manufacture, license or sale had been deducted therefrom, and was not entitled to one-half the gross sum received for each kiln sold or licensed.—Williams v. Walsh Mfg. Co., 169 Mich. 676. (Ostrander, J., dissenting.)

¶ 38. A contract by which the inventor of a certain device binds himself not to make, manufacture, or sell, or to transfer the right to any other person than the other party to the contract, and which definitely fixes the time when payment of royalty thereon shall begin at one year from the date when the device is modeled and ready to be put on the market, and which authorizes such other party in case a patent is not granted or in case it is decided not to be valid, to declare the contract ended, requires the payment of the royalty from the time specified, although the patent has not been granted at that time.—Hamilton v. Park & McKay Co., 112 Mich. 138.

¶ 39. It was sufficiently favorable to the licensee, sued for royalties and claiming that the patent was invalid and that on a given date the patentee was notified that the patent and the contract of license would no longer be recognized, to submit to the jury the question whether thereafter there was any liability for royalties with a charge that if they found such notification was given royalties thereafter could not be recovered. —Brazel v. Thompson Smith's Sons, 141 Mich. 628.

§ 6. Sales of patented articles; rights of parties.

Rights of sale under the patent laws, see also ante ¶ 1.

Power to require licenses from dealers, see also ante ¶¶ 1, 2.

Royalties based on number of sales, see ante § 5.

General law of sales, see Sales.

¶ 40. A machine may be sold independently of the patent-right; and if sold or taken on execution a purchaser does not acquire a right to use it under the patent. —Rodgers v. Torrant, 43 Mich. 113.

¶ 41. The assignee of a patent-right agreed to pay the patentee a certain sum "for each and every one of said machines sold or caused to be sold by him." Held, that this covered any transfer by him of the mere right to use the machine, and any "settlements" made with persons who were using machines of the kind.—Rodgers v. Torrant, 43 Mich. 113.

§ 7. Secret processes and formulæ.

Secret process as property, see Property, ¶ 3.

Validity of agreement to protect secret processes, see Contracts § 85.

Injuctions against breach of agreements, see Injunctions, II, A.

PAUPERS to PAWNBROKERS.

Cross-References.

Paupers—
See Poor Persons.

Paving—
Providing for and making local improvements and assessing cost, see Local Improvements.
Actionable neglect and liability of municipalities, see Highways, XII.
Duty of street railway corporations as to paving between or alongside of tracks, see Street Railways, III.

Pawnbrokers—
Regulation under the police power, see Constitutional Law § 107.
General law of pledges, see Pledges.

PAYMENT, TENDER AND DEPOSIT.

TREATS of the delivery or offer of money or its equivalent for the purpose of discharging or being applied to an obligation, including the payment or deposit of money into court for that purpose, the application of payments among several obligations, and the recall or recovery of payments or the payment out of court of sums deposited therein. It excludes the necessity, time, and character of payment under terms of instruments and statutes (see Contracts, VI, E, VII; Sales, VII; Vendors and Purchasers, IV; Wills, VI; Estates of Decedents; Corporations, VII; Costs, VI; and other like topics which will suggest themselves). Contract instruments calling specifically for payment of money are treated in Negotiable Instruments; Non-negotiable Paper; Mortgages; Chattel Mortgages; Bonds; Municipal Bonds. Implied promises to pay are treated in Implied Contracts.

Analysis.

I. In general; medium, mode and sufficiency.

A. PAYMENT.

§ 1. In general; definitions and nature.
§ 2. Persons entitled to receive or make.
§ 3. Mode or medium of payment.
§ 4. Check, draft or order on third person.
§ 5. ——Debtor's acceptance.
§ 6. Promissory notes as payment.
§ 7. ——Notes given as renewals or substitutions.
§ 8. ——Conditional acceptance or acceptance in part.
§ 9. Third party's note.
§ 10. ——Note of one or several partners for firm debt.
§ 11. Bonds, stocks, securities and certificates of deposit.
§ 12. Payment by credits or application of debt.
§ 13. Assignment of claim or account against third person.
§ 14. Payment by assumption or novation of obligation.
§ 15. Payment by merchandise or chattels.
§ 16. Effect of agreement specifying mode or medium of payment.

B. TENDER OR DEPOSITS IN COURT.

§ 17. General nature and requisites of tender.
§ 18. ——Imposition of conditions.
§ 19. Medium of tender and what is "legal tender."
§ 20. Parties to tender.
§ 21. Mode of tender; producing and showing money.
§ 22. ——Time, place, and opportunity for computation.
§ 23. Keeping tender good.
§ 24. Objections to tender and grounds for refusal.
§ 25. ——Waiver of objections.
§ 26. Deposits in court.
§ 27. ——Payment into justice's court.

II. Effect of payment, tender or deposit.

§ 28. Operation and effect in general.
§ 29. Payment as loan or discharge.
§ 30. Effect of tender.
§ 31. ——To release or discharge lien or secondary obligation.
§ 32. Loss of rights under tender by failure to keep good.
§ 33. Payment or deposit in court.

III. Application of payments.

§ 34. In general.
§ 35. By creditor.
§ 36. By debtor.
§ 37. Express directions or specific applications.
§ 38. Application in order of creation or maturity of debt.
§ 39. Principal or interest.
§ 40. Secured or unsecured debt.
§ 41. Several or joint debt.
§ 42. Individual or firm obligation.

§ 43. Notice of application to debtor.
§ 44. Changing or revoking application.

IV. Paying over or repaying deposits.

§ 45. In general.

V. Pleading and proof of payment, tender or deposits.

§ 46. In general.
§ 47. Issues and proof under plea of general issue.
§ 48. Burden of proof as to payment or tender.
§ 49. Presumptions in general.
§ 50. ——From lapse of time.
§ 51. Presumption from payment as to loan or discharge.
§ 52. Admissibility of evidence.
§ 53. Weight and sufficiency of evidence.
§ 54. Questions of law and fact.
§ 55. Instructions and directing verdict.

VI. Recovery of illegal or mistaken payments.

§ 56. In general; voluntary payment.
§ 57. Payment under protest.
§ 58. Payment under mistake of fact.
§ 59. Payment induced by fraud or misrepresentation.
§ 60. Payment due to mistake of law.
§ 61. Payment under exigency or to avoid threatened loss or penalty.
§ 62. Usury voluntarily paid.
§ 63. Payments under illegal, immoral, or criminal contracts.
§ 64. Payment under void contracts or in violation of statute of frauds.
§ 65. Excessive payment entitling payer to recovery.
§ 66. Payment by municipalities or public officers.
§ 67. Actions and evidence for recovery.

I. IN GENERAL: MEDIUM, MODE AND SUFFICIENCY.

A. PAYMENT.

§ 1. In general; definitions and nature.

Persons entitled to receive or make, see post § 2.
Mode or medium of payment, see post § 3.
Check, draft or order on third person, see post §§ 4, 5.
Promissory notes as payment, see post §§ 6-8.
Third party's note, see post §§ 9, 10.
Bonds, stocks, securities and certificates of deposit, see post § 11.
Payment by credits or application of debt, see post § 12.
Assignment of claim or account against third person, see post § 13.
Payment by assumptions or novation of obligation, see post § 14.
Payment by merchandise or chattels, see post § 15.
Effect of agreement specifying mode or medium of payment, see post § 16.
Determination whether payment results in loan or discharge of debt, see post § 29.
Tender and deposit in court, see post I, B.
Effect of payment in general, see post II.
Pleading and proof of payment, see post V.
Set-off as distinguished from payment, see Set-off.
Payment of taxes in general, see Taxes, VIII.
Necessity of tender or payment to fix contract rights against payee, see Contracts, VII, B; Insurance, VI; Sales, VII; Vendors and Purchasers, IV.
Payment of mortgages generally, see Mortgages, VIII.
Payment of shares of estate, see Estates of Decedents, XIII.
Payment of alimony, mode and time, see Divorce § 179.
Payments amounting to gifts, see Gifts § 1.
Payment as condition precedent to suit by vendee, see Vendor and Purchaser, VI.

Sufficiency of payment to fulfill sales contract, see Sales, VII.
Payment and discharge of mechanics' lien, see Mechanics' Liens § 36.
Payment of costs and means of enforcing payment, see Costs, VI.
Payment of claims in estate, see Estates of Decedents, VI, D.
Necessity that vendees' agreement to pay purchase money be in writing, see Frauds, Statute of § 63.
Payments in satisfaction of mechanics' liens, see Mechanics' Liens § 36.
Voluntary payments amounting to preferences under Bankruptcy Act, see Bankruptcy § 8.
Payment and satisfaction of chattel mortgage, see Chattel Mortgages, VI.
Payment or tender of jury fees, see Jury § 12.
Payment and distribution of insurance to claimants, see Insurance, XVII.
Payment of condemnation award in general, see Eminent Domain, VI.
Payment of less than due as part payment when not good as an accord and satisfaction, see Accord and Satisfaction § 8.
Partial payments or tenders in compromise, see Accord and Satisfaction.
Time for payment to constitute one bona fide purchaser, see Notice and Record of Title § 31.
Sufficiency of payment to constitute one a bona fide purchaser, see Notice and Record of Title §§ 33, 34.
Propriety of payment of joint bank deposit after death of one owner, see Banking § 6.
Necessity of payment to be bona fide purchaser, see Notice and Record of Title § 30.
Measure of damages for breach of agreement to pay in property, see Damages § 83.
Measure of damages for failure to pay in gold, see Damages § 52.
Construction of terms of contract relating to payments, see Contracts, VI, E.
Payment or tender of dues and assessments in benefit society, see Fraternal Associations § 26.
Property, services or rights as paid in capital for stock of corporation, see Corporations §§ 266-268, 322.
Making payments under contract as waiver of defaults, see Contracts § 237.
Validity of payments made on Sunday, see Sunday, § 4 et seq.
Options to pay in goods or money, see Contracts § 172.
Implication that sum is payable on demand when no time is fixed, see Contracts ¶ 830.
Judgment in action for breach of warranty as res adjudicata of question of payment of price, see Former Adjudication ¶ 426.
Right to pay amount found due and avoid restitution in summary proceedings, see Forcible Entry § 64.
Payment of justices' fees for making return on appeal, see Justices of the Peace § 205.
Payment of justices' judgments, see Justices of the Peace § 157.
Payment by garnishee in justices' cases, see Justices of the Peace § 74.
Enjoining payments by city contrary to public policy, see Injunctions § 55.
Money paid conditionally or as earnest of bargain as garnishable for debt, see Garnishment § 27.
Contracts of guaranty of payment, see Guaranty.
Extending time to principal as discharging guarantor, see Guaranty § 19.

¶ 1. Payment, in its more restricted sense, is the discharge in money of a sum due—the performance of a pecuniary obligation.—Blair v. Carpenter, 75 Mich. 167.

¶ 2. Payment implies a voluntary act of the debtor looking to the satisfaction, in whole or in part, of the demand against him.—Detroit, H. & S. W. R. Co. v. Smith, 50 Mich. 112.

¶ 3. A man who was in debt handed money to his wife telling her to put it in the bank and saying that it would go towards paying the creditor. The wife deposited it, but afterwards withdrew and used it. Held, that the money had not been specifically appropriated to the payment of the debt in any such way as not to remain subject to the debtor's control; and that after his death the creditor could not recover the amount in an action against the wife.—Ryan v. O'Neil, 49 Mich. 281.

§ 2. Persons entitled to receive or make.

Parties to tender, see post § 20.
Authority of agents to receive payments, see Agency, II.
Proper person to pay mortgage, see Mortgages § 133.
Persons to whom payment may be made of mortgage debt, see Mortgages §§ 131, 132.
Payment of money to third person as raising presumption that payer was receiver's agent, see Agency ¶ 39.
Validity of payment to original creditor in absence of notice of assignment, see Assignments § 3.
Payment under contract by third person, see also Contracts § 1064.
Payment as condition precedent to rescission, see Rescission, III.
Authority of pledgee of chose or debt to receive payment, see Pledges, § 13.

¶ 4. Where the nominal payee to whom a subscription is payable is bound absolutely to pay it over to a third person, a payment by the subscriber directly to such third per-

son is valid and will discharge him from further liability.—Erwin v. Lapham, 27 Mich. 311.

¶ 5. One may appoint a special payee of funds in his own interest by indorsement for collection and credit.—Pinkham v. Cockell, 77 Mich. 265.

¶ 6. The maker of a note left money with his bankers, directing them to pay it, and therein making them his agents for that purpose; they gave him credit for it on their books, and sent for and received from the holder the note, indorsed to their order for collection; they did not remit the money, and they let the note remain uncancelled among their collection paper and meanwhile failed. Held, that the note was not paid. It had been sent to the bankers for a specific purpose, and no title to it ever passed to them on their own account. They did nothing as agents of the holder.—Sutherland v. First Nat. Bank of Ypsilanti, 31 Mich. 230.

¶ 7. A deposit of money in a bank to one's own credit, with instructions to the bank officers to apply it on a certain note made payable there, does not place the money subject to the control of the holder of the note, and therefore does not operate as a payment. The bank is not the payee's agent to receive the money unless its officers accept the agency. Per contra, their refusal to make payment on demand of the holder is the refusal of the maker of the note.—Pease v. Warren, 29 Mich. 9.

¶ 8. The delivery by a vendee to the vendor's attorney, in the vendor's presence, of a certificate of deposit indorsed in blank, as part payment on a land contract, is the same as delivery to the vendor.—Duquette v. Richar, 102 Mich. 483.

¶ 9. On a deed of land accomplished by fraud upon consideration of the cancellation of debts owing to the grantee and the giving of several notes by the grantee payable to the grantor, where it appeared that two of the notes were paid to an attorney for the grantor, but without any showing that the money came to the grantor, it will be considered as between the grantor and the grantee as a payment pro tanto, though it is alleged as against another defendant that by her fraud all of the notes were taken to her own benefit.—Churchill v. Scott, 65 Mich. 485.

¶ 10. Where several persons, either as copartners or joint contractors, had done work under an agreement with a railway company, a payment made to one of them in township aid-bonds binds the rest if with full knowledge of the facts they decline to repudiate the payment and make a distinct claim upon the company.—Michigan Air Line R. Co. v. Mellen, 44 Mich. 321.

¶ 11. A creditor cannot lawfully refuse a tender by an agent duly authorized, if he has reasonable opportunity to learn the agent's authority.—Eslow v. Mitchell, 26 Mich. 500.

¶ 12. A tender to be valid must be made to the creditor or some one authorized to act for him. It is insufficient if made to a mere servant of the creditor.—Thurber v. Jewett, 3 Mich. 295.

¶ 13. One dealing with an agent who has general authority to sell goods or collect debts is bound to know that the agent has no authority by virtue of his agency to apply or offset his own private debt to such third party in payment of the debt to the principal.—Hurley v. Watson, 68 Mich. 531.

§ 3. Mode or medium of payment.

See also ante ¶ 10.
Check, draft or order on third person, see post §§ 4, 5.
Promissory notes as payment, see post §§ 6-8.
Third party's note, see post § 9.
Note of one or several partners for firm debt, see post § 10.
Bond, stocks, securities and certificates of deposit, see post § 11.
Payment by credits or application of debt, see post § 12.
Assignment of claim or account against third person, see post § 13.
Payment by assumption or novation of obligation, see post § 14.
Payment by merchandise or chattels, see post § 15.
Medium of tender and what is "legal tender," see post § 19.
Effect of agreement specifying mode or medium of payment, see post § 16.
Application of payments, see post III.
Medium of part payment for goods under the statute of frauds, see Frauds, Statute of § 112.
Medium of payment of foreign contract for money, see Conflict of Laws ¶ 30.
Mode and medium of payment of shares in estate, see Estates of Decedents §§ 363-367.
Mode and medium of payment of distributive shares of estate, see Estates of Decedents §§ 363-367.
Right to question medium of payment of purchaser of tax title, see Taxes, XII.
Mode or medium of payment for taxes, see Taxes, VIII.
Certification as payment, see Banking § 22.
Mode and medium for payment for corporate subscriptions, see Corporations §§ 50, 321 et seq.
Medium in which payment of costs and damages must be made in ejectment to entitle to new trial, see Ejectment ¶ 247.
Mode and permissible medium for payment of taxes, see Taxes, X.

What constitutes payment of assessment or premium for insurance, see Insurance §§ 84-87.

¶ 14. Payment may be made in any mode which the parties agree shall be treated as the equivalent of a money payment.—Blair v. Carpenter, 75 Mich. 167.

¶ 15. Where a debtor has the election to pay either money or property, if he fails to make tender on the day fixed for payment he thereby loses his election, and the obligee has the right to demand money.—Crowl v. Goodenberger, 112 Mich. 683.

¶ 16. Wherever a contract provides for the payment of a given amount in a commodity, the payor has the option to pay in that commodity or in cash, up to and including the time payment is due; but upon failure to pay in the commodity on that date, the obligation becomes one to pay cash.—Wheeler v. Ocker & Ford Mfg. Co., 162 Mich. 204.

¶ 17. The legal tender act of congress was not designed to confer a personal privilege upon debtors, but was based upon reasons of state policy, which, in the opinion of the lawmaking power, imperatively demanded that treasury notes should be made equal in legal value to coin; and parties have no right to stipulate that their agreements shall not be governed by it. And therefore, upon a note for the payment of a certain number of dollars in gold, judgment cannot be rendered for a greater sum than the amount specified and interest thereon, notwithstanding it is shown that gold commands a premium in treasury notes. —Buchegger v. Shultz, 13 Mich. 420.

¶ 18. In the absence of special instructions a justice of the peace can receive nothing but the legal money of the United States in satisfaction of a judgment, nor can a sheriff or constable receive anything else on an execution in his hands for collection.—Heald v. Bennett, 1 D. 513; Welch v. Frost, 1 Mich. 30.

§ 4. Check, draft or order on third person.

Debtor's acceptance, see post § 5.

Sufficiency of tender made by check or draft, see post ¶ 106.

Drafts as medium for payment of taxes, see Taxes, VIII.

Time when negotiable paper becomes payable, see Negotiable Instruments § 11.

Necessity that negotiable instrument be certain as to payment, see Negotiable Instruments §§ 3-7.

Effect of order on another for money as payment, see also Contracts ¶ 980.

Certified check as cash payment for stock, see also Joint Stock Companies ¶¶ 16, 17.

Sufficiency of draft as payment for state lands to give payer priority over other applicant to purchase, see Public Lands, ¶ 66.

¶ 19. The register of deeds cannot receive a check on a bank in redemption of mortgaged premises. Money alone is receivable. —Woodbury v. Lewis, W. 256.

¶ 20. Where a check is given to pay an instalment premium by one who is either the beneficiary or the assignee of a life insurance policy and a receipt delivered, liability cannot be avoided by ordering the bank upon which the check is drawn to refuse to honor it, where the policy and receipt are retained, as the check constituted payment of the premium under such circumstances.—Zacharias v. Donaldson, 188 Mich. 443.

¶ 21. The mailing of a check by a buyer to the seller is not payment so as to discharge the liability whether the check is received and paid or not, though there is an agreement between the parties that payment may be made by check.—Baumgardner v. Henry, 131 Mich. 240.

¶ 22. Where the state land-office commissioner received a draft as money in payment for lands, individuals could not treat this as no payment, there being no showing that the draft was not as good as money. —People ex rel. Estabrook v. Pritchard, 19 Mich. 470.

¶ 23. One who has transferred for full value a non-negotiable draft accepted by him as conditional payment of a claim cannot continue to enforce that claim.—Petek v. Chicago & N. W. R. Co., 147 Mich. 377.

¶ 24. A. being indebted to B. gave him an order on C. for the amount of his debt. Three days later B. presented the order to C., who refused payment, and ten days after became insolvent. About four days after B. gave notice of the nonpayment to A. Held, that B. might recover the debt of A., as there was no unreasonable delay or laches on his part, and no evidence of any injury to A.—Briggs v. Parsons, 39 Mich. 400.

¶ 25. By accepting a draft as conditional payment the creditor accepts the duty of doing everything with respect thereto which is necessary to fix the liability of the parties. And the onus is upon him to show that he has performed the duty when he seeks to recover upon the original cause of action.— Phœnix Ins. Co. v. Allen, 11 Mich. 501.

¶ 26. A conditional acceptance of an order drawn in favor of a creditor does not discharge the debtor, if the amount of the order is not paid by the acceptor.—Lupton v. Freeman, 82 Mich. 638.

§ 5. ——Debtor's acceptance.

Conditional acceptance of promissory note, see post § 8.

¶ 27. The taking of an acceptance for the price of goods sold is not, in the absence of

express agreement, equivalent to a payment of the debt.—Kirkpatrick v. Bessalo, 116 Mich. 657; Kirkpatrick v. Costo, 116 Mich. 662.

¶ 28. The taking of the debtor's acceptances does not operate as payment of the debt if there is no agreement that they shall be received in payment.—Au Sable River Boom Co. v. Sanborn, 36 Mich. 358.

¶ 29. The taking by a vendor of the vendee's acceptance for the purchase price of the goods sold does not operate as a payment, where the parties regard the acceptance merely as evidence of the amount to be paid.—Marinette Iron Works v. Cody, 108 Mich. 381.

¶ 30. Iron was purchased for a corporation, whose president gave his individual acceptance therefor, and received credit for the same on its books. When the draft became due he gave as a substitute for it the corporation's acceptance, due in sixty days, unindorsed by himself. Held that, prima facie, the acceptance of the corporation was received by the vendor as payment of the president's draft.—Riverside Iron Works v. Hall, 64 Mich. 165.

¶ 31. Merchandise was ordered by the firm of S. & G. and was sent with drafts for acceptance by the purchasers. Meanwhile the firm dissolved, and G., who continued in business, stated the fact and asked for new drafts. The vendor replied that he wanted the acceptances of both, and asked an immediate return of the drafts, as he needed them. G. sent his own acceptance instead, and falsely stated that S. had gone east, but that if the drafts were not satisfactory he would obtain an indorser. The vendor replied that he needed the paper at once and retained it. S. knew of this correspondence and kept control of the merchandise until it was closed. Held, that as the paper of the only debtor supposed to be within reach was forced upon the vendor, and no offer was made to return the merchandise and there was no apparent means of enforcing any such acceptance as the contract called for, there was no implication from the correspondence of a discharge of the other debtor, and that if there was, it was made nugatory by the fraud of the purchasers.—Case v. Seass, 44 Mich. 195.

¶ 32. The fact that a corporation had been buying merchandise on a cash basis and then changed to a monthly basis with acceptances on time for the goods sold does not tend to show that the acceptances were taken as payment.—Kirkpatrick v. Bessalo, 116 Mich. 657.

§ 6. Promissory notes as payment.

Notes given as renewals or substitutions, see post § 7.

Conditional acceptance or acceptance in part, see post § 8.

Payment of taxes by note to collector, public policy, see Contracts § 58.

Promissory notes as payment for stock in partnership association, see Joint Stock Companies ¶ 14.

Payment by promissory note as payment sufficient to make person bona fide purchaser for value, see Notice and Record of Title § 32.

¶ 33. The giving of a promissory note or other security for goods sold is no payment unless it is specially agreed to be so taken.—Gardner v. Gorham, 1 D. 507.

¶ 34. A note given for a debt is no payment unless so agreed; its date, therefore, does not necessarily fix that of the debt.—Breitung v. Lindauer, 37 Mich. 217.

¶ 35. The giving of a note and mortgage for a previous debt does not, as matter of law, discharge the debt unless it is so agreed or understood. But where the evidences of the previous debt are surrendered when new securities are taken, this is prima facie evidence of satisfaction, but not conclusive.—Brown v. Dunckel, 46 Mich. 29.

¶ 36. Payment of a bequest may be made by giving a note if the parties agree that the note shall stand as cash.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

¶ 37. Giving a note does not pay the debt unless it is so agreed, and the mere taking a note on account, which note was subsequently dishonored by the maker's insolvency, does not show such an understanding.—Delaney Forge & Iron Co. v. The Winnebago, 142 Mich. 84. Affirmed in 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509.

¶ 38. An agreement to regard a note owing by the owner to the contractor as a payment on an earned portion of the building contract price, being self executed, cannot be defeated as to such earned portion by the owner's suspending the work.—Roberts v. Wilkinson, 34 Mich. 129.

¶ 39. The giving of a promissory note for goods sold, or for any other valuable consideration, does not constitute payment, unless it is specially agreed to be so taken, and it is immaterial whether it is the note of a third person or of the party to the agreement.—Swan v. Gregory, 195 Mich. 457.

¶ 40. A bill or note or other security should be regarded as payment whenever it appears such was the intention of the parties; and that such was the understanding may be proved by their subsequent acts and conduct, as well as by direct proof of an express agreement.—Hotchin v. Secor, 8

Mich. 494; Riverside Iron Works v. Hall, 64 Mich. 165.

¶ 41. Where the seller of goods accepts a series of notes for the purchase price, and places certain of such notes out of his control by pledging them as collateral security for his own note, and brings suit upon the remaining note or notes alone, he will be regarded as having accepted the notes which he has thus placed out of his control as payment for the goods.—Comstock v. Taggart, 156 Mich. 47.

¶ 42. The acceptance of a note for the payment of premiums due on an insurance policy and the giving of a renewal receipt by the company amount to a payment of the premium.—Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324.

¶ 43. In view of the correspondence between the parties, and of the fact that new notes were sent to replace those not paid when due, it was held that notes taken by a vendor were not taken in absolute payment of the vendee's indebtedness.—Sheldon Axle Co. v. Scofield, 85 Mich. 177.

¶ 44. Where an application for life insurance provided that any neglect to pay the premium when due should render the policy void and forfeit all payments made thereon, and that the policy should not be binding on the company until all premiums due upon it should be received by the company or by someone authorized to receive them, and during the lifetime of the insured, held, that the company was not liable on an undelivered policy, upon evidence that a subagent of its agent had, without its authority, taken from the insured a promissory note of a third person in part payment of the first premium, and in the absence of any showing that such subagent was allowed to substitute his own personal liability to the company in place of the premium.—Continental Life Ins. Co. v. Willets, 24 Mich. 268.

§ 7. ——Notes given as renewals or substitutions.

Notes as medium for payment of taxes, see Taxes, VIII.

¶ 45. Renewals of notes at a bank are to be regarded as payment in the absence of evidence of a contrary intention.—Childs v. Pellett, 102 Mich. 558.

¶ 46. A past due unsecured note must be deemed to be paid to a bank by the acceptance of a new note for the same amount secured by a real estate mortgage, although the bank, upon learning within a few days after the recording of the mortgage that such mortgage was invalid because the land was owned by the debtor and his wife by the entireties claimed to have repudiated the transaction, where the bank one month after learning of the worthlessness of the mortgage marked such unsecured note as paid and transferred the loan from the commercial accounts to the mortgage loan accounts, and so reported the note to the banking commissioner on several occasions, and retained the note and mortgage in its possession.—Murray W. Sales & Co. v. German-American Sav. Bank, 192 Mich. 540.

¶ 47. A note given by way of renewal is not a payment. Nor does it amount to a payment for the debtor to discount drafts made by him upon his creditor and accepted by the latter, and to take up outstanding notes with the proceeds if the drafts remain to be met by the drawee.—McMorran v. Murphy, 68 Mich. 246.

¶ 48. A note which two parties had indorsed for a third being overdue, the holder wrote the indorsers requesting a new note in renewal. They sent one accordingly, made and indorsed by the same parties, and requested the return of the old note. No notice was taken of this request, nor were any steps taken to fix the liability of the indorsers on the new note; but after it fell due suit was brought on the old note, and the new note tendered to the indorsers on the trial, who refused to receive it. Held, that plaintiff, by retaining the new note under the circumstances, had made it his own.—Sage v. Walker, 12 Mich. 425.

¶ 49. The notes of a partnership are deemed paid so as to justify a verdict for the defendant partners where they were replaced by notes of a corporation which succeeded to all the property and assumed the debts of the partnership and such notes are held for more than three years by the payee without complaint during which time he collected some interest from the corporation and took the corporation note in payment of other interest.—Ellis v. Ballou, 129 Mich. 303.

§ 8. ——Conditional acceptance or acceptance in part.

Debtor's acceptance of draft, see ante § 5.

¶ 50. The effect of receiving notes as conditional payment is simply to postpone payment of the demand on which they are received until the securities fall due.—Dodge v. Stanton, 12 Mich. 408.

¶ 51. Where one transfers notes to another for property purchased on an agreement that if the notes are not collected the purchaser is to make up the deficiency, the purchaser only takes the notes as conditional payment; and if not paid at maturity he is under no obligation to bring suit upon them, but may immediately sue the purchaser for the amount. (By one justice, two other

justices concurring in the result.)—Dodge v. Stanton, 12 Mich. 408.

¶ 52. Where a draft and six notes were sent in payment of account, and where plaintiff, after several times returning the notes to defendant, who refused them, collected three of them, held, that the acceptance of the draft and of the money paid on the notes did not bind plaintiff to accept the other notes.—Tiffany v. Glasgow, 82 Mich. 266.

§ 9. Third party's note.

Note of one or several partners for firm debt, see post § 10.

Taking notes or acceptances of co-operative association as payment for goods so as to discharge stockholder's personal liability under the statute, see also Corporations § 318.

¶ 53. Where the vendor of lands takes the note or obligation of a third party for the purchase price, the presumption is that it is taken in payment and not merely as security.—Sears v. Smith, 2 Mich. 243.

¶ 54. Where a debtor indorses notes to his creditor in part payment, and the latter fails to present and protest the notes and notify the debtor of the default of the maker, although they are collectible at the time of maturity, the debtor is entitled to offset the notes against the creditor's claim, on the maker's becoming insolvent and the notes uncollectible.—Brown v. Spiegel, 156 Mich. 138.

¶ 55. Where an insurance company takes the notes of some other person than the assured when the premium falls due, it cannot, as against the assured, insist that they did not amount to a payment.—Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324; Michigan Mut. Life Ins. Co. v. Bowes, 42 Mich. 19.

¶ 56. W. manufactured shingles for M. and agreed to take his pay in shingles or their proceeds. M. sold a quantity and received, besides some cash, a note made payable to W., to whom he turned it over, but refused to indorse it. W. took it on condition that he found the maker to be responsible, but while holding it the maker failed. Held, that W. could not recover the amount of the note from M., but could only claim his pro rata share of the cash and available paper received for the shingles.—Mason v. Warner, 43 Mich. 439.

§ 10. ——Note of one or several partners for firm debt.

¶ 57. The execution of an individual note by a partner in payment for a team purchased for the firm does not preclude recovery of the debt represented by such note against the partnership who had the benefit of the transaction.—Beckwith v. Mace, 140 Mich. 157.

¶ 58. Where a creditor of the firm of F. & S. had, after its dissolution, refused to accept the paper of S. and discharge F., his receiving and retaining what purported to be the paper of the late firm of F. & S., without knowing that it was signed by S. alone in the firm name without authority, is not such an acceptance and discharge, when he had not accepted any paper as payment, nor unduly delayed enforcing his claim.—Adler v. Foster, 39 Mich. 87.

¶ 59. The note of two of several partners was taken for a partnership debt, and this note was afterwards paid in part, and notes on longer time taken for the balance. Suit being brought against the firm on the original debt, the court was asked by defendants to charge the jury that it was not absolutely necessary to show an express agreement on plaintiff's part to receive the note in payment, but that if the jury find, from all the circumstances of the case, and plaintiffs' subsequent acts in regard to the note, that they had acted and treated it as their own, and as received in payment of their claim, then the jury were authorized to take such facts into consideration, and find that it was received in payment if the evidence satisfied them that such was the fact. Held, that this request presented substantially a correct view of the law, and the court erred in declining to charge accordingly.—Hotchin v. Secor, 8 Mich. 494.

¶ 60. Where a firm agreed to settle for merchandise with a note, and after dissolution a partnership note is given by the remaining partner, the other can repudiate his liability thereon, and if he is released the vendor can treat the note as different from that agreed on, and it cannot then be regarded as payment.—Goodspeed v. South Bend Chilled Plow Co., 45 Mich. 237.

¶ 61. A. bought out the interest of B., his partner, and gave a cashier security for the firm's indebtedness to the bank for certain discounts, with the private understanding that the cashier should indorse A.'s paper to a certain amount, the indorsed paper to be received in payment of the firm's paper as it matured. In an action by the bank on a note given by C. in renewal of notes made to C. by B. and A., and discounted by the bank, held, that no note could be discharged until, by the concurrent action of A. and the bank, the notes indorsed by the cashier were substituted for those of B. and A. to the same amount.—Robertson v. First Nat. Bank, 41 Mich. 356.

§ 11. Bonds, stocks, securities and certificates of deposit.

¶ 62. Creditors who have received bonds in payment cannot retain them and question

their validity or value at the same time; if they wish for a payment in cash they must give up the bonds.—Michigan Air Line R. Co. v. Mellen, 44 Mich. 321.

¶ 63. A man owed debts secured by two mortgages. Wishing to lift them he asked a friend for $2,000. The friend had let a banker have his money, and as the banker could not conveniently repay more than $1,000 then, the friend took a certificate of deposit for the other $1,000 and turned it over to the borrower. The certificate was to fall due when the last remaining mortgage had to be paid, and it was understood that it was to be applied to the payment of that mortgage. This arrangement was acquiesced in so that the lender might, as he required, have all his security in one first mortgage on the land. Before the certificate fell due the banker failed. The borrower then repaid the money actually advanced to him, and tendered the certificate to the lender and demanded the discharge of the mortgage. Held, that there had been nothing to show that the borrower had taken the certificate as payment to him of so much money, and he was entitled to the discharge. The loss would fall on the lender.—Burrows v. Bangs, 34 Mich. 304.

¶ 64. The effect of transfer of funds by a public officer to his successor by means of certificates of deposit is to release such treasurer and his bondsmen from liability, where such transfer was subsequently ratified by the common council. (Local Acts 1875, p. 167.)—City of Lansing v. Wood, 57 Mich. 201.

§ 12. Payment by credits or application of debt.

Application of credits in ascertaining amount of garnishee's liability, see Garnishment § 106.

Rendition of account as estoppel to claim right to pay by applying credit, see Estoppel ¶ 176.

Allowance of costs to be offset from sum due by party charged, see Costs § 148.

Payment made by mistake as set-off to subsequent debt, see Officers ¶ 309.

Treating mutual items as offsets to determine right to costs dependent on amount recovered, see Costs § 18.

Conveyance with abatement of price as payment, see also Contracts ¶ 460.

Applications of credits as payments on alimony, see Divorce § 180.

Giving personal credit as valid payment of fees, see also Appeal § 89, ¶ 396.

¶ 65. Where mutual cash debtors settle fairly on the principle of compensation, each retaining what he owes the other in payment of what is due himself, these compensations are reciprocal payments.—People ex rel. Connecticut Mut. Life Ins. Co. v. State Treasurer, 31 Mich. 6.

¶ 66. An agreement to apply money earned to the extinguishment of an obligation to the employer executes itself and does not require the formality of passing the money back and forth; but these compensations, when they fairly and properly occur, are reciprocal payments.—Roberts v. Wilkinson, 34 Mich. 129.

¶ 67. Where an account is running between a lumberman and a logger to whom he has furnished teams which the latter is to pay for, the occasional occurrence of a balance in favor of the logger does not necessarily amount to a payment by him for the teams.—Hood v. Olin, 68 Mich. 165.

¶ 68. Under a labor contract which bound the employer to rent certain premises to the employee, as well as to give him work and wages, and provided for monthly settlements of wages and rent, in a suit for wages due, the amount of rent due might be proved as payment.—Iron Cliffs Co. v. Gingrass, 42 Mich. 30.

¶ 69. Where the face of the note is cut down by way of recoupment the deduction is not to be regarded as a payment, but as so much taken from the face of the note, and a discount is not to be allowed thereon under an agreement for such discount upon sums paid before maturity.—Russell & Co. v. Klink, 53 Mich. 161.

¶ 70. Where a banker, indebted in a sum, paid part in cash and part by a certificate of deposit, he should be credited with the amount of such outstanding certificate of deposit, whoever owns it; hence a settlement between him and the depositor on the basis of such credit is no proof that its present holder took it as payment.—Burrows v. Bangs, 34 Mich. 304.

§ 13. Assignment of claim or account against third person.

Substitution of debtor's debtor with creditor's consent, see also post ¶ 198.

Payment of debt by insurance benefit, see Estates of Decedents ¶ 686.

¶ 71. A. gave a receipt to B. as follows: "I have this day received of B. $500 in money, a note for $231, and also an assignment of his interest in a claim against the railroad company to secure the $269 agreeably to said instrument of assignment, which is in full of all claims and accounts against B. to date." The assignment referred to was a claim of $875, which by its terms was to be applied on the $269 when collected. Held, that the two instruments taken together did not amount to a payment of the $269.—Dudgeon v. Haggart, 17 Mich. 273.

¶ 72. A vendor cannot dispute that he has received the assignment of a mortgage in payment where the facts are that he him-

self proposed to accept it as such, and has referred to it in the negotiations as payment, reserving only the right to satisfy himself as to the value of the security; has had a reasonable time and opportunity for making such examination; and has finally notified the purchaser that he must make up any deficiency.—Bulen v. Burroughs, 53 Mich. 464.

§ 14. Payment by assumption or novation of obligation.

General law of novation, see Novation.

¶ 73. A corporation gave sundry notes to a firm, both supposing that the corporation was indebted to the firm. The firm indorsed the notes and negotiated them to strangers. The corporation made an assignment, and as it failed to pay the notes at maturity, the firm took them up. Held that, in an adjustment of accounts between the firm and corporation, these notes should have been credited to the firm leaving the accounts standing as if the notes had not been made. They were not proper charges against the firm until paid by the corporation.—Blackmar v. Cornwell, 58 Mich. 400.

¶ 74. On a bill to annul a deed for fraud where an ostensible consideration of the indorsement of a certificate of deposit never was made to the grantor, but it was indorsed in blank by the payee and taken up by other certificates and cash paid to the grantee, and the grantee afterwards used part of the proceeds in paying debts of the grantor to obtain his release from arrest under the fraudulent debtor act, so much as was thus paid was treated as a payment.—Churchill v. Scott, 65 Mich. 485.

¶ 75. A maker of a note pledged as collateral for another note given for the compromise of a debt purchased the compromise note and had transferred therewith his own note in the name of a third person after both notes were due. His own note was looked to to provide funds for payment of the compromise note. Held that the transaction was in effect a payment of his own and the compromise note.—Hale v. Holmes, 8 Mich. 37.

§ 15. Payment by merchandise or chattels.

Contract giving option of payment in commodity, see ante ¶ 16.

Payment of mortgage debt in services or otherwise than in money, see Mortgages § 130.

Sufficiency of discharge of alternative contract obligation by services where there was previous money tender, see Election and Waiver ¶ 15.

¶ 76. A debtor delivered a horse to his creditor to sell it and apply the proceeds in payment of the debt. The creditor exchanged the horse for other property, and the amount to be applied was disputed. Held that, notwithstanding the dispute, the transaction amounted to a payment instead of a mere basis of set-off against plaintiff's claim.—Strong v. Kennedy, 40 Mich. 327.

¶ 77. A purchaser who has promised to "settle" on delivery of the goods away from the place of sale, and has allowed the dealers to suppose him to be a cash customer, cannot oblige them to take payment in their own chattel notes payable in such goods deliverable at their place of business. Such notes are not cash and cannot be used as set-off unless their makers are put in default.—Williams v. Jackson, 31 Mich. 485.

¶ 78. Where a corporation gives its paper to a firm which holds orders issued by it, payable in goods, and there is no evidence that the paper was given or received in payment of the orders, the transfer of the paper must be held to be no payment.—Beecher v. Dacey, 45 Mich. 92.

§ 16. Effect of agreement specifying mode or medium of payment.

Mode or medium of payment generally, see ante § 3 et seq.

Terms of payment in memorandum of agreement for sale of lands, see Frauds, Statute of, § 96.

¶ 79. A contract provided that payment should be made in Canada currency or its equivalent in United States money. Held, that in an action on the contract there was no ground for an exception to the court's refusal to direct the jury to allow nothing for the difference in the currencies where there was, in fact, no difference between them.—Holland v. Rea, 48 Mich. 218.

¶ 80. A certificate of deposit, by its terms made payable in "currency," is prima facie payable in what is current money by law or paper equivalent in value circulating in the business community at par; and it is not competent for a witness, without referring to any local custom or usage, to testify that it is payable in depreciated funds.—Phelps v. Town, 14 Mich. 374.

B. TENDER OR DEPOSITS IN COURT.

§ 17. General nature and requisites of tender.

Imposition of conditions, see post § 18.

Medium of tender and what is "legal tender," see post § 19.

Parties to tender, see post § 20.

Mode of tender; producing and showing money, see post §§ 21, 22.

Keeping tender good, see post § 23.

Objections to tender and grounds for refusal, see post §§ 24, 25.

Deposits in court, see post §§ 26, 27.

Effect of tender, see post § 30.

Effect of tender generally, see post II.
Pleading and proof of tender and deposits, see post V.
Tender as condition precedent to rescission, see Rescission, III.
Tender of performance as condition precedent to rescission, see Rescission, III.
Tender necessary as condition precedent to commencing of suit for specific performance, see Specific Performance.
Sufficiency of tender to fulfill sales contract, see Sales, VII.
Sufficiency of tender on sale of real property, see Vendor and Purchaser, VI.
Tender of mortgage debt, see Mortgages, § 135.
Necessity for tender of reward as condition precedent to replevin of lost goods, see Property.
Tender of performance as requisite to set limitations running on contract, see Limitations § 48.
Tender of payment of fine imposed upon member of benefit society, see Fraternal Associations ¶ 19.
Willingness and ability of primary party to pay negotiable instrument as constituting a tender of payment, see Comp. L. 1915, § 6111.

¶ 81. A tender must be of the full amount due; a partial tender is operative only when the creditor consents to receive it.—Coots v. McConnell, 39 Mich. 742.

¶ 82. A tender need not be divided to meet separate claims where they are all held by one person. Where more is demanded than is due the person making the tender cannot be put in the wrong by requiring him at his peril to separate just from unjust charges.—Johnson v. Cranage, 45 Mich. 14.

¶ 83. A tender for the purpose of cancelling a judgment should include both damages and costs. A tender of damages with the clerk's receipt for the costs is not sufficient.—Thurber v. Jewett, 3 Mich. 295.

¶ 84. A mere offer to pay whatever shall be ascertained to be necessary to discharge a litigated demand without taking any steps to find out beyond preparing a receipt in blank purporting to discharge the judgment when in fact none has been entered is no proper tender of payment.—Chase v. Welsh, 45 Mich. 345.

¶ 85. A tender of simple interest is not necessarily sufficient after default in payments on land contract.—Richards v. White, 44 Mich. 622.

¶ 86. A tender by one tenant in common was held insufficient on a bill in equity to avoid a collusive foreclosure, because it did not include the whole amount of the surplus but only his share.—Norton v. Tharp, 53 Mich. 146.

¶ 87. Where a mortgagee has taken no steps to entitle him to an attorney fee, if such a fee is recoverable at all he is bound to accept such a tender as would be sufficient without it.—Canfield v. Conkling, 41 Mich. 371.

¶ 88. Whether in an action for the breach of a contract and not for a sum certain the defendant may render a sum in satisfaction under the statute after suit brought, quære.—Hollister v. Brown, 19 Mich. 163.

¶ 89. It is not necessary that the amount of the tender of interest to prevent default should be brought into court in a summary proceeding by a vendor.—Hill v. Carter, 101 Mich. 158.

¶ 90. Where a lease gave the lessee the right to purchase the premises described in the lease within the leased term at a certain price, which was tendered to the defendant after notice by a check which defendant's attorney suggested was not certified, and the cash was thereafter tendered before suit, and was brought into court, and refusal of defendant to deed the premises was based upon other grounds than noncertification of the check, held that the tender was good.—Nowicki v. Kapelczak, 195 Mich. 678.

¶ 91. Where, at the time of maturity of note, maker calls at payee's house, and, laying upon table amount to become due, says he wishes another year, which payee says he can have, whereupon maker puts money in his pocket, and payee, without counting or touching money, passes note to maker, who then pays to payee, and indorses as paid, one year's interest, note then being returned to payee, there is no payment, or tender requiring acceptance.—McInerney v. Lindsay, 97 Mich. 238.

¶ 92. An unexplained offer, by the indorser of a note, of the sum due thereon in depreciated bank-bills, is, in legal effect, an offer of compromise, and not of payment, and if accepted operates as a compromise, by way rather of set-off or accord and satisfaction than of payment.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 93. Where the mortgagee has removed from the State some years after the debt is in default and subsequently the mortgagor writes several letters to the mortgagee requesting an opportunity to pay the debt and receives no answer and the mortgagee testifies he did not receive the letters, the circumstances are not equivalent to a tender so as to excuse payment of interest since accrued.—Adams v. Greig, 126 Mich. 582.

¶ 94. Tender to a carrier of the freight, less damage done to the goods, discharges the lien for freight.—Bancroft v. Peters, 4 Mich. 619.

§ 18. ——Imposition of conditions.

Tender with deduction of damages claimed, see ante ¶ 94.

Promises to pay on condition stated, see Contracts, VI, C.

¶ 95. A tender, to be effective, must be without qualification or condition.—Zells v. Stockwell, 171 Mich. 268.

¶ 96. Plaintiff cannot be required to accept or recognize a conditional tender made after the pleadings are concluded.—Zells v. Stockwell, 171 Mich. 268.

¶ 97. A tender coupled with an improper condition does not operate to put the other party in fault.—Wilson v. Wagar, 26 Mich. 452.

¶ 98. A tender made upon the condition that it be accepted in full satisfaction of the amount due puts the party to whom it is made to his election, and his acceptance of the tender is in effect an assent to the condition.—Rosema v. Porter, 112 Mich. 13.

¶ 99. A tender may be coupled with such conditions as the party making it has a right to impose; such as that he shall receive what a payment or tender legally made would entitle him to.—Johnson v. Cranage, 45 Mich. 14; Brink v. Freoff, 40 Mich. 610; Brink v. Freoff, 44 Mich. 69.

¶ 100. A tender coupled with an improper condition cannot destroy a security accompanying the debt sought to be paid.—Dodge v. Brewer, 31 Mich. 227.

¶ 101. A tender coupled with a claim of an allowance not lawfully demandable will not discharge a security.—Sager v. Tupper, 35 Mich. 134.

¶ 102. Where a tender, sufficient in amount to discharge a mechanic's lien for the repair of personal property, was made on condition that the property be delivered up, and the only objection made to the tender was that the amount was insufficient, held, that the tender was not vitiated by the condition.—Moynahan v. Moore, 9 Mich. 9.

§ 19. Medium of tender and what is "legal tender."

Medium for payment in general, see ante § 3.

Mode of tender and necessity of producing and showing money, see post §§ 21, 22.

Effect of agreement specifying mode or medium of payment, see ante § 16.

Validity of Legal Tender Acts, see Constitutional Law ¶ 523.

¶ 103. Where the terms of a contract require payment in cash the tender of the payee's past-due paper, given to a third person, is insufficient.—Hughes v. Daniells, 87 Mich. 190.

¶ 104. One dollar in money is in law equivalent to any other dollar, and in tendering back money in rescinding a transaction it is immaterial whether or not the bills tendered back are the identical ones received.—Michigan Cent. R. Co. v. Dunham, 30 Mich. 128.

¶ 105. A tender partly in money which is not a legal tender need not be accepted.—Richards v. White, 44 Mich. 622.

¶ 106. Although a check may be a sufficient tender of payment to constitute performance of an agreement in composition of a debt, it is not a legal tender barring action where it was received back and nothing was done to make a legal tender or keep it good.—Browning v. Crouse, 40 Mich. 339.

¶ 107. A tender partly in bank-notes cannot be insisted on if rejected for that reason.—Waldron v. Murphy, 40 Mich. 668.

¶ 108. Where a bill holder presents at one time to a bank for redemption several bills of the denomination of $5, it is competent for the bank, under the act of congress of Feb. 23, 1853, entitled "An act amendatory of the existing laws relative to the half dollars," etc., to tender payment of the whole sum so presented in half dollars issued under said act.—Strong v. Farmers' & Mechanics' Bank of Michigan, 4 Mich. 350.

¶ 109. A tender made in greenbacks and fractional United States currency is sufficient, especially where no objection is made to it at the time.—Beebe v. Knapp, 28 Mich. 53.

¶ 110. As a tender in bank notes is good unless objected to on the ground that they are not legal tender, it is error to exclude further evidence of a tender merely because the witness testifying to it is unable to say whether it was in greenbacks or national bank notes.—Koehler v. Buhl, 94 Mich. 496.

¶ 111. A tender of current bank-bills to a constable holding an execution would protect the defendant in the execution against the creditor, unless they were refused as not being constitutional money.—Welch v. Frost, 1 Mich. 30.

¶ 112. A tender in United States treasury legal tender notes is good if no objection is taken at the time to their being regarded as money.—Fosdick v. Van Husan, 21 Mich. 567.

§ 20. Parties to tender.

Persons entitled to receive or make payment, see ante § 2.

¶ 113. A tender to a co-operative savings association of the weekly dues and interest on certain shares in such association, made by an unauthorized person need not be received or recognized.—Michigan Building & Savings Assoc. v. McDevitt, 77 Mich. 1.

¶ 114. Where two persons are both interested, a tender to either is sufficient, especially if both are present. The question whether such a tender was to one or the other or both may go to the jury if material.—Beebe v. Knapp, 28 Mich. 53.

§ 21. Mode of tender; producing and showing money.

Time, place and opportunity for computation, see post § 22.
Keeping tender good, see post § 23.
Objections to tender and grounds for refusal, see post §§ 24, 25.

¶ 115. Plaintiff, after settling a claim against defendant for personal injuries, decided to rescind for fraud, and went with his attorney to defendant's agent and told him that they repudiated the settlement and came to see if he would take the money back, and the agent replied, "No, sir, it is a settlement," whereupon they started to leave when the agent asked to see the money. They did not in fact have the money with them and the attorney replied, "You refused it once," and departed. Held that there was no sufficient tender of return of the money.—Niederhauser v. Detroit Citizens' St. Ry. Co., 131 Mich. 550.

¶ 116. Evidence that tender was made in legal tender greenbacks cannot be objected to on the score that the only proper course was to produce the thing tendered.—Beebe v. Knapp, 28 Mich. 53.

§ 22. ——Time, place, and opportunity for computation.

Time for making objections to tender, see post ¶ 125.

¶ 117. A person to whom a tender is made is allowed a reasonable time to ascertain his rights and compute the amount due.—Potts v. Palsted, 30 Mich. 149; Proctor v. Robinson, 35 Mich. 284; Root v. Bradley, 49 Mich. 27; Post v. Springsted, 49 Mich. 90.

¶ 118. A woman engaged in her ordinary avocations is not bound to know at all times what is owing her upon a mortgage, and to be ready to determine forthwith, without opportunity for examination and computation, whether she will accept any particular sum offered her; she must have reasonable opportunity to satisfy herself what her rights are.—Root v. Bradley, 49 Mich. 27.

¶ 119. A tender made without notice at an unfit place may be properly declined until the creditor can have reasonable time to examine the account.—Waldron v. Murphy, 40 Mich. 668; Parks v. Allen, 42 Mich. 482.

¶ 120. A tender to satisfy a claim in litigation is not good if made in the street without any computation or means of computation that would not require delay, and on the idea that the claim is in judgment, when no judgment has been entered, and when no costs have been or could regularly have been taxed.—Chase v. Welsh, 45 Mich. 345.

§ 23. Keeping tender good.

Loss of rights under tender by failure to keep good, see post § 32.
Keeping tender good on mortgage debt, see Mortgages § 136.
Necessity of keeping tender good after tender of goods to fulfill sales contract, see Sales, VII.

¶ 121. One who makes a sufficient tender to discharge a mechanic's lien for the repair of personal property, and then brings replevin for the property, is not obliged, in order to keep the tender good, to bring the money into court. The lien being discharged by the tender the lien-holder must thereafter rely upon his employer's personal responsibility.—Moynahan v. Moore, 9 Mich. 9.

¶ 122. One who sends a check in payment, which is rejected by the other party, and who thereupon receives it back, cannot claim the benefit of a formal tender, even though previous payments in the same matter were made in the same way and were received without objection; and this is especially so where nothing was done afterwards that would have kept good a formal tender had one been made.—Browning v. Crouse, 40 Mich. 339.

¶ 123. Where a creditor refuses to accept a check under an erroneous belief that a greater amount was due, which he subsequently admits is incorrect, the debtor should keep his tender good until the correction of the error.—Stevens v. Forrest, 183 Mich. 223.

¶ 124. One who bases his claim to relief on a tender made and kept good must keep to his offer and cannot raise the question of usury.—Canfield v. Conkling, 41 Mich. 371.

§ 24. Objections to tender and grounds for refusal.

Waiver of objections, see post § 25.
Refusal of tender on ground that medium of tender is not "legal tender," see ante § 19.

¶ 125. Objection to the mode of tender must be made at the time of the tender.—Browning v. Crouse, 40 Mich. 339.

¶ 126. The holder of a security upon which a party authorized makes a tender is not concerned where or on what terms the person tendering the money obtained it so long as he could have got payment by accepting the tender.—Eslow v. Mitchell, 26 Mich. 500.

§ 25. ——Waiver of objections.

¶ 127. The right to the production in court of a money tender is presumed to have been waived if it was not called for.—Wetherbee v. Kusterer, 41 Mich. 359.

¶ 128. A party who declares positively, when another offers to pay him an alleged claim on behalf of a third person, that nothing is due him and that he will accept no money, thereby excuses any tender, and cannot afterward object that money was not particularly counted out and presented to him.—Lacy v. Wilson, 24 Mich. 479.

¶ 129. A complainant in a bill to set aside an assignment of a decree for alimony is excused from a more formal tender where she undertook to make a tender and did not do so because informed by the defendant that he would not accept it.—Fournier v. Clutton, 146 Mich. 298.

§ 26. Deposits in court.

Payment into justice's courts, see post § 27.
Effect of payment or deposit into court, see post § 33.
Paying over or repaying deposits, see post IV.
Payment into court of condemnation award for division, see Eminent Domain § 118.
Liability of register to garnishment for money paid into court, see Garnishment ¶ 51.
Interpleader in garnishment without paying into court, see Garnishment ¶ 361.
Remedy to require payment into court of money made by sheriff on execution, see Executions § 107.
Necessity of payment of fund into court in order to maintain interpleader of claimants thereto, see Interpleader § 7.
Right of interpleader claimant to fund to have it paid out to him because of delay or fraud in interpleading, see Interpleader § 8.
Payment into court, effect as admission, see Evidence § 392.
Deposit of moneys by clerk or register as trust deposit, see Banking § 45.
Statutory provisions as to deposits of money in court, see Jud. Act, chap. II, §§ 67-76; Comp. L. 1915, §§ 12150-12159.
Payment in court in mortgage foreclosure suits, see Jud. Act, chap. XIX, §§ 33, 34; Comp. L. 1915, §§ 12687, 12688.
Deposit in court to secure injunction to stay proceedings at law, see Jud. Act, chap. XIX, § 10 et seq.; Comp. L. 1915, § 12664 et seq.
Manner of keeping accounts of money deposited in court, see 1916 C. C. Rule 62, § 1.
Method of paying out money deposited in court, see 1916 C. C. Rule 62, § 2.

¶ 130. A party may object to the intrusting of his money to an officer of the court, and he has a right to be heard before an order therefor is made.—Lewis v. Kean, 102 Mich. 605.

¶ 131. A deposit of court funds in a bank with periodical statements to the court by the register in chancery, accompanied by certificates by the cashier to the effect that the money is so deposited, acquiesced in by the court although the deposit was never ordered to be made, is a substantial compliance with Comp. L. 1897, § 420, providing that all moneys brought into court by suitors shall be deposited in such banks as the court shall direct, and section 422 providing that the court registers account shall be accompanied by a certificate of the bank cashier that the total amount is actually in the bank to the credit of the register and not mingled with any other account.—Retan v. Union Trust Co., 134 Mich. 1.

§ 27. ——Payment into justice's court.

¶ 132. If payment into court in a justice's case is after plea, it seems that a motion for leave should be made.—Phelps v. Town, 14 Mich. 374.

¶ 133. A defendant may pay money into a justice's court before or after filing plea, without any rule or order for the purpose, and with the same effect upon the rights of parties as when money is paid into a court of record under the practice there prevailing.—Phelps v. Town, 14 Mich. 374.

II. EFFECT OF PAYMENT, TENDER OR DEPOSIT.

§ 28. Operation and effect in general.

Payment as loan or discharge, see post § 29.
Effect of tender, see post §§ 30, 31.
Loss of rights under tender by failure to keep good, see post § 32.
Payment or deposit in court, see post § 33.
Payment as basis of subrogation, see Subrogation.
Payment by principal as discharging guarantor, see Guaranty § 21.
Payment effecting discharge of mortgage, see Mortgages, VIII.
Payment sufficient to stop interest, see Interest § 14.
Payment as part performance of a parol contract for lands, see Frauds, Statute of §§ 103, 104.
Payment and discharge of executions, see Executions, VIII.
Payment as defense in foreclosure suit, see Foreclosure § 11.
Effect of payment or tender on right to costs, see Costs §§ 18, 20.

Payment or tender to avoid costs in chancery, see Costs § 33.
Part payment of goods as satisfying statute of frauds, see Frauds, Statute of § 110.
Effect of payment on account to make it open account and toll limitations, see Limitations § 51.
Time and sufficiency of payments to prevent default and running of limitations, see Limitations, IV, and especially ¶ 207.
Part payments to toll limitations on debt, see Limitations, VI, B.
Application of credit or payment as part payment tolling limitations, see Limitations § 91 et seq., § 94.
Payment as ratifying alteration of instrument, see Alteration of Instruments § 11.
Necessity that tender or payment to cut off costs should include accrued costs, see also Costs ¶ 70.
Payment and discharge of judgment, see Judgments § 127.
Effect on costs of payment after suit is commenced, see 1916 C. C. Rule 46.

¶ 134. The taker of counterfeit coin or a counterfeit of paper money which had been made a legal tender by law must use due diligence to ascertain its character and to notify the giver, to entitle him to recover its value. Any unnecessary delay beyond such reasonable time as would enable the taker of counterfeit money to inform himself as to its genuineness, and notify the giver, operates as a fraud on the giver and prevents a recovery.—Atwood v. Cornwall. 28 Mich. 336.

¶ 135. Whether the rule that a party passing negotiable paper warrants its genuineness is applicable to payments made in coin or legal tender notes, quære.—Atwood v. Cornwall, 28 Mich. 336.

§ 29. Payment as loan or discharge.

Nature of payment and its character defined, see ante § 1.
Agent's promise to pay his principal as payment where as treasurer he commingles his own funds with his principal's, see Insurance ¶ 1334.
Nature of payment to joint stock company, whether as lender of money or subscriber to stock, see Joint Stock Companies ¶ 18.

¶ 136. A member of a partnership was agent for a firm which operated a bucket shop in another city. A customer wanted to close out his transactions and the agent gave him the check of the partnership for the amount due him, and in due course received a check from his principal which included the amount so paid. The check was protested and remained unpaid, the firm being insolvent. The partnership brought action against the customer to recover the amount paid him. Held that the money was a payment and not an advance or a loan, there being no promise, express or implied, to pay it back.—Clippinger v. Starr, 130 Mich. 468.

¶ 137. A wife dying, her husband (defendant) and her adult son by a former marriage went together to plaintiff, an undertaker, and gave orders for the funeral; nothing was said respecting payment or who was to be charged. The charge was, however, made to defendant, who refused to pay. Then plaintiff applied to the son, who also refused, but finally lent plaintiff the amount of the bill on the understanding that plaintiff should sue defendant and recover the amount for the lender's benefit. Held, that the arrangement was not a payment but was either a loan or a purchase of the demand, and that in either event plaintiff could sue.—Sears v. Giddey, 41 Mich. 590.

§ 30. Effect of tender.

To release or discharge lien or secondary obligations, see post § 31.
Loss of rights under tender by failure to keep good, see post § 32.
To reduce or avoid costs in law actions, see Costs § 20.
Effect of tender on costs in equity suits, see Costs § 33.
Payment or tender to stop interest, see Interest § 14.
Tender of performance to fix rights under contract, see Contracts, VII, B; Sales, V, VII; Vendors and Purchasers, VI.
Tender of principal as discharging guarantor, see Guaranty § 21.
Effect of tender of debt to discharge chattel mortgage, see Chattel Mortgages § 108.
Effect on costs of tender after suit is commenced, see 1916 C. C. Rule 46.

¶ 138. The effect of a tender made during suit or before judgment must always depend more or less on the views of the court, and rarely affects anything but the liability for costs. It cannot discharge the debt until paid.—Chase v. Welsh, 45 Mich. 345.

¶ 139. Tender by defendant of an amount actually due is not an admission of indebtedness to a larger amount claimed by plaintiff.—Kennedy v. Nims, 52 Mich. 153.

¶ 140. A contract to pay royalties for machinery does not bind the purchaser of the stock and business of a manufacturer who owed them, so that his tender of a check in payment in order to keep the factory going was a payment of the seller's debt, such payment having been tendered on condition that the license to use the machines be transferred.—Goodspeed v. United Shoe Machinery Co., 141 Mich. 672.

¶ 141. An instruction as to the effect of a tender, held to be sufficient.—Hoffman v.

Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

¶ 142. An insufficient tender is of no avail.—Montague v. Dougan, 68 Mich. 98.

¶ 143. In an action for the price of running logs it appeared that a third person not a party to the action bought the greater part of the logs from defendant, and that it was arranged between plaintiffs and defendant that such third person should pay plaintiffs, retaining the amount out of the purchase money due defendant. Held, that a tender by such third person to plaintiffs was a tender by and on behalf of defendant and would not make such third person plaintiff's debtor or discharge defendant's liability.—Keystone Lumber & Salt Mfg. Co. v. Jenkinson, 69 Mich. 220.

¶ 144. Tender after suit brought must conform to Comp. L. 1871, §§ 6180-81 (How. St. §§ 7764-65), which does not allow it to bar further prosecution, but only to stop interest and costs and subject the plaintiff to subsequent costs, and contemplates that it may be shown on the trial.—Snyder v. Quarton, 47 Mich. 211.

¶ 145. When tender is regular and is completed by payment into court a verdict for the amount of it is not proper.—Wetherbee v. Kusterer, 41 Mich. 359.

¶ 146. In an action against an attorney to recover a sum of money collected for plaintiff, defendant tendered a certain sum into court subject to certain conditions. The verdict, irrespective of costs, exceeded the amount of the tender. Error was charged on the ground that judgment was entered for a less amount than the verdict after plaintiff had renounced all claim to the sum conditionally tendered. Held, that the tender was immaterial, negligible and invalid, and that plaintiff was entitled to judgment for the full amount of the verdict.—Zells v. Stockwell, 171 Mich. 268.

§ 31. ——To release or discharge lien or secondary obligation.

See also ante ¶ 94.

Tender as defense in foreclosure suit, see Foreclosure § 11.

Refusal of tender as discharge of mortgage, see Mortgages § 137.

Taking notes or paper for log labor as waiver of lien when taken in payment, see Forestry § 11.

Character of tender to break excessive lien, see Liens ¶ 49.

Payment by garnishee to obtain discharge, see Garnishment, XII.

Sufficiency of tender to warrant denial of costs on foreclosure suit, see Foreclosure ¶ 527.

Payment and discharge of mortgages, see Mortgages, VIII.

Effect of tender to discharge attachment, see Attachment § 129, ¶ 372.

¶ 147. A tender, regularly and lawfully made, discharges a lien, and while the debt is not thereby discharged without payment, yet the security is destroyed at once.—Fuller v. Parish, 3 Mich. 211; Moynahan v. Moore, 9 Mich. 9; Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Kanouse, 13 Mich. 303; Flanders v. Chamberlain, 24 Mich. 305; Eslow v. Mitchell, 26 Mich. 500; Potts v. Plaisted, 30 Mich. 149; Sager v. Tupper, 35 Mich. 134; Fry v. Russell, 35 Mich. 229; Stewart v. Brown, 48 Mich. 383.

¶ 148. Tender of payment to creditor of money due on note discharges a guarantor.—Sears v. Van Dusen, 25 Mich. 351.

¶ 149. If the refusal to accept a tender is not absolute or unreasonable it does not necessarily discharge a security.—Waldron v. Murphy, 40 Mich. 668.

¶ 150. The refusal of a tender of the full amount due on a mortgage must be without adequate excuse in order that such tender shall operate as a discharge of the lien.—Renard v. Clink, 91 Mich. 1.

¶ 151. Where the trustee of a vendor of land, while holding the purchaser's bond and mortgage, takes from said purchaser a promissory note for arrears of interest, and bearing higher interest than the bond and mortgage, and then takes a new promissory note for arrears of interest on the former note, and receipts that amount of interest upon the former note, afterwards putting the latter note in judgment, and where, after the mortgage all became due, the purchaser agreed in writing to pay upon the balance from that date a higher rate of interest than was borne by the mortgage, and the former note was accordingly credited as a payment, and the balance made out upon this basis as if the amount had been paid in cash, it was held that an intention was clearly indicated to treat the former note as payment, the effect of which would be to detach that amount from the lien of the mortgage.—Burchard v. Frazer, 23 Mich. 224.

§ 32. Loss of rights under tender by failure to keep good.

Necessity of keeping tender good generally, see ante § 23.

¶ 152. A mortgagor tendered a certain sum in payment and demanded a discharge. The tender was at first refused because it did not cover the attorney fee provided for, but the mortgagee afterward delivered the discharge, which the mortgagor accepted, saying that he would now take his own time for paying. Held, that when the mortgagor, instead of relying on his tender, accepted the discharge, he recognized the

mortgagee's right to the whole sum claimed, and that the mortgagee could recover it from him under the money counts.—Fry v. Russell, 35 Mich. 229.

§ 33. Payment or deposit in court.

Paying over or repaying deposits, see post IV.

Liability of register to garnishment for money paid into court, see Garnishment ¶ 51.

Remedy to require payment into court of money made by sheriff on execution, see Executions § 107.

Payment into court to avoid costs, see Costs § 20.

Deposit in court to stay proceedings at law by injunction, see Jud. Act, chap. XIX, § 10 et seq.; Comp. L. 1915, § 12684 et seq.

Manner of keeping accounts of money deposited in court, see 1916 C. C. Rule 62, § 1.

Method of paying out money deposited in court, see 1916 C. C. Rule 62, § 2.

¶ 153. In the absence of an order by the court, the payment of the amount due on a chancery decree to the register in chancery is not binding upon the party entitled to the money, and he may entirely ignore such payment.—Lewis v. Kean, 102 Mich. 605.

¶ 154. A payment into court of the amount which under the evidence plaintiff might recover, made as a condition of obtaining a new trial after judgment for plaintiff for a larger amount, does not entitle defendant to judgment on the second trial, where the order for the deposit and the deposit itself were not such as to make the money subject to plaintiff's disposal.—Browning v. Crouse, 40 Mich. 339.

¶ 155. By tender and payment into court defendant admits that he owes the sum tendered and paid, and that plaintiff is entitled to it; and defendant cannot regain it though it should turn out that he was not indebted at all.—Thompson v. Townsend, 41 Mich. 346.

III. APPLICATION OF PAYMENTS.

§ 34. In general.

By creditor, see post § 35.

By debtor, see post § 36.

Express directions or specific applications, see post § 37.

Application in order of creation or maturity of debt, see post § 38.

Principal or interest, see post § 39.

Secured or unsecured debt, see post § 40.

Several or joint debt, see post § 41.

Individual or firm obligation, see post § 42.

Notice of application to debtor, see post § 43.

Changing or revoking application, see post § 44.

Effect of bookkeeping entry to make application, see post ¶ 190.

Application of payments made for discharge of mortgage, see Mortgages § 134.

Order of payment of claims against estates, see Estates of Decedents § 213.

Application of payment on mortgage, see Mortgages § 134.

Application of dividends to interest on claims against insolvent corporation, see Corporations ¶ 834.

Application of dividends on corporate claims in insolvency, see Corporations § 226.

Application of payments on building association loans, see Building Associations, § 12.

¶ 156. Where parties do not make a specific application of moneys paid, the law will apply it usually as the justice and equity of the case may require.—Youmans v. Heartt, 34 Mich. 397.

¶ 157. The proceeds of a chattel mortgage given to secure several notes held by one party may be applied exclusively to the payment of one of the notes, and need not be distributed.—Wood v. Callaghan, 61 Mich. 402.

§ 35. By creditor.

By debtor, see post § 36.

Notice of application to debtor, see post § 43.

Right to change or revoke application, see post § 44.

¶ 158. Where a debtor does not designate to what items a payment shall apply, the creditor may make the application at any time before suit is brought.—People for the use of C. H. Little Co. v. Grant, 139 Mich. 26.

¶ 159. In the absence of directions as to their application, payments made by a debtor to a creditor to whom several debts are owing, may be applied to either indebtedness.—Wood v. Genett, 120 Mich. 222.

¶ 160. Where an automobile dealer paid the freight on a machine shipped to him for repairs, in claiming a lien for the repairs so made he is entitled to apply a payment on account to the payment of the freight charges advanced.—Gardner v. Le Fevre, 180 Mich. 219.

¶ 161. In the absence of any direction from the debtor with respect to the application of a payment, the creditor may apply the payment upon whichever debt he pleases.—Blair v. Carpenter, 75 Mich. 167.

¶ 162. A., with a view to securing certain creditors, executed a chattel mortgage to B., assigning some accounts as collateral, and then gave a bill of sale of the accounts and the mortgaged property to C. The lat-

ter purchased B.'s mortgage, taking an assignment to D., who was interested with C. in the claims secured by the bill of sale. The accounts were turned over to C., who collected the same, and applied the amount upon his debt. In trover by D. against an officer who had seized the goods on attachment against A. subsequent to the several transfers, it was held that defendant had no cause to complain of the application made of the moneys so collected.—Hull v. Bernatz, 106 Mich. 551.

¶ 163. A discharged bankrupt having made occasional payments, both before and after his discharge, upon a running account with a creditor who had not had notice of the bankruptcy proceedings, and was not named as a creditor in the bankrupt's schedules, and having, furthermore, given no direction as to the application of the payments, of which those that were made while proceedings were pending and after the discharge exceeded the cost of the goods purchased during that time, it was held that the creditor might apply the payments to the items first due in the account.—Hill v Robbins, 22 Mich. 475.

¶ 164. A creditor cannot lawfully pay himself with the debtor's money without the debtor's consent, express or implied; and when the debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control of it is limited to the purpose declared.—Detroit, H. & S. W. R. Co. v. Smith, 50 Mich. 112.

§ 36. By debtor.

Notice of application to debtor, see post § 43.
By creditor, see ante § 35.

¶ 165. A debtor, upon paying money to his creditor, has a right to say on which one of several demands the payment shall be applied.—Thayer v. Denton, 4 Mich. 192.

¶ 166. A debtor when making a payment has the right to direct its application, and the creditor cannot refuse to apply it accordingly and credit it on some other account.—Michigan Air Line R. Co. v. Mellen, 44 Mich. 321.

¶ 167. A debtor owing two or more debts to a creditor, to whom he makes a payment, may direct its application.—Blair v. Carpenter, 75 Mich. 167.

¶ 168. Where a licensed saloon keeper, who is indebted to a brewing company, sells his license and fixtures to a third party under an agreement whereby part of the purchase price is to be held by the brewing company, first to indemnify the vendee for any loss he may suffer from selling without a proper license, and in case of no such loss to be applied to the payment of the indebtedness to the brewing company, the brewing company does not occupy the position of a stakeholder, the payment to it being on account of the purchase price going into the hands of the brewing company as the money of the vendor and not of the vendee, and the postponement of its application being a matter in which the vendee had no concern.—Kennedy v. Stimming, 192 Mich. 600.

¶ 169. By an agreement between plaintiff and defendant, plaintiff was entitled to collect all outstanding accounts incurred prior to June 30th, and defendant was entitled to all accounts thereafter. A third person sent a check to defendant. There was evidence that said person intended the check in payment of indebtedness incurred after June 30th, and that an indorsement on said check indicating the contrary had been written thereon after the check was returned to said third person. Held, the court properly instructed that plaintiff was entitled to credit for the amount of said check only if the jury found the indorsement was made thereon prior to its receipt by defendant.—Harper v. Concrete Pub. Co., 166 Mich. 429.

§ 37. Express directions or specific applications.

Application in order of creation or maturity of debt, see post § 38.

¶ 170. A payment expressly made on a particular assessment must be so applied by the collecting officer.—Fuller v. City of Grand Rapids, 40 Mich. 395.

¶ 171. A payment made on undisputed items cannot be construed as applying to a disputed item in the same bill so as to prevent a recovery.—Fish v. Adams, 37 Mich. 598.

¶ 172. The agent of accommodation indorsers to whom money was paid by the maker of a note for the purpose of taking up the same, was held not entitled to apply such payment upon the indorsers' indebtedness to himself.—McLellan v. Walsh, 99 Mich. 265.

¶ 173. Where it has been agreed between a son and his mother, to whom his certificate of membership in a mutual benefit association is payable, that the amount thereof, when received, shall be applied upon and shall pro tanto extinguish his indebtedness to her, she cannot, after his death when sued by his administrator for the proceeds of other policies held as security, deny that the indebtedness to be charged against them is diminished by the amount of such certificate since the plaintiff is not seeking to recover the proceeds of the policy but in-

sisting upon its application in accordance with the agreement.—Maybury v. Berkery, 102 Mich. 126.

¶ 174. Where property is given by a surety in consideration of his discharge from the debt, the principal is not entitled to be credited with the amount as so much paid on the debt.—Peer v. Kean, 14 Mich. 354.

§ 38. Application in order of creation or maturity of debt.

Principal or interest, see post § 39.
Secured or unsecured debt, see post § 40.
Several or joint debt, see post § 41.
Individual or firm debt, see post § 42.

¶ 175. Where a payment is entered as a credit to a general account and an account thereof rendered to the debtor, it constitutes an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.—People for the use of C. H. Little Co. v. Grant, 139 Mich. 26.

¶ 176. Where payments are made and credited generally upon an account, they will, in an action against a surety, be applied upon the indebtedness in the order of the creation of the several items.—R. L. Polk Printing Co. v. Smedley, 155 Mich. 249.

¶ 177. Payments made by one indebted for merchandise, without direction as to their application, and which are credited generally upon his account, will, in an action against a third party as surety for the payment of the purchase price of part only of the goods, be applied upon the indebtedness in the order of the creation of the several items thereof.—Grasser & Brand Brewing Co. v. Rogers, 112 Mich. 112.

¶ 178. In trover by the assignee of a chattel mortgage against an attaching creditor of the mortgagor, defendant cannot complain that moneys collected by plaintiff upon certain accounts assigned as collateral to the mortgage, instead of being credited thereon, were applied to the payment of other claims against the mortgagor, to secure which plaintiff held a second assignment of the accounts, executed prior to the levy.—Hull v. Bernatz, 106 Mich. 551.

¶ 179. On accounting by a mortgage trustee, who operated a mortgaged business and applied receipts, the applications should be charged as of the dates shown by his accounts, they being correct and honest, where the accounts have charges of money paid and also credits of money received and the moneys paid out were on interest bearing debts.—Pomeroy v. Noud, 145 Mich. 37.

§ 39. Principal or interest.

¶ 180. In an action upon a promissory note bearing interest at a usurious rate, contrary to Pub. Acts, 1891, No. 156, payments made generally will be deducted from the lawful debt, or the principal of the note.—Fretz v. Murray, 118 Mich. 302.

§ 40. Secured or unsecured debt.

¶ 181. A creditor having a secured and an unsecured debt may, in the absence of any direction by the debtor, apply a payment upon the unsecured debt.—Wood v. Callaghan, 61 Mich. 402.

¶ 182. Where one has given an undertaking that, if the person to whom it is addressed will let the bearer have a bill of goods, he will see the amount paid in a reasonable length of time, and the goods are delivered accordingly, the first moneys afterward received by the creditor on the debtor's general account must be applied on the purchase under this guaranty.—Gard v. Stevens, 12 Mich. 292.

¶ 183. A mortgagee is not bound to apply on the mortgage money received from the mortgagor, if he has other occasions to use or apply it; nor would he have any right to apply it on the mortgage before its maturity.—Richardson v. Coddington, 49 Mich. 1.

¶ 184. A trustee, to whom a chattel mortgage had been executed to secure certain of the mortgagor's creditors, took in payment for a part of the mortgaged property, which he had sold to certain of the beneficiaries, their promissory note. He afterward turned out the note to an unsecured creditor, who had recovered a judgment for less than the amount of the note against the trustee as garnishee of the mortgagor. This was done under an agreement that the avails of the note should be applied, so far as necessary, in satisfaction of said judgment. The note was sued in the name of the trustee, a judgment recovered, and the amount thereof paid into court, whereupon one of the makers filed a bill for an accounting, and to protect his interest in the surplus. Held, that the unsecured creditor, to whom the note was turned out, had the right the same as the trustee to take out of the proceeds of the judgment rendered thereon the costs and expenses, including attorney fees incurred in collecting said note.—Fetters v. Atkinson, 102 Mich. 485.

§ 41. Several or joint debt.

¶ 185. Where the application has been once made upon a joint debt, it operates to extinguish so much of the debt, and the application cannot be subsequently changed by the concurrent act of the creditor and paying debtor, and the claim thus revived without the consent of the co-debtor.—Thayer v. Denton, 4 Mich. 192.

§ 42. Individual or firm obligation.

¶ 186. Where a certain payment made by defendant to a third party upon an order

signed by one of the plaintiffs, partners, was paid on a bill due the drawer of the order, or on the firm account, was a question to be submitted to the jury.—Yerkes v. Norris, 90 Mich. 234.

¶ 187. Where the owner of a building fails to see that payments made to the principal contractor are properly applied by a subcontractor in paying for materials furnished for the building the creditor of the subcontractor may, at his election, apply the payment received upon another debt.—Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429.

¶ 188. H., having claims against two firms, of each of which B. was a member, took B.'s notes in part payment, indorsed by a third firm of which B. was also a member, and B. having afterwards died, H. presented his claim against the estate of B., crediting the amount of these notes as payment so as to balance one of the accounts, but at the same time submitting a written statement that in presenting his claim as he did he did not waive any rights against the survivors of either of the firms. Held, that considering the manner of submitting this claim against the estate in connection with such disclaimer, it is evident that H. had no intention of making, and did not thereby make, any application of the payment made by the notes.—Youmans v. Heartt, 34 Mich. 397.

¶ 189. A trial court having so distributed a payment by notes upon an indebtedness of two firms respectively as resulted in a pro rata application upon each, it cannot be said that any error was thereby committed to the prejudice of the survivors of either of said firms.—Youmans v. Heartt, 34 Mich. 397.

§ 43. Notice of application to debtor.

¶ 190. It seems that the mere entry of a credit to a particular account is not a conclusive application of the payment in the absence of notice to the debtor.—People for the use of C. H. Little Co. v. Grant, 139 Mich. 26.

§ 44. Changing or revoking application.

¶ 191. Where debits and credits have been made absolutely, both parties consenting, credits cannot afterward be shifted for the purpose of confining payments to unsecured liabilities.—McMaster v. Merrick, 41 Mich. 505.

IV. PAYING OVER OR REPAYING DEPOSITS.

§ 45. In general.

Repayment of money paid into court where done under mistake as to debt, see ante ¶ 155.
Notice and protection of attorney's lien before paying money out of control of court, see Attorney § 49.
Method of paying out money deposited in court, see 1916 C. C. Rule 62, § 2.

¶ 192. Money paid into court belongs to the plaintiff absolutely; the defendant cannot reclaim it though paid by mistake. So much of the plaintiff's claim is considered as stricken out of the declaration, and he can only recover the balance, if able to prove any; if not, he will be liable to all costs in the further prosecution of the suit.—Phelps v. Town, 14 Mich. 374.

¶ 193. Where in a suit in a justice's court for unliquidated damages the defendant has made a tender of a sum of money on the trial, and on its being refused has paid it into court, the acceptance of this money from the justice by the plaintiffs after judgment and appeal is not a bar to a recovery of a larger sum under the pending issue upon the appeal on the basis of an accepted tender in court; and where by the rulings the defendant is allowed the benefit of the money so received by plaintiffs as payment in the claim in suit, he is not damnified.—McKercher v. Curtis, 35 Mich. 478.

¶ 194. Receipt of money paid into court, unless accompanied by the condition that, if taken, it must be taken in full satisfaction of the claim, does not bar the right to prosecute the suit for the balance, as by the payment into court the defendant admits his liability to that amount and it belongs to plaintiff and may at any time be withdrawn by him.—Cooley v. Kinney, 119 Mich. 377.

¶ 195. Complainants brought a combined bill in aid of execution and creditor's bill. In the law suit on promissory notes, two of the defendants, who were defendants in the equity suit, paid into court in behalf of another defendant some two hundred dollars as representing said other defendant's pro rata liability, on condition that the money should be accepted by plaintiffs in the law suit in full of their claim against said other defendant. It was not paid in in pursuance of any order of the court. The court did not recognize any jurisdiction over the money, and the plaintiffs in the law suit, who were the complainants in the equity suit, did not accept the terms offered. Held, complainants were not in the equity suit entitled to said two hundred dollars.—Rohrabacher v. Walsh, 170 Mich. 59.

V. PLEADING AND PROOF OF PAYMENT, TENDER OR DEPOSITS.

§ 46. In general.

Issues and proof under plea of general issue, see post § 47.

Burden of proof as to payment or tender, see post § 48.
Presumptions in general, see post §§ 49, 50.
Presumptions from payment as to loan or discharge, see post § 51.
Admissibility of evidence, see post § 52.
Weight and sufficiency of evidence, see post § 53.
Questions of law and fact, see post § 54.
Instructions and directing verdict, see post § 55.
Action and evidence for recovery of illegal or mistaken payments, see post § 67.
Proof of payment of taxes, see Taxes, VIII.
Mode of pleading payment occurring after bill filed for mortgage accounting, see Equity ¶ 565.
Judgment as bar of claims for payments which might have been asserted, see Former Adjudication § 51.
Party entitled to sue and right of action for money improperly paid out of or into county treasury, see Counties § 54.

§ 47. Issues and proof under plea of general issue.

Issues and proof generally, see Pleading, IX.
Necessity for special notice of defense where payment is relied upon, see 1916 C. C. Rule 23, § 3.

¶ 196. Payment may be shown under a plea of the general issue.—Cleveland v. Rothschild, 132 Mich. 625.

¶ 197. Under the general issue in assumpsit the defense of payment can always be made.—Olcott v. Hanson, 12 Mich. 452; Burt v. Olcott, 33 Mich. 178; Huntoon v. Russell, 41 Mich. 316; Brennan v. Tietsort, 49 Mich. 397.

¶ 198. Payment by substitution of the debtor's debtor with the creditor's consent is a matter of defense and open to reply.—Glover v. First Universalist Parish of Dowagiac, 48 Mich. 595.

¶ 199. Quære, whether payment can be shown under the general issue under circuit court rule 7, subd. B.—R. K. Carter & Co. v. Weber, 138 Mich. 576.

§ 48. Burden of proof as to payment or tender.

Burden of proof and presumptions as to payment of mortgage, see Mortgages §§ 152, 153.

¶ 200. The burden of showing payment is upon the party who claims it has been made.—Hood v. Olin, 80 Mich. 296.

¶ 201. The burden of proof of payment is on the debtor.—Adams v. Field, 25 Mich. 16; McCabe v. Shaver, 69 Mich. 25.

¶ 202. The burden of proving payment of a debt is upon the debtor when in an action to recover upon it the debt has been established by competent evidence.—Smith's Appeal, 52 Mich. 415; Baldwin v. Clock, 68 Mich. 201.

¶ 203. The burden of proving payments is upon a defendant in foreclosure.—Coon v. Bouchard, 74 Mich. 486.

¶ 204. The burden of proof to show payment is upon the party who claims it has been made.—Hood v. Olin, 80 Mich. 296; Doolittle v. Gavagan, 74 Mich. 11; Coon v. Bouchard, 74 Mich. 486.

¶ 205. Where the payment of an admitted indebtedness is disputed, the burden of proof is on defendant to establish the payment; but where the payment is admitted, and suit is for the amount of it on the ground that it was made in spurious bills, the burden is on plaintiff to prove the character of the bills.—Atwood v. Cornwall, 25 Mich. 142.

¶ 206. Where complainant mortgagor brings a bill to compel defendant mortgagee to credit certain payments on the mortgage and to determine the balance due thereon, the burden of proving that he made the alleged payments is on complainant.—Sager v. Hartshorn, 163 Mich. 578.

¶ 207. The rule that where a defendant in an action for money had and received admits the receipt of the money, as agent for plaintiff, but claims to have paid it over to plaintiff, the burden is on him to prove such payment, does not apply, where he has expended money on behalf of the plaintiff company and taken credit therefor according to the usual custom in its business.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 208. Where defendant in an action for money had and received admits the receipt of the money, but claims to have paid it over to plaintiff, the burden is not on plaintiff to prove that he had not received it.—Liesemer v. Burg, 106 Mich. 124.

¶ 209. The burden of showing payment for goods admitted to have been accepted and not paid for at time of delivery is upon him who asserts subsequent payment.—Doolittle v. Gavagan, 74 Mich. 11.

¶ 210. In a proceeding against an estate to recover the amount of a note given by the decedent the fact that since the date of the note the payee has received from decedent checks enough to pay it does not of itself establish the payment of this particular note, nor does it even place upon the claimant the burden of showing that it was not paid.—Smith's Appeal, 52 Mich. 415.

¶ 211. The rule that on foreclosure defendant has the burden of showing that the

debt has been paid will be relaxed where the debtor has confided in the creditor and placed himself in his hands, and for ten years neither debtor nor creditor has taken any notice of the debt, and the evidence relating to it has become uncertain and conflicting.—Lashbrooks v. Hatheway, 52 Mich. 124.

¶ 212. In a foreclosure suit on a mortgage the burden is on the mortgagor to prove payment of the mortgage.—Chamberlain v. O'Leary, 161 Mich. 670.

¶ 213. Receipt stubs, purporting to be signed by the accountant but which he denies signing, are thereby put in issue on an accounting, so as to leave the burden on the party asserting the payment evidenced. —University of Michigan v. Rose, 45 Mich. 284.

¶ 214. A defendant in foreclosure having other unsecured loans has the burden to prove an asserted payment, but the burden is upon the complainant to show upon which debt he applied the payment.—Van Sceiver v. King, 176 Mich. 605.

§ 49. Presumptions in general.

From lapse of time, see post § 50.
Presumption from payment as to loan or discharge, see post § 51.
Presumption of payment of taxes, see Taxes, VIII.

¶ 215. A note and mortgage given for an existing indebtedness are presumed to have been taken as security and not as payment, in the absence of a contrary showing.—Dempsey v. Pforzheimer, 86 Mich. 652.

¶ 216. The law does not raise a presumption of nonpayment, but of payment when due, unless the contrary is shown.—Bailey v. Gould, W. 478; Martin v. McReynolds, 6 Mich. 70.

¶ 217. On a bill to foreclose a mortgage given to secure a note, it was held that the law did not raise a presumption of nonpayment, but of payment, when due, unless the contrary was shown by the production of the note, or evidence accounting for it.—Bailey v. Gould, W. 478; George v. Ludlow, 66 Mich. 176.

¶ 218. From the payment or delivery of money by one person to another a loan is not presumed, but rather the payment of a debt.—Downey v. Andrus, 43 Mich. 65.

¶ 219. Where it is found that a payment was made on a mortgage it cannot be presumed, in the absence of any finding as to the date, that it was not made at or near the time when the mortgage fell due.—Albright v. Cobb, 84 Mich. 316.

¶ 220. The payment by an assured of the premiums on a policy of insurance will be presumed until the contrary is proven.—Rousseau v. Brotherhood of American Yeomen, 186 Mich. 101.

¶ 221. Where a question of payment is in issue, and it appears that a credit was given upon the day a check was drawn, and that such credit was in excess of the amount of the check, there is, in the absence of testimony tending to prove that the amount of the check was in addition to the amount of the credit, no reason for supposing that the check was not a portion of the credit given.—People ex rel. Reynolds v. Banhagel, 151 Mich. 40.

¶ 221a. There is no presumption that taxes have been paid.—Stevens, Auditor-General v. Lake George & M. R. R. Co., 82 Mich. 426.

§ 50. ——From lapse of time.

¶ 222. Presumption of payment can never arise from lapse of time alone, short of the period of limitation fixed by law.—Adair v. Adair, 5 Mich. 204.

¶ 223. After a lapse of thirty years it is presumed that an executrix paid over to and settled with the heirs money belonging to them as proceeds of lands.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

¶ 224. The equitable presumption of payment from lapse of time differs from a limitation of an action at law, in that it is not an absolute bar to the remedy.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

¶ 225. Real estate was devised in trust to be sold under power of attorney in a will, and the balance of the proceeds from the sale after paying certain debts was to be paid to complainant. An absolute deed was made conveying the land, and complainant who at the time was over twenty-one years of age signed as a witness. Held, that an unexplained delay of twenty-one years by complainant before attempting to enforce her claim for a part of the proceeds of the sale gives rise to a presumption of payment.—Longe v. Kinney, 171 Mich. 312.

¶ 226. Payment of a demand note is not presumed from the neglect to present it until time enough has passed to outlaw it. —Smith's Appeal, 52 Mich. 415.

§ 51. Presumption from payment as to loan or discharge.

Evidence in garnishment as to payment of debt before service, see also Garnishment §§ 79, 80.
Inadmissibility of presumption of loan from receipt of checks where parties present might testify positively, see Evidence ¶ 190.

¶ 227. A cancelled check standing alone imports a payment and not a loan to the payee.—Bernard v. Fee's Estate, 129 Mich. 429.

¶ 228. A delivery of money from one person to another imports a payment rather than a loan to be repaid.—Downey v. Andrus, 43 Mich. 65.

§ 52. Admissibility of evidence.

Weight and sufficiency of evidence, see post § 53.

Evidence as to payment of mortgage, see Mortgages § 154.

Admissibility of custom to pay in full as evidence of payment to plaintiff's intestate, see Customs ¶ 41.

Parol evidence to vary, explain or supply terms and details of payment, see Evidence §§ 176, 177.

Parol proof of payment of legacy, see Evidence ¶ 672.

Best and secondary evidence of payments, see Evidence § 115.

Parol evidence to contradict or explain receipts, see Evidence §§ 190, 191.

Parol evidence that one written obligation was payment of another, see Evidence ¶ 821.

Admissibility of declaration by deceased debtor that note is outstanding, see also Evidence ¶ 1968.

Payment of claim as an admission, see Evidence § 392.

Warrants as best evidence of payment by school district, see Evidence § 130.

Letter of transmittal as res gestæ of payment, see Evidence ¶ 2501.

Rebuttal of evidence of payment by showing finances, see also Evidence ¶ 451.

Admissibility under plea of payment or under general issue of payments made after action begun, see Pleading § 136.

¶ 229. Testimony having a tendency to prove payment is admissibility.—Hood v. Olin, 80 Mich. 296; Doolittle v. Gavagan, 74 Mich. 11; Coon v. Bouchard, 74 Mich. 486.

¶ 230. In an action by a father against the estate of his son-in-law to recover on a claim for money loaned to be used by deceased and his wife in the purchase of property held that the testimony of one of the vendors that on a certain date when the deal was closed claimant gave him a check for the amount sued for in the presence of deceased was admissible as evidence of payment.—In re Davis' Estate, 200 Mich. 500.

¶ 231. In an action for goods sold defendants claiming that the amount had been paid by check, it is not error to admit in evidence the check stamped "Paid" by the bank on which drawn, the stamp showing no date, though there was no endorsement thereon, it appearing that the bank had paid other checks to plaintiff without requiring the endorsement of the payees.—Baumgardner v. Henry, 131 Mich. 240.

¶ 232. Where a widow claimed payment of a note made by her deceased husband, whose attitude toward her had been hostile for a long time prior to his death, it is permissible to go into transactions and communications of the parties, his necessities, her means of lending and their relations with each other.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 233. Where, in an action against a township treasurer, and upon his bond, the treasurer had testified to a certain order material to the issue, and stated that he thought that he had paid it through a bank, the cashier of the bank, in rebuttal, may be examined to show what arrangement had been made whereby money was placed by the treasurer in the bank, and orders drawn upon the account, and also to show whether the order in question was so paid.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 234. Where in a suit by a surviving partner defendant claims to have paid the account sued upon to the deceased partner, and is allowed in support of such claim to make proof of the purchase of a draft by such partner, at about the time of such payment, in the city where defendant resided, payable to the firm, the book from which such partner reported his collections to the firm on his return from his trip, and which did not show the receipt of said payment from defendant, should be received in evidence on rebuttal.—Doolittle v. Gavagan, 74 Mich. 11.

¶ 235. A mere receipt for part payment of the purchase-price of land orally sold, stating such price, describing the land, etc., is not a written agreement of sale excluding oral proof of the bargain in an action to recover the amount paid on the theory of a rescission.—Bailey v. Cornell, 66 Mich. 107.

¶ 235a. The fact of payment of money may always be proved by parol, whether a receipt was taken for it at the time or not; so of the payment of taxes.—Hammond v. Hannin, 21 Mich. 374.

§ 53. Weight and sufficiency of evidence.

Evidence of gift of balance by passing receipt in full, see Gifts ¶ 122.

Sufficiency of evidence of payment or receipt of money in prosecution for embezzlement, see Indictment § 324e.

Bank stamp on paper as evidence of payment, see Evidence ¶ 2604.

Inconclusiveness in evidence of receipts of payment, see Evidence § 603.

Conveyance of realty by decedent to creditor as prima facie evidence of payment, see Estates of Decedents ¶¶ 651, 652, 685.

Record of previous suit admissible in chancery to show tender though not pleaded, see Former Adjudication ¶ 469.
Evidence as to part payment to toll limitations, see Limitations § 112.

¶ 236. In an action by the seller to recover on a contract for the purchase of steel, where defendants claimed credit for labor in tagging the pieces in a letter sending check for the balance, after deducting the amount of its claim, a letter in reply from plaintiff asking defendant to forward bills for the charges so that they could be passed upon and credited, if correct, held not to constitute an admission that the check was received as payment.—Trussed Concrete Steel Co. v. Rosema, 198 Mich. 160.

¶ 237. In a suit to foreclose a mortgage, the mortgagor, to prove a certain payment of $125, introduced evidence of the certificate of deposit which said mortgagor testified was given as said payment; put in the testimony of the banker touching the circumstances of how and where he found said certificate; introduced testimony of the mortgagor's conversation with the heir of the deceased mortgagee after his death; put in the testimony of a third person with respect to the conversation of the mortgagor with the mortgagee in which the former asserted his claim of payment; and introduced the testimony of the mortgagor's wife as to how the mortgagor raised the money for said payment. All said evidence indicated that the mortgagor had made the payment in question. Held, he was entitled to be credited therefor on the mortgage.—Norris v. Ryno, 169 Mich. 193.

¶ 238. Testimony indicating a simple tender is overcome by cross-examination of the witness showing that it was accompanied by a desire and demand for the transfer and indorsement of commercial paper not collateral thereto.—Schmittdiel v. Moore, 101 Mich. 590.

¶ 239. Evidence consisting of book entries showing a balance as of a certain date, of debits and credits thereafter based on sales and payments, and of the admission of the buyer that he did not pay for goods until payments came due and the value of the goods sold, held to show an unpaid balance on an open account for goods sold and delivered.—Armstrong v. Rorick, 142 Mich. 80.

¶ 240. Evidence held not to have any tendency to show that certain stock was transferred in payment of the notes in suit where the notes representing the debt were retained with the stock claimed to have been given in payment.—Webber v. Turner, 94 Mich. 589.

¶ 241. Evidence reviewed, and held to prove that a mortgage was paid to a bank in cash, rather than by a surrender of certificates of deposit where two witnesses testified to getting the money on the certificate and then paying it over, but the bank clerks testified that the certificate would not have been stamped "Paid" as it was unless so marked in a register as well, and that the books would not have balanced, as they did, had it been paid.—Wallace v. Stone, 107 Mich. 190.

¶ 242. A person took a conveyance of land from his mother, in consideration of which he was to support her for the rest of her life. But he shifted the burden upon a debtor whose mortgage he held, bargaining to allow him upon it a dollar a week, which was to be increased to a reasonable compensation when she became more infirm, as she did two years later. The mortgage was to secure about $700, due in four years. For seven years the creditor indorsed $50 a year upon the mortgage; for the next four years $75, and for the next three $100. It was shown that after the mother became infirm from three to five dollars a week would have been a reasonable compensation for her board and care, and after she left the debtor's house her son in fact paid three dollars a week therefor. Held, that a bill to foreclose the mortgage should be dismissed and the mortgage discharged as fully paid.—Gallup v. Jackson, 47 Mich. 475.

¶ 243. A conveyance of property by a promisor to pay for services to the promisee, who has performed such services, is prima facie a payment and not a gift.—In re McNamara's Estate, 148 Mich. 346.

¶ 244. Where there was a conflict of testimony as to whether mortgages sought to be foreclosed had been drawn into a settlement and paid, the fact that after a certain meeting which was conceded to have taken place for the purpose of a settlement the mortgagee, though a money-lender of moderate means, never sought another settlement, and neglected for seven years to enforce his securities, but stood by and saw the premises sold, and the title warranted as unincumbered, without asserting any claim, was held to indicate payment.—Shattuck v. Foster, 32 Mich. 427.

¶ 245. A mortgagor who claims to have made a large payment to a deceased person shortly before the latter's death, but shows no voucher, indorsement or entry of the payment by the deceased, should produce very convincing proof to sustain his position.—Wakeman v. Akey, 29 Mich. 308.

¶ 246. The evidence held to sustain the case made by the bill, that the mortgage held by defendant, and which he was seeking to foreclose by advertisement, had been fully paid and satisfied.—Hanchett v. McKelvey, 32 Mich. 38.

¶ 247. The lien of a mortgage is not discharged by an alleged tender of payment, where the evidence in support thereof is unsatisfactory, and it appears that the mortgagee was not only willing to accept and anxious to obtain payment, but made every reasonable effort to get it.—Hayward v. Chase, 181 Mich. 614.

¶ 248. Proof that payments were made by the mortgagor to the mortgagee after a time certain, that the mortgagor was frugal and had income sufficient with which to pay, etc., is overcome by proof that the net income was too small to admit of such payments, and that the payments were in fact less than supposed, and that an indorsement of payment claimed to be too little was exactly what was paid.—Morris v. Anderson, 142 Mich. 279.

¶ 249. Indorsements upon notes, unexplained, prove payment, and, whether explained or not, prove an extinguishment and release of liability to their extent as between the parties, unless it be shown that they were not intended so to operate.—Morris v. Morris, 5 Mich. 171.

¶ 250. An attempt by the holder of a certificate of deposit to obtain payment of it before it falls due is not inconsistent with its ownership by somebody else, and hence affords no evidence that it was taken by him as a payment.—Burrows v. Bangs, 34 Mich. 304.

¶ 251. In an action for money had and received upon a draft, evidence that defendant was present when another transferred the draft and received the money upon it was held to authorize the inference of payment of the amount to defendant by such other person.—Bullard v. Hascall, 25 Mich. 132.

¶ 252. An administrator brought suit for an accounting against one who had made sales for his decedent. A note had been taken on one of the sales upon which a payment of $528 was indorsed. It was found, but only by the aid of a letter written by decedent, that this was really for merchandise turned over to a creditor of his; but as the letter mentioned a smaller sum it was held that it could not be given effect beyond its terms, and that only the smaller sum could be charged against the estate.—Thatcher v. Hayes, 54 Mich. 184.

¶ 253. Payment of consideration for a deed by assuming and discharging a note then owing by the grantor, is not shown by testimony that grantor asked the holder of the note about two years thereafter if she wanted the money, telling her that if she did, grantee, who was grantor's son, would like to borrow it, and that this transaction was consummated by taking up grantor's note and exchanging for it the note of the son then held by the grantor; where this testimony is corroborated by proof of a declaration by the son at about that time and is opposed only by proof of a declaration of the grantor that the son gave his note and took up that of grantor, the grantor and holder of the note both being dead at time of trial.—Mosher v. Mosher, 104 Mich. 551.

¶ 254. The maker's possession of a note is not evidence of payment in an action by him to recover back money claimed to have been paid on it.—Buckley v. Saxe, 10 Mich. 328.

¶ 255. Where, to prove that he had paid money on a bet, plaintiff produced a note he had given for the same bet, held that this alone did not prove the payment of money on the bet.—Buckley v. Saxe, 10 Mich. 328.

¶ 256. Proof of payment by defendant of orders drawn by plaintiffs upon him in favor of third persons for articles sold him is sufficient proof of payment to plaintiffs; such payment being in law a payment to plaintiffs.—Webber v. Howe, 36 Mich. 150.

¶ 257. In an action for services testified to as rendered by plaintiff a year after the date of a receipt for payment for a specific service rendered, the jury is not authorized to regard such receipt as covering the late account.—Baldwin v. Clock, 68 Mich. 201.

¶ 258. A written order directing the drawee to pay what money he has of the drawer's, without specifying any sum, is not of itself proof in the hands of the drawee of the payment of any sum, but only of authority to pay to the person named in the order.—Beardslee v. Horton, 3 Mich. 560.

¶ 259. Payment of a bill should be shown by the person who paid it, or by someone who knew the fact, and not by testimony that the witness had caused it to be paid.—Bulen v. Granger, 56 Mich. 207.

¶ 260. A man who had a mortgage on a house went to live with its owner, and after his death the latter made a claim against his estate for the value of his board and for services. The claimant gave evidence tending to show that decedent had been boarding out his mortgage and had finally released it. Held that, if the jury took that view of the case, the estate was entitled to have the amount of the mortgage deducted from the claim.—Ludlow v. Pearl's Estate, 55 Mich. 312.

¶ 261. Complainant mortgagor brought a bill to compel defendant mortgagee to credit certain payments on the mortgage. The payments claimed to have been made were not indorsed on the note or the mortgage,

and the receipts put in evidence by complainant did not indicate what they were given for. Complainant's financial condition and other circumstances indicated great doubt about the truth of his testimony as to making the alleged payments. Held, the decree finding said payments had been made on the mortgage should be reversed.—Sager v. Hartshorn, 163 Mich. 578.

¶ 262. Execution was levied on an express package of money sent by the judgment debtor to an agent of his firm to repay advances made by the agent in the interest of principals. The agent brought replevin against the sheriff. Held, (1) that as between these parties the question of defendant's right to seize money in the hands of the express company was immaterial; (2) that, if the money was mutually meant as payment, plaintiff could recover, but if it was meant to be used by the agent in the principal's business he could not; (3) that defendant was not concluded by the concurrent testimony of the consignor and the consignee that it was a payment, but was at liberty to show the contrary if he could. Nor was the jury bound by plaintiff's version.—Nicholson v. Dyer, 45 Mich. 610.

§ 54. Questions of law and fact.

Questions of fact as to payments to attorney, see also Attorney ¶ 163.

¶ 263. An administrator in remitting funds of the estate to an heir bought a draft in his individual name. The bank failed, but the heir receipted for the money before the draft was dishonored. The administrator took back the draft and wrote acknowledging his liability to the heir. Held that, despite the receipt, the court was in error in holding there was a payment as a matter of law.—In re Curtis' Estate, 162 Mich. 47.

¶ 264. The mere taking of notes is no evidence that they were received in payment, and whether they were so received is for the jury under all the circumstances of the case.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 265. Whether or not an order on a third person for the amount of a debt was accepted as payment is properly submitted to the jury as a question of fact.—Bond v. McMahon, 94 Mich. 557.

¶ 266. In an action to enforce a lien the question whether notes or acceptances received on a contract for the manufacture of shingles were taken as payment and discharged the lien of the contractor, held to be a question for the jury, whose finding was conclusive.—Craddock v. Dwight, 85 Mich. 587.

¶ 267. Plaintiff bought, on instalments, a piano for his wife, the daughter of defendant, and defendant made payments on the contract. In a suit by plaintiff for services rendered, in which defendant claimed a set-off, defendant brought out on cross-examination of the plaintiff, that the plaintiff had given seventy-five dollars to his wife to pay on the contract. There was other evidence that, at a former trial, a copy of the contract which was then introduced in evidence had a payment of seventy-five dollars indorsed on it. Held, there was material evidence to go to the jury on the question whether plaintiff had paid seventy-five dollars on the piano contract.—Middlebrook v. Slocum, 152 Mich. 286.

¶ 268. The payee in a check is not to be assumed to have received payment thereon if it is not shown to be indorsed; the fact of payment is for a jury.—Smith's Appeal, 52 Mich. 415.

¶ 269. Where goods were sold and securities, executed by third persons, were received for the purchase price, one of which the vendor collected, and the other offered to return, it was held, in an action brought by the vendor for goods sold, that whether the securities were received by him in payment for the goods sold was a question for the jury, and it was erroneous for the court to exclude evidence offered by the plaintiff from which it might be inferred that there was no such agreement.—Gardner v. Gorham, 1 D. 507.

¶ 270. Where the undisputed testimony is that it was agreed that the price of goods bought by plaintiff of defendant should be applied upon the claim in suit, the question of application should not be left to the jury, even though there is some evidence that defendant subsequently assumed to make the application upon another account.—Gillett v. Knowles, 97 Mich. 77.

¶ 271. Defendant mortgaged premises to plaintiff with a provision authorizing plaintiff to collect the rent and apply same in reduction of the mortgage. There were statements from plaintiff from time to time showing the balance due on the debt. Later defendant conveyed the premises to plaintiff and at the trial testified that the conveyance was in discharge of the debt. The consideration named in said conveyance was larger than the balance due on the debt. Defendant in a suit in assumpsit sought to recoup for unpaid rent. Held, the court properly refused to hold as a matter of law that the rent was unpaid.—Trudeau v. Boivin, 164 Mich. 665.

§ 55. Instructions and directing verdict.

Instruction as to payment by check erroneous as not supported by evidence, see also Instructions ¶ 323.

¶ 272. A debtor claimed to have paid a note and then destroyed it. His creditor said he destroyed it without paying. The judge thought the burden of proof, if any,

was on the debtor, but charged the jury to determine the question of veracity in view of all the facts. This ruling was approved.—Marvin v. Newman, 39 Mich. 114.

¶ 273. On an issue whether a note was genuine and had been paid, an instruction that the fact that defendant, at a specified time four years before the trial, took $208 from his house, and soon after returned without the money and with a $200 note given to his mother, plaintiff's intestate, was evidence of its payment, was properly modified by stating that this would be true if in fact the jury should "believe that he did so," there being evidence that the $200 note produced by defendant as the same note was freshly written and possibly spurious.—Schulz v. Schulz, 113 Mich. 502.

¶ 274. Where the assignment of a partnership interest recites that "the party of the first part, for and in consideration of the sum of $240, agrees to, and does hereby, sell, assign," etc., and the question is whether the price was not paid at the time of the transfer, it is error to charge that the writing is the only evidence to be considered, and that the law implies from it a promise to pay; the question is one for parol proof, and the writing, standing alone, is entitled to be construed rather as a recital of payment than a promise.—McLouth v. Dibble, 31 Mich. 68.

¶ 275. In a case where no facts were in proof upon which a jury could be asked to find a tender essential, a discussion by the judge to the jury as to the requisites of a sufficient tender would be inappropriate, as having a misleading tendency as to the real point in issue, and as likely to impress their minds with the belief that in the opinion of the judge a tender might be necessary on the facts in proof.—Lacy v. Wilson, 24 Mich. 479.

¶ 276. In an action on a claim against an estate for services rendered for the deceased, it is not error to instruct that a receipt in full may be cast aside if the jury believe that it was given on the request of the deceased to enable him to obtain the signature of his wife who would not consent to any allowance on the purchase price of land sold by the deceased to the claimant and that the deceased promised payment of the claim in full on his death.—Van Slambrook v. Little's Estate, 127 Mich. 61.

¶ 277. A charge is not objectionable as treating "settlements" and "payments" as synonymous, where in its entirety they are used in a distinctive sense and in connection with the word "payment" the court speaks of the full knowledge of the payer as an element in determining whether it was to be a final discharge of the transaction covered.—Lyon v. Watson, 109 Mich. 390.

¶ 278. In an action for material and labor, where it was undisputed that a certain payment of $500 had been made, an instruction to find for the plaintiff if such payment had been made prior to the accrual of the charges specified in the bill of particulars was held not erroneous as treating the $500 payment as being a disputed fact.—Smaltz v. Newhof, 178 Mich. 500.

VI. RECOVERY OF ILLEGAL OR MISTAKEN PAYMENTS.

§ 56. In general; voluntary payment.

Payment under protest, see post § 57.
Payment under mistake of fact, see post § 58.
Payment induced by fraud or misrepresentation, see post § 59.
Payment due to mistake of law, see post § 60.
Payment under exigency or to avoid threatened loss or penalty, see post § 61.
Usury voluntarily paid, see post § 62.
Payments under illegal, immoral or criminal contracts, see post § 63.
Payment under void contracts or in violation of statutes of frauds, see post § 64.
Excessive payment entitling payer to recovery, see post § 65.
Payment by municipalities or public officers, see post § 66.
Actions and evidence for recovery, see post § 67.
Recovery of taxes paid, see Taxes, VIII.
Right of joint obligor or debtor to contribution for payments made, see Indemnity, § 13 et seq.
Money had and received to use as secret profits or receipts of agents or persons in fiduciary relation, see Implied Contracts § 14.
Money paid to use or benefit, see Implied Contracts § 16.
Equitable jurisdiction to compel representative to repay funds improvidently paid out, see Estates of Decedents ¶ 49.
Recovery of price on renouncing subscription for corporate stock, see Corporations § 60.
Recovery of excessive or mistaken payment for insurance assessment or premium, see Insurance § 95.
Voluntariness of tax payments, see Taxes § 206.

¶ 279. A voluntary payment cannot be recovered back.—Tompkins v. Hollister, 60 Mich. 485.

¶ 280. One cannot ordinarily sue to recover back money voluntarily paid upon a debt.—Brennan v. Tietsort, 49 Mich. 397.

¶ 281. A voluntary payment made with full knowledge of all the facts, though with a protest as to the justness of the claim, cannot be recovered back.—Copas v. Anglo-American Provision Co., 73 Mich. 541.

¶ 282. A voluntary payment cannot be recovered back; but such a payment is one made with full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the payee's part, or duress of the payor's person or goods.—Pingree v. Mutual Gas Co., 107 Mich. 156.

¶ 283. Payments of premiums by an insured on a life policy are voluntary, where the insured is during all the period insured and has the benefits of the policy, and they cannot be recovered back.—Warren v. Federal Life Ins. Co., 198 Mich. 342.

§ 57. Payment under protest.

Payment under exigency or to avoid threatened loss, see post § 61.

Payment of drain assessments under protest and refundment and action for refund, see Drains §§ 79, 80.

¶ 284. Payment made under protest does not change a voluntary into an involuntary payment.—Warren v. Federal Life Ins. Co., 198 Mich. 342.

¶ 285. If in paying at a bank a draft accepted by him one falls into a dispute with the teller as to the delivery of a ten-dollar bill needed to complete the payment, and thereafter pays $10 more in order to get the draft, protesting that the bank wrongfully has $10 of his money, such payment is not voluntary, and may be recovered, the burden being on plaintiff to prove the previous payment.—McCabe v. Shaver, 69 Mich. 25.

¶ 286. The amount of an attorney fee stipulated in the mortgage was paid under protest in order to effect redemption from a statutory foreclosure. Held, that it could be recovered back from the mortgagee to whom the register had paid it over.—Vosburgh v. Lay, 45 Mich. 455.

¶ 287. An attorney fee paid under protest on redeeming from a statutory foreclosure may be recovered back.—Vosburgh v. Lay, 45 Mich. 455.

§ 58. Payment under mistake of fact.

Payments induced by misrepresentation of facts, see post § 59.

Payment due to mistake of law, see post § 60.

Right to recover money paid into court under a mistake as to indebtedness, see ante ¶ 155.

Liability of depositary of money to bailor on ground of mistake in paying it out, see Bailments ¶ 51.

Right to recover money paid upon claim made in good faith although afterwards it proves baseless, see Mistake ¶ 4.

Burden of proof on mistaken overpayment, see also Mistake ¶¶ 35, 38.

General law of mistake, see Mistake.

¶ 288. Money paid under a mistake of material facts is recoverable.—Pingree v. Mutual Gas Co., 107 Mich. 156.

¶ 289. A payment made under a mistake of fact is not voluntary.—Detroit & Northern Michigan Bldg. & Loan Ass'n v. Oram, 200 Mich. 485.

¶ 290. The theory upon which the law permits a recovery for money paid by mistake is that the same was received either by mistake or with knowledge of the overpayment, in which case the law raises an implied promise to repay.—Kennedy v. Murphy Iron Works, 91 Mich. 500.

¶ 291. Money voluntarily paid in the reasonable belief that it is due, and after investigation or the opportunity therefor, and without fraud on the part of the recipient, cannot be recovered back as paid under a misapprehension.—Wheeler v. Hatheway, 58 Mich. 77.

¶ 292. The right to recover money paid under a mistake of fact, to wit, gas rates in excess of the legal rate based on an average of other cities, is not defeated by the fact that the payor's ignorance of the legal rate was due to his neglect to investigate before paying, the fact being one which it was the duty of the payee to know and make known by the bills presented.—Pingree v. Mutual Gas Co., 107 Mich. 156.

¶ 293. Earnest money paid by a successful bidder at an administrator's sale under a mutual mistake of fact as to the condition of the property is recoverable.—McKay v. Coleman, 85 Mich. 60.

¶ 294. Money paid on an express contract by mistake and in ignorance of material facts may be recovered on the common count for money had and received.—Lane v. Pere Marquette Boom Co., 62 Mich. 63.

¶ 295. Money paid under a mutual mistake for that which has no legal existence or validity may be recovered back as paid without consideration, where the vendor is responsible for the mistake or represents the person so responsible. So held of the bona fide transfer, by executors, of the certificate of an execution sale that had been issued to their testator and turned out to be void.—McGoren v. Avery, 37 Mich. 120.

¶ 296. The general rule that money paid under a mistake of material facts may be recovered back, although there was negligence on the part of the person making the payment, is subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must in that case bear the loss occasioned by his own negligence. If circumstances exist

which take the case out of the general rule, the burden of proving them is upon the defendant.—Walker v. Conant, 65 Mich. 194.

¶ 297. Overpayments made upon a mortgage by a grantee who took subject to it may be recovered by him when made in ignorance of the state of the account and in reliance upon defendant's statement as to the balance due to him as the holder.—Byrnes v. Martin, 67 Mich. 399.

¶ 298. Where plaintiffs, as agents, received a draft and forwarded it for collection, not disclosing the agency, and, on its being paid at maturity, paid over the amount to defendant, and the draft proved to be a forgery, and plaintiffs were compelled to refund the amount to the drawee, it was held that they were entitled to recover from the defendant.—Little v. Derby, 7 Mich. 325.

¶ 299. Plaintiffs may recover for a payment made on a forged draft, where on receiving the draft as the agent of the defendant, they advanced to defendant a part of the amount and gave him a certificate agreeing to account for the proceeds and the defendant bought this certificate, having first called upon plaintiffs for information respecting the draft and been informed that if he bought it the amount would be paid to him if collected.—Little v. Derby, 7 Mich. 325.

¶ 300. There can be no recovery for money had and received against one who has collected a debt due the plaintiff, a life convict, under the mistaken idea that he has the right to the money as guardian of the infant children of the plaintiff; the right of the plaintiff against the original debtor is not impaired.—Finn v. Adams, 138 Mich. 258.

¶ 301. In an action by the seller to recover, as paid under mistake, a repaid half of the purchase price of property it was not improper to charge that though a half interest was offered, if the buyer bid for the whole there was no valid sale for want of any meeting of minds; where the evidence admitted of a finding that the buyer was mistaken as to the interest sold, and he had offered to rescind, but where the plaintiff's (seller's) evidence was that in making a computation he became confused and repaid the half under the impression that too much had been paid; and where the buyer claimed that the repayment had been by way of a compromise and settlement and that the mistake was in the sale and not in the repayment.—Stowell v. Ames, 148 Mich. 439.

¶ 301a. Plaintiff entered into a contract with a village and obtained a preliminary bond from defendant whereupon the village paid him in advance the entire contract price. This was stated in the application for the bond but the company issued a bond which stipulated that the village should give notice before the last payment under the contract was made. The village notified the company that it could not accept the bond in that form whereupon defendant stated that the company would not become surety and requested the return of the bond. The bond was retained and the contractor completed the contract. In an action relative to the contract the solicitor for defendant interposed an unsworn answer stating that they were not liable to the village on any bond. After the contract had been completed the contractor sued to recover the premium paid. Held that he could not recover since the bond had served its purpose, he having given no other bond.—Hanley v. United States Fidelity & Guaranty Co., 131 Mich. 609.

§ 59. Payment induced by fraud or misrepresentation.

Right to recover payment fraudulently obtained, see Implied Contracts § 18.
Fraud and deceit generally, see Fraud.

¶ 302. Where money is received in good faith, and in the ordinary course of business, and for a valuable consideration, it cannot be recovered back because the payor, fraudulently deceived by a third person made the payment and lost thereby.—Walker v. Conant, 69 Mich. 321.

§ 60. Payment due to mistake of law.

Payment due to mistake of fact, see ante § 58.
Recovery of money paid into court under mistake, see ante ¶ 155.
Recovery of payment made by reason of mistake of law, see Mistake ¶¶ 12, 16.

¶ 303. Payments made under the erroneous supposition that a constitutional amendment imposing such obligation had been adopted by the people are made under a mistake of law, and not of fact.—Ellis v. Board of State Auditors, 107 Mich. 528.

¶ 304. A saloonkeeper who, without protest, voluntarily pays license fees to a city council under a void ordinance cannot recover such sums.—Baldwin v. Village of Chesaning, 188 Mich. 17. (Brooke, C. J., Kuhn and Bird, JJ., adopting opinion of the late Justice McAlvay, dissenting.)

§ 61. Payment under exigency or to avoid threatened loss or penalty.

Usury voluntarily paid, see post § 62.
Payment under protest, see ante § 57.
Money improperly paid under garnishment, see Garnishment § 113.
Duress in compelling payment as rendering it involuntary, see Duress.

¶ 305. Charges involuntarily paid to a gas company by a private consumer in excess of the rates prescribed by the ordinance under which the company is operating may be recovered back, although a right of action therefor is not expressly conferred by the

ordinance.—Pingree v. Mutual Gas Co., 107 Mich. 156.

¶ 306. It seems that an action at law may properly be brought to recover money paid under protest in excess of the contract price where the only other remedy would be to tender the contract price and file a bill for specific performance, and the delay in the equitable proceedings would endanger the plaintiff's interests.—Congdon v. Preston, 49 Mich. 204.

¶ 307. Where one who is neither aged nor infirm in intellect, nor ignorant of the law or of his rights under it, pays, because of the village attorney's threat of prosecution, a license required by a void ordinance, the payment is voluntary and not recoverable. —Betts v. Village of Reading, 93 Mich. 77.

¶ 308. Where, upon being served with a subpoena in a chancery foreclosure suit, the defendant mortgagor pays the amount demanded, under protest, there is not such duress of property as will make such payment involuntary, and enable him to recover an excess over the amount legally demandable, included in such payment.—Vereycken v. VandenBrooks, 102 Mich. 119.

¶ 309. Where, on the foreclosure of a mortgage by advertisement, an illegal attorney's fee was included in the amount for which the premises were sold, the payment of which was insisted upon as a condition to redemption, such payment is not binding and may be recovered by the mortgagor in a proper action.—Klein v. Bayer, 81 Mich. 233.

¶ 310. A surety on a guardian's bond, who had been compelled by threats of a levy to pay the amount of a judgment on the bond and who paid it to defendant, defendant being in apparent control of the judgment, may recover directly from defendant on the subsequent reversal of the judgment without first resorting to the ward; where there is nothing to show that the payment did not accrue to defendant or that it was received as representative of the ward or of the judge of probate.—Kalmbach v. Foote, 79 Mich. 236.

¶ 311. Where an attorney on threat of execution obtained payment from plaintiff, a surety on a guardian's bond which had passed into judgment, and the money so obtained had passed to the benefit of the ward, and the attorney did not know at the time of receiving it that the guardian intended to appeal the judgment, and when receiving payment made no misrepresentations to the surety, the attorney is not liable to the surety for the amount of the money on the subsequent reversal of the judgment.—Kalmbach v. Foote, 86 Mich. 240.

¶ 312. Payment made to the owner of goods taken by the payor's adult daughter cannot be recovered back on the ground of duress, although the owner was pressing for payment, and there was a dispute as to the value of the goods taken, where there was no threat by the owner of a prosecution of the daughter for a criminal offense, and the payment was voluntarily arranged for on one day, and the amount paid on the next after consulting a lawyer.—Francis v. Hurd, 113 Mich. 250.

§ 62. Usury voluntarily paid.

Excessive payment entitling to recovery, see post § 65.

Voluntary payments of usury and rights thereunder, see Usury, II.

¶ 313. One who voluntarily pays usurious interest cannot recover it.—Gardner v. Matteson, 38 Mich. 200.

¶ 313a. Where a party voluntarily pays usurious interest he cannot recover it back. —Solomon v. Alpena Cedar Co., 194 Mich. 267.

¶ 313b. Usurious payments are not recoverable.—Pinch v. Willard, 108 Mich. 204.

¶ 313c. One who has freely and of his own accord fulfilled a usurious contract cannot have relief or recover back the money paid upon it.—Dykes v. Wyman, 67 Mich. 236.

¶ 313d. Where a surety, whose property had been levied on, paid a judgment confessed by himself and principal for a usurious loan, with a knowledge of the usury. it was held that he might recover the amount so paid by him of his principal.— Thurston v. Prentiss, W. 529; Thurston v. Prentiss, 1 Mich. 193.

§ 63. Payments under illegal, immoral or criminal contracts.

Right to recover where payment was made under illegal contract, see Contracts § 96.

Right to set-off against valid indebtedness money paid under illegal contract, see Set-off.

¶ 314. Where money has been paid in pursuance of an immoral or criminal contract, or in violation of a statutory provision, and the parties are in pari delicto such money cannot be recovered and the courts will leave the parties where they have placed themselves.—Walhier v. Weber, 142 Mich. 322.

¶ 315. Under the common counts plaintiff could recover any number of payments for liquors sold in violation of the prohibitory liquor law, and was not limited to the sum

paid at any one time.—Peters v. Goulden, 27 Mich. 171.

¶ 316. An action to recover money paid on a Sunday horse-trade cannot be met by the defence that plaintiff had unreasonably delayed to rescind, for there is nothing to rescind where the contract is void; nor can plaintiff rely on a warranty of the horse and breach thereof, as they are of no legal importance in a Sunday bargain.—Brazee v. Bryant, 50 Mich. 136.

¶ 317. Comp. L. 1857, § 1662, authorizing moneys paid for liquors to be recovered back, was aimed at sales in the ordinary sense of the term, where the title passed from one owner to a new and different one; and not to releases on dissolution of a partnership.—Jacobs v. Stokes, 12 Mich. 381.

¶ 318. Although the law avoided all contracts the consideration of which, in whole or in part, consisted of liquors sold in violation of the statute, yet if purchase included other articles besides liquors, and had been paid for, the statute did not authorize a recovery by the purchaser beyond the amount actually paid for the liquors.—Jacobs v. Stokes, 12 Mich. 381.

¶ 319. An agreement whereby the plaintiff agreed he would open a saloon in Saginaw, pay the government tax, and give the bond required and purchase his beer of defendants, and in addition to paying for the beer was to advance $10 or more each week to defendants, who were the brewers, for the use of a liquor license issued to another at another location, and for protection from the police and prosecuting attorney, is an illegal agreement under Comp. L. 1897, §§ 5382-5384, and moneys paid thereunder cannot be recovered.—Walhier v. Weber, 142 Mich. 322.

¶ 320. Plaintiff leased certain premises for two weeks, and put up a tent and kept a saloon thereon. Injunction proceedings were brought to restrain such use of the premises and the saloon was discontinued after one week and suit was brought for damages under the common counts for money equitably due plaintiff, being the amount paid for rent for the two weeks. Held that he was not entitled to recover since if defendant had broken his covenant for quiet enjoyment or if he had been evicted by a paramount title, the declaration should have been special and the measure of damages would have been the value of the use of the land less the rent.—Prochaska v. Fox, 137 Mich. 519.

§ 64. Payment under void contracts or in violation of statute of frauds.

Recovery of money paid on invalid guardianship sale, see Guardianship § 53.

Implied contract for payments made under contract within statute of frauds, see Frauds, Statute of, § 125.

Necessity for rescission as condition precedent to recovery of money paid under void contract, see Rescission, VII.

Right to recover money paid for void public bonds, see Municipal Bonds § 18.

¶ 321. A vendee of land under oral contract can refuse to carry out his contract—where nothing has been done to take the case out of the statute—and can recover back what he has paid.—Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523; Nims v. Sherman, 43 Mich. 45; Kelly v. Kelly, 54 Mich. 30; Wright v. Dickinson, 67 Mich. 580.

¶ 322. The statute of frauds does not prevent one who has surrendered his contract from recovering the consideration he has paid.—Sullivan v. Dunham, 42 Mich. 518.

¶ 323. Money advanced on an oral agreement to purchase lands, to be held as stipulated damages on default in the purchaser, and otherwise to be applied as part of the purchase money, may be recovered back, even though the vendor offers to convey, where no possession has been given or act done so as to take the case out of the statute.—Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523.

¶ 324. Money advanced on an oral agreement to purchase lands may be recovered, even though the contract stipulates for its retention as compensation for vendor's expenses and trouble.—Scott v. Bush, 29 Mich. 523.

¶ 325. Money paid by a mutual insurance company to the beneficiary named in an insurance policy which was void because at the time the application for such insurance was made and the policy issued, the applicant was over 65 years of age, could not be recovered by the heirs of the deceased assured.—Smith v. Pinch, 80 Mich. 332.

¶ 325a. When a memorandum for the sale of land under contract is void under the statute of frauds, Comp. L. 1897, § 9511, How. 2nd Ed., § 11395, because signed by one of two joint owners individually and for other owner without authority, the purchaser may maintain an action to recover money paid under the memorandum.—Adler v. Katus, 190 Mich. 86.

§ 65. Excessive payment entitling payer to recovery.

See also ante ¶ 297.

Usury voluntarily paid, see ante § 62.

Recovery of excessive or improper payments made on account of local assessments, see Local Improvements, VII, D.

Recovery of overpayments other than illegal or mistaken payments, see Implied Contracts.

¶ 326. One who through mistake pays to another more than is due him may recover the excess so paid.—Truax v. Bliss, 139 Mich. 158.

¶ 327. There was an overpayment of $500 where pursuant to an arrangement to have the interest on a mortgage reduced by placing another loan at a less rate a willing lender was found for $6,000, but the mortgagee refused to take less than $6,500 claiming that so much was due and the exact amount being known only to him because the payer, a grantee of the mortgagor, had kept no sufficient receipts or accounts, whereupon the mortgage was assigned to the new lender for $6,000, all joining in a covenant that such was the amount due, and the payer simultaneously giving a chattel mortgage to the old mortgagee for $500 for the balance, which was afterwards paid. The covenant was an estoppel to say that more was due, and the chattel mortgage had no consideration.—Byrnes v. Martin, 67 Mich. 399.

¶ 328. Where an ordinance provides that a gas company shall not charge consumers more than an average of the rates charged in certain cities, payment of a charge in excess of such rate is not voluntary, where made in ignorance of the fact that it is excessive.—Pingree v. Mutual Gas Co., 107 Mich. 156.

¶¶ 329, 330. A contract to pay more than $10 for services in obtaining a pension is void, and the excess is recoverable by the pensioner.—Hall v. Kimmer, 61 Mich. 269.

¶ 331. Where an officer of a partnership association, limited, overdrew his salary account for a number of years, such overdrafts being carried on the books of the association, and interest charged thereon with his acquiescence, it was held that such over-charges constituted an indebtedness of the employee for which his estate was liable.—Berry Bros., Ltd. v. Hooper's Estate, 179 Mich. 67.

¶ 332. A builder is liable for the overdraft at a bank and cannot recover from the cashier's estate, where the testimony of the assistant cashier is to the effect that the building account was kept in the name of the builder with oral instructions by the cashier, owner of the building erected, who had recently resigned but still exercised authority about the bank, and who paid the checks as issued and charged the builder; the overdraft cannot be considered as a part payment made on the building by the cashier.—Hulburt v. Just, 126 Mich. 337.

§ 66. Payment by municipalities or public officers.

Following and recovering public funds, see also Municipal Corporations § 145.

¶ 333. Money paid out by a ministerial officer of the state under a misapprehension may be recovered back, since in making such payment the officer acted beyond the scope of his authority.—Ellis v. Board of State Auditors, 107 Mich. 528.

¶ 334. Defendants entered into a contract with certain citizens of plaintiff village, whereby they agreed to construct and operate an electric plant and a flour mill in consideration of a bonus of $3,000 to be paid to them. $2,000 of the bonus was paid by the village which subsequently brought an action to recover the money so paid. Held that the village was not a party to the contract and the money could be recovered.—Village of Morrice v. Sutton, 139 Mich. 643.

¶ 335. A municipal council, after allowing claims with no effort to investigate them, cannot order an investigation and rescind their action and recover back the money paid because of facts which they did not know of, but might have ascertained by reasonable diligence.—Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116.

¶ 336. A common council empowered to audit and allow accounts against the city cannot, having allowed a person more than he was entitled to, recover back the excess under a claim that it was ignorant, at the time, of facts which it should have investigated.—Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116; Perry v. Cheboygan, 55 Mich. 250.

¶ 337. Where a city has paid the salary of its mayor supposing that the provisions of an act eliminating it were invalid when as a matter of fact they were valid, the money may be recovered back in a suit by the city for money had and received.—City of Battle Creek v. Barnes, 143 Mich. 400.

§ 67. Actions and evidence for recovery.

Bar of recovery by failure to assert payment defensively in action, see Former Adjudication ¶ 278.

Propriety of common assumpsit for overpayments and payments by mistake, see also Assumpsit § 43.

Occasion and propriety of money counts, see Assumpsit §§ 12-19.

Actions for recovery of stakes or winnings, see Gambling Contracts § 4.

Limitations of actions on implied contracts for repayment, see Limitations § 57.

Impropriety of trover for recovery of amount of overpayment in bill or note, see Conversion ¶ 80.

¶ 338. A member of a mutual aid society providing for benefits in case of death or sickness who sues it in assumpsit to recover back money paid cannot join two members having no joint functions with the society as receivers of the money.—Murphy v. Bidwell, 52 Mich. 487.

¶ 339. In assumpsit against an officer to recover moneys paid on an execution issued upon a void judgment, the execution is admissible in evidence under a plea of the general issue.—Miller v. Hahn, 116 Mich. 607.

¶ 340. In an action to recover a payment made under duress it is proper to show the environment of the person upon whom the duress is alleged to have been practiced.—Welch v. Beeching, 198 Mich. 338.

¶ 341. The question whether the facts shown, when undisputed, constitute an involuntary payment, is one of law for the court.—Betts v. Village of Reading, 93 Mich. 77.

¶ 342. The question as to whether payments were voluntarily made, where the facts are undisputed, is one of law.—Eslow v. City of Albion, 153 Mich. 720.

¶ 343. Where a woman, while in a sick and nervous state and in great financial need, was told by a lawyer that unless she made a certain payment of money the law could be and would be successfully invoked against her to force her to pay a debt, which as a matter of fact she was not obliged to pay, held that the question whether such payment was made under duress and not voluntarily on her part was properly submitted to the jury in an action by her to recover such payment.—Welch v. Beeching, 198 Mich. 338.

¶ 344. In an action to recover money paid as a saloon license, evidence as to a license fee for the year previous, which had been made under protest and returned, is immaterial as to whether or not the payment sued for was voluntary.—Eslow v. City of Albion, 153 Mich. 720.

PEACE BOND to PENAL STATUTES.

Cross-References.

Peace Bond—
- Security to keep the peace, see Indictment § 660.

Peace Officers—
- See Sheriffs and Constables; Justices of the Peace.
- Power to make arrests, see Arrest.

Peaceable Entry—
- Under license, see Licenses to Enter.
- Trespass after peaceable entry, see Trespass.
- See also Forcible Entry and Detainer.

Pecuniary Ability and Resources—
- Of parties as affecting damages, see Damages, V, XI, B; Death by Wrongful Act § 28.
- Factors in adjusting alimony, see Divorce, X.
- Improper allusions in arguments to jury, see Argument of Counsel § 20; Indictment § 374 et seq.

Peddling—
- Municipal power to regulate, see Municipal Corporations § 85.
- Ordinances regulating and licensing peddlers, see Municipal Corporations, VI, IX, C.
- General law of licenses, see Licenses.
- Itinerant selling by corporate agents as doing business in state, see Foreign Corporations § 16.
- Interstate commerce and regulations thereof, see Commerce.
- Indictment or information for unlawful peddling, see Indictment § 43u.
- Liability of innkeeper to peddler leaving valuables in pack, see Inns § 8.

Pedestrians—
- Rights, duties, and liabilities incident to use of highways and streets, see Highways, XII, D, XIII.
- Rights and liabilities respecting street railways and railroads, see Street Railways, IV; Railroads, VIII, D.

Pedigree—
- Admissibility of hearsay in proof, see Evidence § 323.

Penal Actions—
- See Penalties § 3.

Penal Bonds—
- See Bonds.

Penal Statutes—
- General law of crimes, see Crimes.
- Interpretation and effect of statutes, see Statutes, V.

PENALTIES AND FORFEITURES.

TREATS of penalties for other than misdemeanors and penal actions on the civil side of the courts for recovery of such penalties, and of the general law and policy respecting forfeitures. Cross-references in the body of the topic cite the particular matters excluded to other topics.

Analysis.

§ 1. In general; policy towards forfeitures and penalties.
§ 2. Enforcement of or relief from forfeiture.
§ 3. Actions for penalties.
§ 4. ——Trial practice, court and jury questions.
§ 5. ——Appeals from justices and trials on appeals.
§ 6. ——Judgments, costs and executions.

[Note. For statutes fixing the penalties for the various crimes and misdoings consult indices to the published statutes. Cases decided under such statutes will be found in the specific topics treating of the act or crime which is subject to the penalty.]

Particular penalties and penal statutes, see specific topics dealing with the subject-matter to which the penal regulation or statute pertains, e. g., Crimes, II; Animals § 3; Carriers § 147; Food; Fish and Game; Health §§ 2, 3; Highways § 193; Mortgages § 159; Intoxicating Liquors.

Penalties for failure to provide cars with safety couplers, see also Railroads § 41.

Penal liability for bringing pauper into county, see Poor Persons, § 9.

Power of legislature to allow penal damages, see Constitutional Law § 188.

Forfeiture of bail or recognizance, see Arrest, X.

Remission of forfeiture of bail, see Arrest § 52.

Forfeitures under internal revenue laws of United States, see Internal Revenue § 3.

Forfeiture of estates for breach of condition, see Deeds §§ 87-91; Life Estates, II.

Forfeiture of corporations, see Corporations §§ 253-256.

Forfeiture of license to cut timber for failure to comply with the conditions thereof, see License to Enter ¶¶ 77, 78.

Construction of penal statutes, see Statutes, V.

Penal nature of statutory liability for failure to file corporate reports, see Corporations § 165.

Statutory penal liability for double damages for loss caused by escape of fire to premises of another through negligence as a "taking of property," see Eminent Domain ¶ 76.

Penal bonds and liability thereon, see Bonds.

Construction of clauses in contracts and statutes as penal or nonpenal or forfeiting, see Contracts § 148; Master and Servant ¶ 69; Statutes, V.

Liquidating or forfeiting nature of damage clause in contract, see Damages § 181 et seq.

Penalty of bond, effect in general, see Bonds.

Covenants and conditions for forfeiture in lease, see Landlord and Tenant § 17.

Necessity of writing to waive forfeiture of rights in respect to estates or interests in land, see Frauds, Statute of § 52.

Fines and penalties imposed on members of associations, see Associations § 4.

§ 1. In general; policy towards forfeitures and penalties.

Enforcement of or relief from forfeitures, see post § 2.

Actions and procedure to enforce penalties, see post §§ 3-6.

Power of municipality to impose penalty for offense, see Municipal Corporations § 96 et seq.

What law governs as to penalties, nonrecognition of foreign penal laws, see Conflict of Laws.

When penalized act is regarded as a misdemeanor, see Jud. Act, chap. XXXV, § 11; Comp. L. 1915, § 13403.

¶ 1. Equity will not lend its aid to enforce a penalty or forfeiture.—Crane v. Dwyer, 9 Mich. 350; White v. Port Huron & M. Ry. Co., 13 Mich. 356; Wing v. Bailey, 14 Mich. 83; Watrous v. Allen, 57 Mich. 362.

¶ 2. Forfeitures are not favored at law or in equity, and waiver of provisions therefor will be assumed, on slight evidence, if equity requires.—Lyon v. Travelers' Ins. Co. of Hartford, Conn., 55 Mich. 141.

¶ 3. Forfeitures are not favored in the law, and provisions creating them are to be strictly construed.—Great Lakes Realty & Building Co. v. Turner, 190 Mich. 582.

¶ 4. Courts of equity do not impose or enforce penalties, or punish parties for their wrongs in the administration of trusts, but only furnish adequate means of redress when the law fails so to do.—Perrin v. Lepper, 72 Mich. 454.

¶ 5. A court of equity is reluctant to enforce a forfeiture, even against one whose fraudulent conduct deserves it; so held as to a defendant in a bill to redeem from an equitable mortgage.—Meigs v. McFarlan, 72 Mich. 194.

¶ 6. A forfeiture is a strict legal right and can never be enforced except by the holder of the legal title.—Grummett v. Gingrass, 77 Mich. 369.

¶ 7. Equity will not enforce a forfeiture on a mere technicality.—Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43.

¶ 8. Stipulations for forfeiture are not favored and are to be strictly construed.—Small v. Robarge, 132 Mich. 356.

¶ 9. Equity will not lend its aid to divest an estate for the breach of a condition subsequent, although that aid will sometimes be extended to relieve against such a condition.—Michigan State Bank v. Hastings, 1 D. 225; Michigan State Bank v. Hammond, 1 D. 527.

¶ 10. Equity relieves against forfeiture when it would be oppressive or fraudulent not to.—Gram v. Wasey, 45 Mich. 223.

¶ 11. There is no rule that equity will not recognize a forfeiture when it is only one of the incidents of a past transaction.—Eberts v. Fisher, 44 Mich. 551.

¶ 12. Equity will recognize a forfeiture, when it is simply an incident of a past transaction.—Brown v. Brown, 196 Mich. 677.

¶ 13. Equity may recognize that a forfeiture of a lease has taken place and determine the rights of the respective parties, although it will not directly enforce a forfeiture.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 13a. Acts not expressly forbidden by penal statutes cannot be reached merely because they resemble the offense provided against or are equally and in the same way demoralizing or injurious; they cannot be made to embrace anything which was not within the intent of the legislature.—Shaw v. Clark, 49 Mich. 384.

¶ 13b. When a law is susceptible of penal applications in special cases, such applications must be closely confined to cases within its principle.—Wallace v. Finch, 24 Mich. 255.

¶ 13c. Where a statute newly defines a forbidden act and its penalty and prescribes a particular judgment, that judgment only can be rendered; and the course of proceeding established by law to produce such a judgment is the only one appropriate to the case.—Pardee v. Smith, 27 Mich. 33.

¶ 13d. "Penal laws," as used in Const. art. XIII, § 12 requiring fines collected for any breach of the penal laws to be applied to the support of the libraries, refers to the laws of the state for the preservation of the public order and does not include the numerous forfeitures and penalties growing out of breaches of duty that partake of the nature of civil grievance and do not come within the category of criminal conduct.—People ex rel. Fennell v. Bay City Common Council, 36 Mich. 186.

¶ 13e. A "penal statute" is a statute imposing a penalty for doing that which the statute prohibits, or for omitting to do that which the statute requires.—People v. Crucible Steel Co. of America, 151 Mich. 618.

§ 2. Enforcement of or relief from forfeiture

Policy of law towards forfeitures, see ante § 1.
Injunctions to prevent enforcement of forfeitures, see Injunctions, II, I.
Restraint on exercise of expired franchise as enforcement of forfeiture, see Franchises ¶ 19.
Jurisdiction of equity to decree forfeiture of lease, see Landlord and Tenant ¶ 578.
Relief against statutory forfeitures on ground of mistake, see Mistake ¶ 32.
Forfeiture of mining leases, see Mines § 7.
Rule against invalidating and forfeiting construction of contract, see Contracts § 148.
Right to forfeit or to declare or rely on breach of contract, see Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers, VII.

¶ 14. A court of equity has no jurisdiction to enforce forfeitures; if the vendor in a land contract desires such relief he must seek it at law, or by entry for breach of condition.—Fitzhugh v. Maxwell, 34 Mich. 138.

¶ 15. Relief may be given against the breach of a condition precedent in the nature of a penalty; and there is no good reason why it should not be given in the case of a condition precedent, when it would be against a condition subsequent. The substantial question is, not whether the condition is precedent or subsequent, but whether compensation can or cannot be made.—Chipman v. Thompson, W. 405.

¶ 16. Relief given where the condition—which was to support the grantor—had not been strictly performed by the guardian of a minor.—Chipman v. Thompson, W. 405.

§ 3. Actions for penalties.

Variance on appeal from allegation of statute violated, see also post ¶¶ 24, 25.
General law of actions and procedure, see such topics as Pleading; Process; Evidence; Trial; etc.
Assumpsit as remedy, see Assumpsit § 3.
When indictment is proper procedure for enforcement of penalty, see Indictment § 3.
Declaration in justice's court for penalty for selling liquor, see also Justices of the Peace ¶ 374.
Civil warrants in suit before justice to recover penalty for bringing pauper into state, see Justices of the Peace ¶ 185.
Prosecutions for violations amounting to crimes and misdemeanors, see Indictment.
Penal actions for violations of ordinances, see Municipal Corporations § 216.
Form of process in action by municipality, see also Municipal Corporations § 219.
Penal actions against corporate officers for failure to file reports, see Corporations §§ 178, 179.

Sufficiency of complaints for violations of food regulations, see Food § 5.
Actions under liquor laws, see also Intoxicating Liquors § 74.
Sale of estrays to cover costs of keeping and impounding, see Animals ¶ 23.
Statutory provisions concerning actions, pleading, and procedure for recovery of penalties where the act incurring them is not a misdemeanor, see Jud. Act, chap. XXXV, § 1 et seq.; Comp. L. 1915, § 13393 et seq.
Assumpsit as proper form of remedy, see Jud. Act, chap. XI, § 1; Comp. L. 1915, § 12350.
Venue of penal actions, see Jud. Act, chap. X, § 1, ¶ 9; Comp. L. 1915, § 12340, ¶ 9.
Statutory penalties on sheriff or jurors, and procedure by imposing fine and notice to show cause, see Jud. Act, chap. XX, §§ 8-10; Comp. L. 1915, §§ 12744-12746.

¶ 17. Comp. L. 1871, §§ 2066, 2067; How. St. § 2121, authorizing the supervisor to sue in his name of office on behalf of his township for the penalty for neglecting to kill a dog that has bitten any person, etc., does not authorize the supervisor of a city ward to sue.—Bixby v. Steketee, 44 Mich. 613.

¶ 18. The legislature has power to direct in what name suits for penalties under the liquor laws shall be brought and that they shall be brought in the names of the respective cities, villages and townships.—Smith v. Village of Adrian, 1 Mich. 495; Village of Romeo v. Chapman, 2 Mich. 179.

¶ 19. A plank-road company may sue in its own name in assumpsit to recover the penalty for illegally passing its toll-gate.—Canal St. Gravel-Road Co. v. Paas, 95 Mich. 372.

¶ 20. An action to recover a penalty under Comp. L. 1897, § 4157, for the obstruction of a highway is not a criminal action, and, the assistance of the prosecuting attorney not being required, private counsel may be employed.—La Barre v. Bent, 154 Mich. 520.

¶ 21. More particularity is required in a declaration to recover a statutory penalty than in some other common-law actions in which general counts are allowed; and in the absence of any statutory provision to the contrary, it must set out, with substantial certainty, the facts to bring defendant within the terms of the statute, neither leaving out nor misstating any element of liability, and it must aver the obligation to have arisen under a statute.—Benalleck v. People, 31 Mich. 200.

¶ 21a. A declaration under Comp. L. 1871, § 2143, to recover a penalty for a violation of the prohibitory liquor law, is insufficient on demurrer if it only refers generally to the statute, and not specifically to the section for a violation of which the action is brought; it ought, perhaps, to be so held, even on an objection taken on that ground to the admission of any evidence under it on the trial.—Benalleck v. People, 31 Mich. 200.

§ 4. ——Trial practice, court and jury questions.

Jury in action before justice of peace to recover penalty for violation of liquor law, see Jury ¶ 17.

¶ 22. Where, in a suit for a violation of How. St. § 1403, which imposes a penalty, not exceeding $25, for the wilful obstruction of any ditch constructed for draining the water from any highway but does not specify whether the court or the jury shall fix it, the proofs establish such violation, the court has no power to direct a verdict for more than six cents, and it is for the jury to say how much greater a penalty, if any, shall be imposed.—Hines v. Darling, 99 Mich. 47.

§ 5. ——Appeals from justices and trials on appeals.

General law of appeal and review, see Appeal; Certiorari; Justices of the Peace, V, VI.
Presumption on error as to penal and forfeiture judgments, see Appeal § 393.
Appeals in prosecutions for violations of municipal ordinances, see Municipal Corporations § 232 et seq.

¶ 23. The prosecuting attorney is the proper officer to represent the public in the circuit court upon an appeal from a justice in a prosecution to recover a penalty.—People v. Navarre, 22 Mich. 1.

¶ 24. An action was brought before a justice for the penalty of $50 alleged to have accrued under "section 3640 of the Comp. L. of 1882," this being the only reference to the statute. On appeal an amended declaration was filed, merely referring to the statute by section and chapter, and also by the compiler's section, which, however, did not correspond with the statute's section and chapter, nor with the section declared on in justice's court. Held, that as the prosecuting attorney, under How. St. § 8432, was only authorized to plead an indebtedness in this general way by referring to the section and chapter of the statute violated, the variance was fatal.—People v. Grand Rapids & W. Plank Road Co., 64 Mich. 618.

¶ 25. An issue joined in an action of trespass for obstructing a highway upon the southwest quarter of a section presents a different issue from a claim for trespass for obstructing a highway on the southeast quarter of the section; and the proceedings being penal in their nature, and the statute providing that the case shall be tried on appeal on the issues joined in the justice's court, an amendment cannot be permitted in the

circuit court.—Graham v. Langston, 65 Mich. 45.

¶ 26. An amendment to an oral declaration in a suit commenced in a justice's court to recover the penalty for illegally passing a tollgate is properly allowed in the circuit court to set out the time when and the circumstances under which the penalty was incurred.—Canal St. Gravel-Road Co. v. Paas, 95 Mich. 372.

§ 6. ——Judgments, costs and executions.

Immunity of state from costs in penal actions, see Costs § 12.

Penalties within statute requiring application of moneys so derived to library purposes, see Counties § 38.

Omission of costs and expenses as part of legal penalty, as ground of objection, see Animals ¶ 22.

Process for collection of fines when unaccompanied by sentence of imprisonment and execution of such process, see Jud. Act, chap. XXXV, § 24 et seq.; Comp. L. 1915, § 13416 et seq.

Provisions for disposal of collected fines and penalties, see Jud. Act, chap. XXXV, § 16 et seq.; Comp. L. 1915, § 13408 et seq.

PENDENCY OF ACTIONS to PERPETUATION OF TESTIMONY.

Cross-References.

Pendency of Actions—
- See Actions § 6.
- Doctrine of lis pendens, see Lis Pendens.
- Abatement because of another action pending, see Abatement § 10 et seq.
- Priority of jurisdiction by action first commenced and pending, see Courts § 72 et seq.
- Priority of other pending action as ground for stay, see Stay, I.
- See also post "Pending Actions."

Pendente Lite Injunctions—
- See Injunctions, IV.

Pending Actions—
- Abatement and revival, see Abatement.
- Effect of dissolution, receivership, assignment for creditors, or bankruptcy, see Bankruptcy § 17; Assignment for Creditors § 37; Corporations §§ 244, 260; Partnership § 100.
- As affected by amendment or repeal of statute, see Statutes, V, VI.
- See also ante "Pendency of Actions."

Penetration—
- Element in rape and other sexual crimes, see Rape; Crimes, II.

Penitentiaries—
- See Prisons and Jails.
- Proper place for imprisonment or sentence, see Crimes §§ 28, 29.
- Specifications in sentence, see Indictment § 489.

Pensions—
- Rights of inmates of soldiers' homes receiving pensions, see Military § 3.
- Recovery of money illegally withheld for procuring, see Payment ¶ 329.

People—
- In the sense of the People of the State of Michigan, see State of Michigan.
- In the sense of the people as a whole comprised in local subdivisions of the state, see Municipal Corporations; Counties; Townships.
- Actions and prosecutions in the name of the People, see Indictment; Mandamus; Quo Warranto; Certiorari; Prohibition; Parties.

Per Capita and Per Stirpes—
- Construction of wills and devolution of estates in event of death of one of the primary takers, see Wills, VI.

Per Diem Allowances—
- For fees and costs, see Costs, III, V, B.
- Fees allowable, see Sheriffs, III; Witnesses, VII; Jury, VII.

Per Stirpes—
- Rights of secondary takers of devise or bequest, see Wills, VI.

Percentage—
- Rate and computation of interest, see Interest; Usury.
- Agreements for compensation by percentage on given sums, see Contracts § 186 et seq; Master and Servant § 11; Brokers; Agency § 101; Attorneys § 36.
- Sharing on percentage basis as mark of partnership or joint enterprise, see Partnership § 4 et seq.; Joint Adventures.

Percolating Liquids—
- As nuisances, see Nuisances § 10.

Percolating Waters—
- See Waters, III.

Peremptory Challenges—
- See Jury § 60 et seq.

Peremptory Charge—
- See Directing Verdict.

Peremptory Mandamus—
- See Mandamus §§ 171, 175.

Performance—
- Of contracts, see Contracts, VII; Sales; Vendors and Purchasers; and other contract subjects.
- Of conditions in deeds, wills, and trusts, see Deeds, III, E; Wills, VI; Trusts.
- Remedies to compel performance or redress breach, see Specific Performance; Assumpsit; Contracts, X; Sales, VIII, IX; Vendors and Purchasers, XII.
- Presumptions as to due and regular performance of duty, see Evidence §§ 37, 38.
- Part or full performance as taking case out of the statutes of frauds, see Frauds, Statute of, II.
- Sufficiency of performance to raise equity to specific enforcement, see Specific Performance, III.

Periodical Tenancies—
See Landlord and Tenant, I.
Perishable Property—
In attachment, sale pending action, see Attachment § 139.
Liability of common carriers for loss or delay, see Carriers § 44.
Perjury and Subornation—
See Crimes §§ 115, 116; Indictment.
Permanent Injuries—
Elements and measure of damages, see Damages.
Permissive Use—
Insufficiency as basis for claim of adverse possession or prescription, see Adverse Possession § 13 et seq.; Easements § 12.
Permissive Waste—
See Waste.
Permissive Words—
In statutes, how construed, see Statutes, V.
In contracts and wills, see Contracts, VI; Wills, VI.
Permits—
For use of streets, see Franchises; Highways, X; Street Railways, I.
See also Licenses; Licenses to Enter.
Perpetual Franchises—
See Franchise § 2.
Perpetuation of Testimony—
See Depositions § 42.
Bills to establish papers or records lost or destroyed or suppressed, see Restoration of Papers and Records.

PERPETUITIES AND ACCUMULATIONS.

TREATS of the law against suspension of the power of alienating property beyond a statutory period and of the statutory limitation of the period during which trust for accumulation may continue. It excludes construction of wills and deeds to ascertain the period of accumulation or suspension (see Wills, VI; Trusts, II).

Analysis.

§ 1. In general; statutory provisions and applicability.
§ 2. Computation and validity of period of suspension.
§ 3. Restraints on accumulations of rents and profits.
§ 4. Rule for personal property.

§ 1. In general; statutory provisions and applicability.

Weight of New York decisions as precedents in construction of statute, see Courts § 25.
Construction of deeds and wills as to time of vesting or as to contingency of gift, see Deeds § 40; Wills, VI, D.
Construction of will as of time of testator's death for purpose of applying the statute, see Wills, VI.
Lapse into intestacy or into residue of invalid suspensive devises, see Wills, VI.
Contruction of lease against perpetuity, see Landlord and Tenant § 15.
Validity of conditions against alienation, see also Deeds § 82.
Statutory prohibition of the suspension of the absolute power of alienation beyond two lives, see Comp. L. 1915 § 11533 et seq.
Applicability to chattels real of the statutes limiting suspension of the power of alienation, see Comp. L. 1915, § 11541.
Inapplicability to gifts to charities of the statutes or rule against perpetuities, see Comp. L. 1915, § 11099.

¶ 1. In all cases where the application of the rules against perpetuities is invoked, the character of the interest, as vested or otherwise, is the turning consideration.—Hull v. Osborn, 151 Mich. 8.

¶ 2. Under sections 8796, 8797, Comp. L. 1897, forbidding the suspension of the power of alienation of estates beyond two lives in being, the period of suspension is not determined by the fact that more than two lives were in being when the estate was created who by a contingency might share in its distribution, but by the number of life estates between the creation of the estate and its enjoyment in possession.—McInerney v. Haase, 163 Mich. 364.

¶ 3. In determining whether the provisions of a will violate the rule as to perpetuities, the chief inquiry is whether the interest passing to the devisees is vested or contingent, the statutes restricting perpetuities being confined to avoiding future estates that are made more remote in their vesting than two lives in being, and such arrangements as serve to postpone them.—Hull v. Osborn, 151 Mich. 8.

¶ 3a. The rules against perpetuities do not depend on whether the interest devised is or is not vested.—Toms v. Williams, 41 Mich. 552.

¶ 4. A provision in a will giving the executor discretionary powers as to the time for payment of legacies, but not interfering with the power to sell and convey the land at any time and give a perfect title, does not operate as a suspension of the power of alienation.—Fitz Gerald v. City of Big Rapids, 123 Mich. 281.

¶ 5. Under Comp. L. 1897, §§ 8796 and 8797, the absence of any person in being, capable of conveying the fee, for the period of time not based on lives in being, voids a conveyance of real estate.—Casgrain v. Hammond, 134 Mich. 419.

¶ 5a. Estates in trust are subject to the statutes, prohibiting the suspension of the absolute power of alienation for a longer time than two lives in being.—Thatcher v. St. Andrew's Church of Ann Arbor, 37 Mich. 264; Newark M. E. Church v. Clark, 41 Mich. 730.

¶ 5b. A perpetual trust for a particular purpose, with no power of alienation in the trustee, is invalid; and trusts for charitable uses are not distinguished in this state from others, and their validity depends on the same rules.—Newark M. E. Church v. Clark, 41 Mich. 730.

¶ 5c. Such trusts as may be necessary to save estates from being sacrificed to pay encumbrances and preserve land as such for devisees do not contravene the statute against accumulations.—Toms v. Williams, 41 Mich. 552.

¶ 6. The rule against perpetuities applies to a case where the trustee is authorized to sell the real estate and other property of the deceased but is required to immediately reinvest it, it being for a period otherwise suspensive.—Niles v. Mason, 126 Mich. 482.

¶ 7. Delays occasioned by a requirement in a will that before conveying to a certain devisee the executor must first satisfy debts and legacies and determine about the alteration of the homestead, are not a restraint on alienation.—Fitz Gerald v. City of Big Rapids, 123 Mich. 281.

¶ 8. A devise to the executor with directions to convey the realty to a city for a free library under certain conditions, among them that the property should be kept and maintained for the designed purpose, and to "revert to" certain legatees if it should be used for any other purpose or if it ceased to be used for library purposes for three years, or to be sold by the executor and the proceeds given to such legatees if the city should not accept conveyance on those terms, does not suspend the power of alienation; since there is a complete power to alienate either in the executor alone or in him by the concurrent action of the city.—Fitz Gerald v. City of Big Rapids, 123 Mich. 281.

¶ 9. So long as a title is in fee in trust the validity of a reversion thereof under the statute does not properly come under discussion.—Thatcher v. St. Andrew's Church, Wardens, etc., of Ann Arbor, 37 Mich. 264.

¶ 10. A conveyance of land to the grantor's son and daughter-in-law for their lives, and on their death to their son living at the time of such conveyance, does not suspend the absolute power of alienation and is valid.—Case v. Green, 78 Mich. 540.

¶ 11. A bequest of a sum of money to trustees of a cemetery, "as a perpetual fund to be kept at interest by said trustees, and the interest used to take care of the graves on my lot in the cemetery and keep the said lot in order," is an attempt to effect a trust in perpetuity, and void accordingly.—Lounsbury v. Trustees of Square Lake Burial Ass'n, 170 Mich. 645.

¶ 12. A will which, after making a bequest to two beneficiaries and providing that its payment shall be postponed until they shall reach the age of forty-five years, makes further provision for survivorship of the bequest in case of the death of one of such beneficiaries, and for the application of the bequest in the case of the death of both of such beneficiaries without issue, does not violate the rule against perpetuities, since it postpones the vesting of the estate at the latest for two lives in being.—Hull v. Osborn, 151 Mich. 8.

¶ 13. A will providing for payment of a bequest to two beneficiaries in instalments, until the beneficiaries shall reach the age of forty-five, at which time the residue of the bequest shall be paid to them, creates a vested estate, and does not violate the rule against perpetuities, although it is provided that, in case of the death of either of the beneficiaries before reaching the age of forty-five, such portion of the bequest as shall not have been paid should go to the survivor.—Hull v. Osborn, 151 Mich. 8.

¶ 14. A will by which a testator devises, among other property, a certain office building to trustees, with directions to pay annuities to his wife and a daughter, and directs that the estate consisting of the building shall not be finally distributed except upon the death of both the wife and the daughter and the payment of the testator's debts, does not, because of the provision relating to the payment of debts violate Comp. L. 1897, §§ 8796, 8797, How. St. 2nd ed., § 10636, providing that every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, since if no specific direction had been given for the payment of debts the estate would still have been

charged with the debts.—McGraw v. McGraw, 176 Fed. 312.

¶ 15. A conveyance to grantees "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them forever," is not void as violating a statutory prohibition against perpetuities, the word "heirs" in the deeds being used not as indicating purchasers, but for the purpose of showing the estate in the grantees to be one in fee.—Root v. Snyder, 161 Mich. 200.

¶ 16. A testator devised a lot to his sister Mary if she survived her husband William, but in case she should die before said husband, the premises were to go to the children of Mary. An intention was stated that said William should not in any manner participate in the estate, either as the heir of his wife or any of his children, and that in case any one or more of the children of said Mary should die under age and without issue, his or her surviving brothers and sisters should inherit such respective share of any deceased child to the absolute and complete exclusion of said William. Held, said clause was not void as violating Comp. L. 1897, § 8797, which provides that the absolute power of alienation shall not be suspended for a longer period than during the continuance of two lives in being at the creation of the estate.—Van Gallow v. Brandt, 168 Mich. 642.

¶ 17. Sections 8796, 8797, Comp. L. 1897 provide that the absolute power of alienation shall not be suspended for a longer period than during the continuance of two lives in being at the creation of the estate. Testator devised a life estate to his wife, a life estate to her daughter Hannah, and upon Hannah's death a fee to his granddaughter if she should survive said Hannah, otherwise to the surviving children of said Hannah. Held, the devise was not void for violation of the statute.—McInerney v. Haase, 168 Mich. 364.

¶ 17a. How. St. § 5531, prohibiting the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, is not violated by the direction in a foreign will probated here that Michigan lands shall be sold and the proceeds invested, no matter for how many lives, in lands in another state.—Ford v. Ford, 80 Mich. 42.

¶ 17b. A bequest of personalty to be realized from real estate, which the testator directs to be sold, does not come within the statute which applies to restraints on alienation of real estate.—Penny v. Croul, 76 Mich. 471.

§ 2. Computation and validity of period of suspension.

Particular provisions as unduly suspensive, see also ante § 1.

Construction of wills or deeds to ascertain intendment of suspensive and future limitations, see Wills, VI; Deeds, III.

¶ 17c. Provisions for suspending the power of alienation for any number of lives in being and twenty-one years thereafter are valid.—Toms v. Williams, 41 Mich. 552.

¶ 18. Under Comp. L. 1871, § 4091 (How. St. § 5540), which permits the creation of freehold estates to begin at a future day, a contingent remainder is not too remote which depends on the death of the husband of the grantee of the life-estate and on her own remarriage or death, as theirs are lives in being (Comp. L. 1871, § 4082; How. St. § 5531).—Paton v. Langley, 50 Mich. 428.

¶ 19. A deed to one for life and with life estate over to "children" by a certain husband is too remote as to any who may be unborn at the time the deed takes effect.—Downing v. Birney, 117 Mich. 675.

¶ 20. A will is suspensive beyond two lives in being where the whole estate is put under a trust for the life of testator's widow to raise an annuity for her and which thereafter requires that the estate, though regarded as divided into separate parts for his sons, shall be held in trust for the sons severally and their wives respectively to go to their children at their parents' death.—Dean v. Mumford, 102 Mich. 510.

¶ 21. A declaration of trust to hold real estate for the use of a named party for life or for fourteen years, if she die before that time and in the event of her death, to convey to the survivor of a class at the expiration of the fourteen years, is void as suspending the power of alienation during a period not measured by lives in being.—Casgrain v. Hammond, 134 Mich. 419.

¶ 22. Under Comp. L. 1897, §§ 8796, 8797, prohibiting the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being, any suspension of the power of alienation not based on lives in being, is invalid.—Fitz-Gerald v. City of Big Rapids, 123 Mich. 281.

§ 3. Restraints on accumulations of rents and profits.

Permissible limits of accumulation of rents and profits of real estate, see Comp. L. 1915, § 11555.

Statutory invalidity of accumulation provisions beyond minority, see Comp. L. 1915, § 11556.

Chancery power to use accumulations for infants when it may be necessary to do so for education and support, see Comp. L. 1915, § 11557.

Provisions as to disposal to next eventual estate of accumulations not validly disposed of, see Comp. L. 1915, § 11558.

¶ 22a. The statute forbidding the accumulation of rents and profits is simply to prevent tying up real estate for purposes of accumulation during extended periods so that its continued rental might keep the property entire and undisposed of, and build up a considerable fund in connection with a landed estate.—Toms v. Williams, 41 Mich. 552.

¶ 22b. In determining whether accumulations or restraints upon alienation directed by a will are valid, the magnitude of the estate cannot be considered.—Palms v. Palms, 68 Mich. 355.

¶ 22c. Accumulations under a will of the income of personal property for any number of lives in being and for twenty-one years longer are not forbidden.—Toms v. Williams, 41 Mich. 552.

¶ 22d. A lease provided for its own renewal in case the appraised value of buildings erected by the lessee should not be paid at its expiration. Held, that a provision in a devise covering this and other property, real and personal, by which a certain sum was to be annually set aside from the income of the whole to constitute a sinking fund to pay for the buildings, was not in violation of the statute against accumulations.—Toms v. Williams, 41 Mich. 552.

¶ 22e. A will devised a mixed fund of realty and personalty to certain minors, but provided that a certain sum should be annually set aside from the income arising therefrom to free the realty devised from a lease which after testatrix' death had eighteen years yet to run, and would then have to be renewed for forty years unless the appraised value of improvements placed upon it by the lessee should be paid. The rest of the net income of the property was to be held in trust for the minors until the youngest should become of age. The will was held valid, and not in violation of the statutes against perpetuities.—Toms v. Williams, 41 Mich. 552.

¶ 22f. The statute, Comp. L. 1871, §§ 4104-4106 (How. St. §§ 5553-5554) forbids accumulations of rents and profits "for a longer period than during the minority of the persons intended to be benefited thereby." Held, that this language is not inconsistent with a provision for accumulating until the youngest of several minors becomes of age.—Toms v. Williams, 41 Mich. 552.

¶ 22g. A codicil to a will directed that the royalties and other moneys derived from the leases of mineral lands should be considered as capital of the estate and should be invested as such by the trustees under the will, the income therefrom to be paid to the testator's two children, the accumulation therefrom not to continue longer than the minority of the testator's grandchildren "now living," after which the royalties and income should be paid to the testator's children. It seems this provision was valid, considering the royalties as realty, since the statute against accumulations of rents and profits would not apply.—Palms v. Palms, 68 Mich. 355, per Morse and Campbell, JJ.

¶ 23. Accumulations of income and accretions from a trust consisting of realty and personalty for the period of the minority of the cestui que trust, limited to cease at majority, are valid under How. St. § 5553 and under the decision in Toms v. Williams, 41 Mich. 552.—Eldred v. Shaw, 112 Mich. 237.

¶ 24. There is no suspension of the power of alienation for a longer period than two lives in being, by the fact that the trust created by will was to continue during the life of two named persons, although an annuity in favor of a third person was charged upon the same property.—Cole v. Lee, 143 Mich. 267.

§ 4. Rule for personal property.

¶ 25. The law relating to perpetuities as adopted by statute in New York, and there applied both to realty and personalty, has been adopted in Michigan only with respect to realty, leaving the common law to govern as to personalty.—Palms v. Palms, 68 Mich. 355, per Champlin, J., and Sherwood, C. J.

¶ 26. The rule that prevents personal property from being tied up for more than lives in being, and twenty-one years thereafter, never had any application to charitable or public benefactions.—Penny v. Croul, 76 Mich. 471.

¶ 27. There has never been any incapacity to keep a fund in permanence when there is a public corporation to receive and expend the income.—Penny v. Croul, 76 Mich. 471.

PERSONAL ACTIONS TO PLATS.

Cross-References.

Personal Actions—
- Abatement and survivability, see Abatement.
- Rule against trial of title to land, see Pleading, IX; Ejectment; Trespass.
- Time to sue and limitations, see Limitations.
- Proper venue, see Venue, I.
- Change of venue, see Venue, II.
- Jurisdiction over foreign causes, see Courts §§ 44-46.

Personal Contracts—
- See Contracts § 168; Assignments § 7; Agency § 29; Master and Servant, I, II.
- Nonenforceability in specie, see Specific Performance, II.
- Injunctions against breach, see Injunctions § 25 et seq.

Personal Dealings and Profits—
By fiduciaries and agents, see Agency §§ 25, 91; Estates of Decedents § 270 et seq.; Guardianship § 80; Trusts, VIII; Corporations, XVII, G.
Personal Injuries—
Actionable negligence or other tort to the person, see Negligence; Assault, II; Carriers, IV, E; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV; and other specific topics treating of negligence.
Actions under the Survival Act for injury followed by death, see Death by Wrongful Act.
Measure and elements of damages for injury to the person, see Damages.
Personal Interest—
Effect to entitle, qualify, or disqualify the person, see topics treating of the office, capacity, or right affected. See also cross-references under "Interested Persons."
Personal Judgments—
Essentials of jurisdiction, see Courts § 41; Judgments § 10; Process, II.
Effect of judgment in attachment cases, see Attachment § 134 et seq.
Necessary basis for creditors' bill, see Creditors' Suits § 11.
Effect as bar or estoppel on parties and privies, see Former Adjudication.
Deficiency judgments in foreclosure, see Foreclosure, VI.
Personal Liability—
Of corporate stockholders and officers, see Corporations, XVII, F; XXIV, E.
Of members of partnership associations, see Joint Stock Companies §§ 12, 16.
Of partners and joint adventurers, see Partnership, IV; Joint Adventures § 4.
Of administrators, executors, guardians, and trustees, see Estates of Decedents, IX, X; Guardianship, VI, VII; Trusts, VII.
Of public officers, see Officers, VI.
Personal Liberty—
Defined, see Constitutional Law § 139.
Personal Property—
See generally Property; Sales; Chattel Mortgages; Pledges; Bailments; Warehousing.
Devolution and succession, see Descent; Wills; Estates of Decedents.
Malicious injury of, as crime, see Crimes § 105.
Theft as crime, see Larceny.
Taxation of, see Taxes.
Leviability and exemptions, see Executions; Exemptions.
Trusts in personalty, see Trusts.
Character of personalty affixed to land, see Fixtures.
Remedies for injuring and procedure therein, see Conversion; Replevin; Trespass.
Personal Relations—
See Husband and Wife; Parent and Child; Adoption; Agency; Master and Servant; Guardianship.
Personal Service—
See Process, II; Notices § 3.
Essentials of due process of law, see Constitutional Law § 129.
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Within Due Process Clause, see Constitutional Law §§ 135-137.
Aggrieved persons, right to sue or to have review, see Appeal § 60 et seq.; Certiorari § 25; Mandamus § 126 et seq.; Parties; and see specific topics treating of the particular rights of action and remedies.
Not in being, conclusion by judgment, see Former Adjudication, V.
Not in being, validity of devise, see Wills; Perpetuities.
Pest Houses—
See Health § 8.
Liability of city for rental as affected by obtaining by trick, see Eminent Domain § 125.
Petitions—
See generally particular topics treating of the proceeding or action to which a petition may be appropriate or necessary. A motion is perhaps more usual except in equity. See Motions and Orders.
In equity, see Equity § 71.
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For placing names of nominees on primary ballots, see Elections § 27.
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As evidence, see Evidence § 505; Indictment § 299.
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Physical Conditions—
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Physical Examination—
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Denotation of boundaries by reference to plats, see Boundaries §§ 21, 23.
Creation of highways by dedication and acceptance, see Highways, II, A.
Admissibility as documents, see Evidence, VIII, A.
Lines shown as boundaries, see Boundaries §§ 13, 19, 21.
See also cross-references under "Maps and Plats."

PLEADING.

TREATS of pleadings in actions at law and of the general law of pleading so far as applicable alike to law and equity. It excludes the special rules of pleading in equity (see Equity, VII) and criminal pleadings (see Indictment, I, V) and statutory proceedings (e. g., Forcible Entry; Garnishment), and also excludes the necessity, form, and sufficiency of allegations to make out particular causes of action or defenses. See those portions of the specific topics treating of "pleading" or "actions," e. g., Damages, X; Contracts, § 282 et seq.; Carriers, II, J, IV, E, 8; Highways, XII, H, 2; Negotiable Instruments § 101 et seq. Papers in actions other than the pleadings are treated of in such topics as Affidavits; Depositions; Judgments; Motions; Process. See further cross-references following analysis and throughout the body of this topic.

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§ 186. ——Misjoinder or improper union of matters.
§ 187. Bad counts, pleas, or allegations in pleadings otherwise good.
§ 188. Waiver of demurrer or plea by pleading over.

[Note.—By reason of the changes made by the Judicature Act and the rules of court thereunder many of the older precedents of pleading have a diminished value and some are perhaps entirely obsolete. It will be found that many of the precedents, however, are of use and authority on the principles of pleading although obsolete on the particular formality involved. No selection or discarding has been attempted and the analysis has been devised to conform to the new procedure and to accommodate the older cases as well.—Editor.]

Pleading in equity, see Equity, VII.
Criminal pleading, see Indictment, I, V.
Pleadings under Water Craft Act, see Shipping, IV.
Pleading in justice's courts and municipal courts, see Justices of the Peace, IV, D; Municipal Courts § 14.
Pleadings in probate courts, see Probate Courts § 6.
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I. GENERAL RULES AND PRINCIPLES.

A. NECESSITY, PURPOSES, AND MANNER OF ALLEGATIONS.

§ 1. Nature and object of pleadings.

Of pleas to the declaration, see post § 54.
Rule as to definiteness and certainty, see post § 4.
Reading pleadings as part of argument, see Argument of Counsel § 26.
Pleadings as evidence, see Evidence § 544.

¶ 1. The object of pleading is to apprise the opposite party and the court of the grounds of the pleader's claim or defense.—Hurtford v. Holmes, 3 Mich. 460; People ex rel. Benoit v. Miller, 15 Mich. 354; Batterson v. Chicago & G. T. R. Co., 49 Mich. 184; Merkle v. Township of Bennington, 68 Mich. 133.

§ 2. Mode, form, substance, and particulars of allegations.

Effect of Judicature Act, see post § 9.
Necessary precision, definiteness, and certainty, see post §§ 4, 5.
Precision required in proving time, place, and the like, see post §§ 151, 167.
Repetitions and redundancy, see post § 6.
Rule dispensing with allegations of matters presumed or judicially known, see post § 14.
Pleading conclusions, see post § 15.
Pleading statutes and ordinances, see post §§ 16-18.
Construction and effect of pleadings, see post § 19 et seq.
Surplusage, see post § 22 et seq.

Captions and titles and indorsements, see post § 25.
Signatures to pleadings, see post § 26.
Responsive office and function of pleas, see post § 54.
Pleas in abatement, see post § 65.
Pleas in bar, see post §§ 67-70.
Requisites of special notices of defense under general issue, see post § 69.
Bills of particulars and requisites, sufficiency, and effect of same, see post V.
Matters essential in bills of particulars, see post § 98.
Impropriety of oral demurrers, see post ¶ 363.
Amendments in general, see post VI.
Form or manner of making amendments, see post § 134.
Cure of defects by verdict or judgment, see post § 188 et seq.
Necessary and proper substantial allegations in the various specific causes of action, see specific topics, e. g., Contracts § 282 et seq.; Conversion §§ 23, 24. The plan of compilation has been to treat in Pleading the rules of pleading and to treat in connection with substantive topics the allegations necessary and proper to them. See also cross-references, post § 10.
Sufficiency of general allegation that act was done by agent, see also Contracts § 286, ¶ 1162.
Necessity of alleging manner or means in trover, see Conversion § 23.
Allegations in declaration on insurance policy of compliance with conditions subsequent, see Insurance ¶ 1127.
Inducement, innuendo, and colloquium in charging libel or slander, see Libel and Slander § 55.
Necessity of writing, typewriting, or printing, see 1916 C. C. Rule 3, § 1.
Necessity for written petitions and motions, see 1916 C. C. Rule 15, § 1.
Requirement of English language for judicial records and proceedings, see Jud. Act, chap. IV, § 13; Comp. L. 1915, § 12260.
Rule as to brevity of statement, see 1916 C. C. Rule 21, § 3.
Rule against alleging matters not necessary to be proved, see 1916 C. C. Rule 21, § 3.
Rule as to use of figures in stating dates, sums, and numbers, see 1916 C. C. Rule 21, § 2.
Mode of pleading performance of conditions precedent, see 1916 C. C. Rule 21, § 5.

¶ 2. Only ultimate facts should be alleged in a pleading, it being unnecessary and improper to plead the circumstances tending to prove such facts.—McDonald v. Hall, 198 Mich. 50.

¶ 3. A pleading need not allege more than is sufficient, prima facie, to constitute a good cause of action or defense.—Walker v. Michigan State Bank, 2 D. 359; Farmers' & Mechanics' Bank of Michigan v. Kingsley, 2 D. 379.

¶ 4. In an action for interference with rights counts are demurrable that do not show the extent of plaintiff's rights and how they have been impaired; and though in the absence of a demurrer they are not considered fatally defective, their effect must be confined to what it would have been if they had been properly framed. This applies to actions on the case as well as to those upon the contract.—Ives v. Williams, 53 Mich. 686.

¶ 5. A declaration for assault and battery need set forth no more specific description of the resulting injuries than a statement charging sickness and bodily pain to have been among the sufferings caused by the assault.—Johnson v. McKee, 27 Mich. 471.

§ 3. ——Matters of evidence.

See also ante ¶ 2.
Allegations of evidence as surplusage, see post § 22.
Rule against pleading evidence, see 1916 C. C. Rule 21, § 3.

¶ 6. A pleading should contain allegations of facts and not of evidence.—Picard v. McCormick, 11 Mich. 68.

§ 4. Definiteness, precision, and certainty.

Rule as to certainty, see also post ¶ 21.
Duplicity and ambiguity, see post § 5.
Rule against pleading conclusion instead of facts leading thereto, see post § 15.
Repetitions and redundant allegations, see post § 6.
Office of bill of particulars, see post § 94.
Mode of pleading matters in abatement, see post § 65.
General sufficiency of declaration, see post § 29.
Modes of objection for uncertainty and indefiniteness, see post § 172.
Precision required in the proofs, see post X.
Necessity of positiveness in equity pleading, see Equity § 78.
Rule as to plain and concise statement, see 1916 C. C. Rule 21, § 2.

¶ 7. A pleading is generally sufficient when it fully accomplishes the purpose of apprising the court and the opponent of the pleader's claim or defense.—People ex rel. Benoit v. Miller, 15 Mich. 354.

¶ 8. Under any system of pleading such facts must be averred as will, if admitted, lead to a necessary legal conclusion of liability or guilt.—Enders v. People, 20 Mich. 233 (criminal case).

¶ 9. The wording of pleadings should be precise.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 10. Extreme niceties and technical exactness in form of pleadings is not favored, in

Michigan, and the tendency is to eliminate the ultra refinements and technicalities of old forms of common-law pleading.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 11. Extreme niceties and technical exactness in form in the requirements of pleadings are not favored.—Coon v. Plymouth Plank Road Co., 31 Mich. 178.

¶ 12. Good pleading requires reasonable certainty as to the pleader's meaning, but there is no special legal advantage in a multitude of words.—Ayres v. Toulmin, 74 Mich. 44.

¶ 13. Certainty to a common intent is all that is required in the declaration.—Truesdale v. Hazzard, 2 Mich. 344; Merkle v. Township of Bennington, 68 Mich. 133.

¶ 14. In pleading certainty to a certain intent in general, or what upon a fair and reasonable construction may be called certain, is all that is required.—McDonald v. Hall, 193 Mich. 50.

§ 5. ——Duplicity and ambiguity.

Construction against pleader, see post § 20.
Improper union of causes in one count, see post § 42.
Inconsistency of causes pleaded, see post § 50.
Mode of raising objection, propriety of general demurrer, see post § 76.
Modes of objection for duplicity, see post § 172.
Pleading inconsistent defenses, see post § 70.
Doubleness and uncertainty in equity pleading, see Equity § 78.
Doubleness in declaration for seduction, see also Seduction, § 3.

¶ 15. A pleading is double if a single issue cannot be made to controvert it by denying any one material fact.—People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389.

¶ 16. Unless one averment negatives the other an objection for duplicity is not good; but it is better pleading to set out two possible theories in two counts rather than to plead one as the alternative or disjunctive of another, e. g., where defendant is sued as master and also of owner of premises where plaintiff was working for an independent contractor.—Douglas v. Marsh, 141 Mich. 209.

¶ 17. An affirmation in the alternative is bad; since where one alleges that another has done either one or the other of several acts, it naturally means that he has done but one of the several acts charged, and the accuser is unable to tell which. In such case the accused is unable to tell which one of the charges he must prepare to meet.—First National Bank v. Steele, 81 Mich. 93.

§ 6. Repetitions and redundancy.

See also post ¶ 96.
Redundant pleas, see post § 24.

¶ 18. Our rules of pleading do not require or encourage the needless repetition of allegations which are so averred as to be plainly understood.—Ayres v. Toulmin, 74 Mich. 44.

§ 7. Anticipative and negative allegations.

Anticipating defenses in chancery bills, see Equity § 88.
Anticipating defense of statute of frauds, see Frauds, Statute of § 149.
Negativing defenses in actions for injuries from defective highways, see Highways § 274.
Anticipation of limitations by pleading fraud and concealment, see Limitations § 107.

¶ 19. The pleader is not bound to anticipate, nor need he notice and remove, every possible exception, answer or objection that may exist, and with which the adversary may intend to oppose him.—Farmers' & Mechanics' Bank of Michigan v. Kingsley, 2 D. 379.

¶ 20. A party need not deny allegations before they are made.—Brown v. Thompson, 29 Mich. 72.

¶ 21. The rule of certainty does not require the declaration to negative every possible counter-implication.—Weiss v. Whittemore, 28 Mich. 366.

¶ 22. The declaration need not negative a defense against the existence of which there is a general presumption of law.—Carrier v. Cameron, 31 Mich. 373.

¶ 23. A new promise need not be specially counted on in declaring upon a judgment otherwise barred by bankruptcy discharge, but may be proved when defendant sets up the discharge.—Craig v. Seitz, 63 Mich. 727.

§ 8. Statutory regulations of pleading.

Effect of Judicature Act and court rules, see post § 9.

¶ 24. Sess. L. 1849, § 26, regulating pleadings in the county court, required but a brief statement of plaintiff's claims or demands, without regard to previous forms; and it seems it was enough for plaintiff to set forth, in some manner, sufficient to apprise defendant of what he had to meet.—Mills v. Spencer, 3 Mich. 127.

¶ 25. The statute abolishing special pleadings does not make special pleading void where the parties have voluntarily adopted it, joined issue, and proceeded to trial and judgment.—Wales v. Lyon, 2 Mich. 276.

§ 9. Effect of Judicature Act and court rules.

See note at head of topic following analysis.
Effect of abolition of special pleading, see ante § 8.
Power of courts to make rules, see Courts, III.
English rules of practice, adoption and applicability, see also Courts ¶ 33.

Powers of supreme court to make rules for simplification and regulation of pleading, see Jud. Act, chap. I, § 14; Comp. L. 1915, § 12019.

¶ 26. While this state has no code, and the common-law form of pleading obtains, special pleadings have been abolished, and innovations introduced tending to relax technical rules and simplify the practice; and extreme niceties and technical exactness in form are not favored.—McDonald v. Hall, 193 Mich. 50.

§ 10. Particular facts and pleadings in particular proceedings.

General substance requisite to declaration, see post § 29.

[Note.—No attempt has been made to collect in Pleading all the precedents on the mode and sufficiency of pleading the particular facts, causes of action, and defenses. The essential allegations in such cases involve substantive law to such an extent that the reader is better served by treating such matters of pleading in connection with the substantive law. Accordingly those portions of the specific topics which treat of "pleading" or "actions and procedure" should be consulted, e. g., Contracts, X, A; Conversion, II; Assumpsit; Trespass, II; Accord and Satisfaction § 15; Account Stated § 8; Frauds, Statute of § 149 et seq.; Limitations § 103 et seq.; Payment § 46 et seq.; Customs and Usages § 6; Duress § 6; Fraud § 90 et seq., § 98; Former Adjudication § 94; Estoppel § 57 et seq.]

In action on bail bond or recognizance, see Arrest, XII.

In disbarment proceedings, see Attorneys § 6.

In forcible entry and summary proceedings, see Forcible Entry, II.

Allegations required in action on bond, see also Bonds § 6.

General allegations of consideration for contract, see also Contracts § 288.

Pleading breach of alternative promise in contract, see Contracts ¶ 1177.

Pleading debt revised by new promise by discharged bankrupt, see Bankruptcy § 24.

Pleading in actions on benefit certificate or contract, see Fraternal Associations § 70.

Pleading in actions upon guaranties, see Guaranty § 23.

Pleading damages, see Damages, X.

Pleading in equity, see Equity, VII.

Pleading in justices' courts, see also Justices of the Peace, IV, D.

Pleadings on appeal from justices' court, see Justices of the Peace § 213.

Pleadings in municipal courts, see Municipal Courts § 14.

Pleading in probate courts, see Probate Courts § 6.

§ 11. Names and descriptions.

Allegations of character of persons, special capacity, or incorporation, see post § 12.

Descriptio personæ as surplusage, see post § 23.

Mode of pleading misnomer or misdescription, see post § 63.

Frivolousness of demurrer for want of names and description, see post ¶ 393.

Amendments as to parties and names of parties, see post §§ 109, 110.

Necessity of amendment in case of use of wrong name, see post ¶ 476.

Cure of misnomer or misdescription by statute of amendments, see post § 182.

Allegation that "defendant is administrator" as descriptio personæ, see Estates of Decedents ¶ 1027.

Sufficiency of descriptions in equity pleading, see Equity § 79.

Description of property in trover, see Conversion § 23.

Name or description of party in process, see Process, I.

Defective description in affidavit for replevin aided by description in writ, see Replevin, II.

General law of names and doctrine of idem sonans, see Names.

¶ 27. Under How. St., § 6871, providing for description by initials when suit is on any note or instrument in writing which designates parties by initials of Christian names, the payee in a note payable to "C. F. Shaw" may bring suit thereupon in that name.—Shaw v. Fortine, 98 Mich. 254.

¶ 28. It is enough in giving the residence of parties in a declaration to describe them as "of the city of Detroit," or otherwise.—Elliott v. Farwell, 44 Mich. 186.

¶ 29. A municipality should ordinarily be sued in its corporate name where the statute has not provided otherwise, and, where the statute has made village officers ex-officio highway commissioners, they suing for the village to recover the cost of constructing a bridge should sue in their names as commissioners of highways rather than as a village council.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 30. A foreclosure bill which describes the mortgaged premises as "lot No. 6 of Backus' subdivision of out-lot No. 8 of the Woodbridge Farm," when the number of the out-lot is in fact 87, and which fully identifies the property involved, is not fatally defective as to description.—Stevenson v. Kurtz, 98 Mich. 493.

¶ 31. Where, in a bill to remove a cloud on complainant's title, the land is described as a "sand-bar" or "piece of ground," etc., such description is broad enough to include the term "island."—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246; affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

§ 12. Character, special capacity, or incorporation of persons.

Description of capacity or special ownership as surplusage, see post § 23.

Construction of declaration as one pleading individual or representative cause of action, see post § 35.

Pleas to capacity or title of plaintiff as matter in abatement, see post §§ 60, 66.

Amendments changing description of character or capacity of representative party, see post § 110.

Suing as individual and proof supporting suit as next friend of infant, see also post ¶ 801.

Regarding amendment as made to cure defective averment of incorporation, see post ¶ 897.

Cure of want of description by statute of amendments, see post § 182.

Necessity of alleging assignment for creditors in suit by assignee, see Assignments for Creditors § 41.

Pleading trust or letters of administration, see Estates of Decedents §§ 322, 323; Guardianship § 60; Trusts, IX.

Pleading existence of corporate party, see Corporations §§ 189, 193.

Pleading corporate existence of foreign corporation, see Foreign Corporations, § 27.

Pleading compliance by foreign corporation with statutes and regulations, see Foreign Corporations § 28.

Pleading existence of municipal corporation, see Municipal Corporations § 213.

Sufficiency of general averment that party is a corporation, see Jud. Act, chap. XIV, § 7; Comp. L. 1915, § 12459.

¶ 32. A party suing in a representative capacity, where the contract or promise was made to the person he represents and not to himself personally, must set up specially the representative capacity in which he sues —Smith v. Pinney, 86 Mich. 484.

¶ 33. In suits instituted by a corporation, the general allegation that it is a corporation under the laws of the state is a sufficient averment of corporate existence. —Palmiter v. Pere Marquette Lumber Co., 31 Mich. 188.

¶ 34. In an action against a village a declaration which describes defendants as "the village of North Muskegon, a municipal corporation of the state of Michigan," sufficiently alleges its corporate existence and character.—Clark v. Village of North Muskegon, 88 Mich. 308.

§ 13. Writings and formal acts, records, contracts, and doings.

Making exhibits and attachment of copies of writings, see post § 140.

Allegation of sealing as surplusage, see also post ¶ 80.

Amendments to describe writing correctly, see post § 113 et seq.

Defective allegation cured by reference to record or by setting out writing in full, see also post ¶ 68.

Cure of deficient allegation of consideration by verdict, see post § 183.

Affidavits of nonexecution to raise issue of non est factum, see post § 147 et seq.

Admission of execution and genuineness by failure to put in affidavit of nonexecution, see post § 158.

Variance of proofs in matters of date or description of instrument, see post § 167.

Effect and materiality of declaring on original contract instead of on it as modified, see post ¶ 880.

Materiality of variance in description, see post ¶ 903.

Pleading records in mandamus, see Mandamus ¶ 815.

Manner of pleading records in answer or return to mandamus, see Mandamus ¶ 845.

Pleading contracts and bills and notes, see Contracts § 284; Negotiable Instruments § 101.

Mode of pleading covenant for title, see Covenants for Title § 24.

Mode of pleading assignments, general terms and effect, see also Assignments § 32.

Mode of pleading judgments and official decisions, see 1916 C. C. Rule 21, § 4.

Mode of pleading instruments by setting out or by substance and annexed copy, see 1916 C. C. Rule 21, § 6.

¶ 35. It is sufficient to allege the undertaking in a written instrument according to its legal effect.—Jerome v. Hopkins, 2 Mich. 96.

¶ 36. A condition of a mortgage sought to be foreclosed may be set out according to its legal effect.—Jerome v. Hopkins, 2 Mich. 96.

¶ 37. In declaring on an agreement as a demise, there are but two proper modes of stating it: first, by its legal effect; or, second, by setting it forth in such a manner that its legal character can be seen.—Tillman v. Fuller, 13 Mich. 113.

¶ 38. It is not necessary to allege that an acceptance of a written offer to purchase certain lands was in writing.—Kroll v. Diamond Match Co., 106 Mich. 127.

B. MATTERS OF FACT AND LAW; CONCLUSIONS.

§ 14. Facts implied, presumed, or judicially known.

Rule as to negativing facts which are contrary to presumption, see ante ¶ 22.

Nonaider of demurrer by judicially noticing facts contrary to allegations of declaration, see post ¶ 890.

Matters within scope of judicial notice, see Evidence, I.

Rule against pleading matters judicially known, see 1916 C. C. Rule 21, § 3.

¶ 39. It is not necessary to allege implications of fact or presumptions of law.—Farmers' & Mechanics' Bank of Michigan v. Kingsley, 2 D. 379.

¶ 40. No plea is necessary to bring to the notice of the court facts which the judges must judicially know.—People v. Mahaney, 13 Mich. 481 (quo warranto proceeding).

§ 15. Legal conclusions and matters of law.

Rule against pleading evidence, see ante § 3.
Necessity of pleading facts leading to legal conclusion, see ante § 4.
Pleading formal writings, records, and contracts according to their legal effect, see ante § 13.
Pleading matters legally presumable, see ante § 14.
Allegations in conflict with law, see post ¶ 72.
Pleas in abatement, see post § 65, ¶ 279.
Nonadmission of conclusions of law by demurrer, see post § 89.
Pleading evidence or conclusions of law in chancery bill, see Equity §§ 81, 82.

¶ 41. An allegation in a declaration which is not an averment of fact, but a mere conclusion of the pleader, is bad.—Leland v. Goodfellow, 84 Mich. 357.

¶ 42. Parties cannot be allowed to stipulate or to admit by pleading that a statute was not properly or constitutionally passed.—Attorney General v. Rice, 64 Mich. 385.

C. PLEADING STATUTES AND ORDINANCES.

§ 16. In general; statutory causes of action or defenses.

Rule as to negativing exceptions and provisos, see post § 17.
Immateriality of misstatement of section number, see also post ¶ 827.
Pleading foreign laws, see post § 18.
For the necessity and sufficiency of allegations to make out the particular statutory causes and defenses, see the specific topics treating of them, e. g., Death by Wrongful Act §§ 13-15; Highways § 273 et seq.; Railroads, VIII.
Declarations on statutory liability for injury by animals, see Animals § 14.
Pleading the statute in action under Civil Rights Act, see Civil Rights ¶ 3.
Pleading statutes by numerical reference in affidavit for arrest, see Civil Arrest ¶ 97.
Statutory provisions as to manner of pleading statutes and ordinances, see Jud. Act. chap. XIV, § 13; Comp. L. 1915, § 12465.

¶ 43. Where a thing is originally authorized by statute which could not be done at common law, then, in pleading, everything must be averred which the statute requires to bring the act within it; but where a statute makes a writing necessary, in a case where it was not so at common law, then such an averment in pleading is not necessary.—Dayton v. Williams, 2 D. 31.

¶ 44. Where plaintiff's title to sue is statutory and the right of action depends on a special construction of facts defined in the statute, the declaration must aver the existence of such facts.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 45. Pleading the statute is stating the facts which bring the case within it, and counting on it is making express reference to it by apt terms to show the source of right relied on.—Howser v. Melcher, 40 Mich. 185.

¶ 46. A declaration for a statutory cause of action, if containing all the averments necessary to bring the case within the statute, need not expressly count upon the statute.—Hayes v. City of West Bay City, 91 Mich. 418.

¶ 47. A common-law declaration upon a statute is bad if it does not in the same count state the circumstances necessary to support the action, and expressly refer to the provision counted on.—Howser v. Melcher, 40 Mich. 185.

¶ 48. In pleading under a statute there is a distinction between a declaration and a plea in respect to averring the statutory facts, and a plea of contract must show that the contract was such as would sustain an action.—Dayton v. Williams, 2 D. 31.

¶ 49. A declaration in trover against an officer for value of exempt property levied on should, under How. St., § 7343, be special, pleading the statute.—McCoy v. Brennan, 61 Mich. 362.

¶ 50. A declaration in a statutory action referred to the chapter of the statute by the wrong number, but otherwise cited it correctly, and was not demurred to. Held sufficient to support a verdict for plaintiff.—Achey v. Hull, 7 Mich. 423.

¶ 51. In debt to recover a penalty under the prohibitory liquor-law a precise reference to the section of the statute alleged to have been violated was required where the statutory form was not followed.—Benalleck v. People, 31 Mich. 200.

¶ 52. In an action to recover for the destruction of plaintiff's property by fire negligently set by the defendants, the fact that the act of the defendants was in violation of the city ordinance must be specially pleaded to allow the plaintiff to offer the ordinance in evidence, even though such violation is not claimed to be negligence per se.—Richter v. Harper, 95 Mich. 221.

¶ 53. The misstatement of the number of the section of a statute declared on, is not reversible error.—Duffiny v. Detroit & Mackinac Ry. Co., 186 Mich. 40.

§ 17. Negativing exceptions and provisos.

¶ 54. In declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is matter of defense, and must be shown by defendant.—Attorney General v. Oakland County Bank, W. 90; Myers v. Carr, 12 Mich. 63; Lynch v. People, 16 Mich. 472 (penal action); People v. Phippin, 70 Mich. 6 (criminal case); Schelske v. Township of Orange, 147 Mich. 135.

¶ 55. In pleading a statute which shows an exception in the enacting clause the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or in a subsequent statute, that is a matter of defense, and is to be shown by the other party.—People v. Pendleton, 79 Mich. 317 (criminal case); People v. Curtis, 95 Mich. 212 (criminal case).

¶ 56. The rule that one who relies on a statutory exception not shown by the enacting clause of the statute must bring himself within the exception by his pleadings is not always a rule of pleading, but is sometimes one of evidence; and it only requires the party who relies on the exception to present the facts in such form as the case demands.—Osborn v. Lovell, 36 Mich. 246.

¶ 57. The rule of pleading at common law is that, in declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso or in a subsequent section, it is a matter of defense.—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

§ 18. Foreign statutes and laws.

¶ 58. Where the liability of a party results from the violation of a foreign statute, a party relying upon it in an action for damages on such liability must set out the statute and the facts showing a case within its provisions.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

D. CONSTRUCTION AND EFFECT; SURPLUSAGE.

§ 19. In general.

[Note.—Questions of construction of pleadings arise most often on review for the purpose of considering the meaning and intendment of what is contained in and shown by the "record" or transcript and of making implications from the silence of the record as to particular things. See Appeal, XII, C.]

Intendments against pleader, see post § 20.
Allegations in conflict with law, see post § 21.
Surplusage, see post § 22.
Descriptions added to names, see post § 23.
Effect of redundant and immaterial pleas, see post § 24.
Construction of declaration to ascertain form or class of action, see post § 33.
Construction with respect to issues joined and as to variance of proof, see post IX, C, X.
Construction to determine what is admitted and what controverted, see post IX, C.
Construction of supplemental pleadings, see post § 139.
Effect and construction of bill of particulars, see post §§ 98, 100.
Construction of affidavits of nonexecution, see post § 147.
Demurrers joined in by several parties, see post ¶ 365.
Strict construction of pleadings assailed by demurrer to evidence, see Directing Verdict § 26.
Construction of pleadings as appearing in record on appeal, see Appeal § 330.
Adherence on appeal to theory of pleadings adopted below, see Appeal §§ 267-269.
Construction and effect of averments in equity, see Equity §§ 148-151.
Pleadings and files as evidence in action on bail bond given in the action, see Civil Arrest § 63.
Admissibility of pleadings as evidence in other suits, see Evidence §§ 381, 548.
Statements and recitals in pleadings as admissions receivable in evidence in other cases, see Evidence § 381.
Pleadings and files in the case as substitute for judgment roll in evidence, see Evidence § 545.
Interpretation and construction of justices' pleadings, see Justices of the Peace § 103.
Privilege in publishing matter contained in pleadings, see Libel and Slander § 32.

¶ 59. Declarations are construed with reasonable intendments, and their terms are read and applied in the natural and usual sense and without supposing qualifications which, though possible, are not fairly indicated.—Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184.

¶ 60. A general expression superadded to specific words in the charging part of a declaration is construed as a term of the same class as the rest.—Macumber v. White River Log & Booming Co., 52 Mich. 195.

¶ 61. Where the declaration employs a term which, standing by itself, has a technical meaning, such term is nevertheless to

be read so as to make sensible the whole clause in which it stands; so, the phrase "acquitted and discharged," in a declaration for malicious prosecution, was held, because of its connection, to refer to a nolle prosequi.—Stanton v. Hart, 27 Mich. 539.

¶ 62. The construction and interpretation of a pleading is a matter of law on the pleading as it appears in the record notwithstanding a finding of facts contrary to its implication.—Earle v. Westchester Fire Ins. Co., 29 Mich. 414.

¶ 63. A defective description of a paper in pleading is cured by referring to the record of the paper, especially if the pleading also sets it forth in full.—Botsford v. Botsford, 49 Mich. 29.

§ 20. Intendments for or against pleader.

In pleas in abatement, see post § 65.

Taking statements of fact in demurrer as true against demurrant, see post ¶ 386.

¶ 64. In pleading every implication will be taken most strongly against the pleader.—Bush v. Dunham, 4 Mich. 339.

¶ 65. An ambiguous allegation is construed most favorably for the party against whom it is made.—Browne v. Moore, 32 Mich. 254.

¶ 66. No presumption can be raised in favor of a plaintiff against his own express allegations.—Raymond v. Hinkson, 15 Mich. 113.

¶ 67. It is presumed that pleadings are not put in for sham purposes or in bad faith, and that they cannot be attacked except upon averments to the contrary.—Sanford v. Huxford, 32 Mich. 313.

¶ 68. Technical regularity is required in a pleader who objects to a mere technical irregularity.—Comstock v. McEvoy, 52 Mich. 324.

¶ 69. When the case is disposed of on demurrer the declaration will be considered more critically than when it has gone to trial on the merits.—Hammond v. Michigan Cent. R. Co., 162 Mich. 431.

¶ 70. If defendant delays to take demurrable objections until the trial, all intendments will be against him.—Barton v. Gray, 48 Mich. 164.

¶ 71. The sufficiency of a declaration does not depend upon statements by the plaintiff's counsel made on the trial limiting its scope.—McLeod v. Crosby, 128 Mich. 641.

§ 21. Allegations in conflict with law.

Disregard of pleadings contrary to judicially known statutes, see also Evidence ¶ 162.

¶ 72. If the allegations in a pleading conflict with a public statute they must be disregarded.—People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389.

§ 22. Surplusage.

Construction of declaration with needless matter added, effect to make declaration sound in tort or contract, see post § 34.

Immateriality of particular allegations, others being good and sufficient, see post § 187.

Immaterial pleas, see post § 24.

Stating effect of contract which is set out in terms, see also Contracts ¶ 1158.

¶ 73. In a pleading, all beyond what is necessary to constitute, prima facie, a sufficient cause of action or defense, is surplusage.—Walker v. Michigan State Bank, 2 D. 359.

¶ 74. Anything outside of the facts necessary to state a cause of action is surplusage; the necessary facts, however, must be stated.—Smith v. Holmes, 54 Mich. 104.

¶ 75. Immaterial averments in a pleading will be treated as surplusage.—Murphy v. McGraw, 74 Mich. 318; Marquet v. La Duke, 96 Mich. 596.

¶ 76. An averment that is a mere conclusion of law—such as that the defendant's acts were "unlawful"—may be regarded as surplusage.—Williams v. Raper, 67 Mich. 427.

¶ 77. Mere matters of evidence set forth in pleadings are treated as surplusage.—Attorney General v. May, 97 Mich. 568.

¶ 78. An erroneous allegation in a declaration that a release unnecessarily referred to in the declaration was executed under a certain statute is to be treated as surplusage.—Holdridge v. Farmers' & Mechanics' Bank, 16 Mich. 66.

¶ 79. No allegations descriptive of that which is legally essential to the claim or charge can be rejected as immaterial.—Harrington v. Worden, 1 Mich. 487.

¶ 80. It is surplusage to allege that the contract of corporations was "sealed with the seals of the respective parties," where upon its face it appeared to be executed by agents who had only affixed their own seals.—Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

¶ 81. Where in assumpsit for the breach of a railroad construction contract, plaintiff alleges that defendant broke the contract in the seizure and conversion of his tools, an allegation that defendant disposed of the tools for a sum of money may be treated as surplusage.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

§ 23. Names with added descriptions.

¶ 82. The use of the term "assignee," etc., after plaintiff's name in the declaration, held to be mere descriptio personæ, and not to authorize the construction that the declaration purported to be for a cause of action that had accrued to the assignors prior to the assignment, and claimed to have been passed by the assignment to plaintiff.—Bloom v. Sexton, 33 Mich. 181.

¶ 83. Naming a defendant in tort as a receiver, which office he holds and under which office he committed the tort, may be treated as a mere description of him as a defendant.—Gutsch v. McIlhargey, 69 Mich. 377.

¶ 84. Where a cause is entitled "Thomas Bortz, for James B. Bortz, vs." etc., the plaintiff in the suit is Thomas Bortz, and the words "for James B. Bortz" are surplusage, indicative merely that the suit is prosecuted for his use and benefit.—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

¶ 85. An action for contribution was brought by two plaintiffs "for themselves and for the use of E. H. S.," a dormant partner. Held, that the words quoted might be treated as surplusage, and that the action was properly brought.—Smith v. Ayrault, 71 Mich. 475.

§ 24. Immaterial or redundant pleas.

Plea to jurisdiction as immaterial after demurring, see post ¶ 359.

Disregarding and striking redundant plea, see post § 79.

Disregard of defective or redundant plea after verdict or judgment, see post § 187.

¶ 86. Where of two pleas—nonassumpsit and not guilty—filed to the whole of a declaration, the former meets the whole, the latter may be treated as superfluous and a nullity.—The Milwaukie v. Hale, 1 D. 306.

E. CAPTION, TITLES, AND SIGNATURES.

§ 25. Captions and titles and indorsements.

Entitling affidavits of nonexecution, see post ¶ 697.

Entitling equity pleadings, see Equity § 65.

Entitling affidavits in name of case, see Affidavits § 4.

Entitling dissolution proceedings in attachment, see Attachment § 117.

Entitling affidavits for capias, see Civil Arrest § 9.

Entitling cause on appeal or error, see Appeal § 130.

Name in which municipalities should sue or defend, see Municipal Corporations § 212.

Indorsements on process, see Process, I.

Statutory requisites of title, recitals as to term and venue, see Jud. Act, chap. XIV, § 8; Comp. L. 1915, § 12455.

Manner of entitling papers in the case, see 1916 C. C. Rule 3, §§ 2, 3.

Indorsements of abbreviations of title and character of paper, see 1916 C. C. Rule 3, § 4.

Indorsement of addresses of attorneys, see 1916 C. C. Rule 3, § 5.

¶ 87. Addition of superfluous words which cannot mislead in the caption of an unsworn pleading is immaterial: e. g., calling the court in which a demurrer is filed "the superior court of the city of Grand Rapids," when the court's legal title is "the superior court of Grand Rapids."—Comstock v. McEvoy, 52 Mich. 324.

§ 26. Signatures.

Signatures to answers in mandamus, see Mandamus § 143.

Signatures in chancery pleadings, see Equity § 66.

Necessity for signature by party or attorney, see 1916 C. C. Rule 21, § 9.

Signature to pleas, see 1916 C. C. Rule 23, § 2.

¶ 88. In all courts the declaration must be signed by someone, and this signature is usually the test to determine who appears.—Benalleck v. People, 31 Mich. 200.

F. SERVICE, FILING OR ENROLLING, WITHDRAWAL AND REPLACEMENT.

§ 27. In general; filing and serving.

Striking from files, see post § 79.

Filing of amended pleadings, see post § 134.

Supplemental pleadings as superseding earlier pleadings, see post § 139.

Service of affidavit of claim and amount due, see post § 143.

Filing as essential to commencement of action begun by declaration, see Actions § 6.

Filing declaration in attachment to complete commencement of action, see Attachment § 77.

Necessity of filing declaration to make right to costs accrue, see Costs § 2.

Appearance to default plaintiff for not seasonably declaring, see Appearance § 9, ¶ 36.

Necessity of filing of declaration to support default in action by filing and summons, see Defaults § 1.

Time for filing declaration with respect to default against defendant not pleading, see Defaults § 3.

Commencement of actions by notice and service of copy of declaration, see Process, I.

Mode and sufficiency of service of process in general, see Process, II.

Jurisdiction where entry fee is not paid, see Courts § 39.

Removal of files from office of custodian, see Records § 6.

Suppression of files and papers from public inspection, see also Records § 5.

Time and place for filing pleadings, see Jud. Act, chap. XIV, § 1; Comp. L. 1915, § 12453.

Time for filing declaration, see 1916 C. C. Rule 31, §§ 1, 2.
Time for service of copy of declaration, see 1916 C. C. Rule 31, §§ 1, 2.
Time for filing and serving pleas, see 1916 C. C. Rule 31, § 3.

¶ 89. Failure to file declaration within twenty days after return day of summons is at most an irregularity, advantage of which can only be taken by entering default, and which, where neither appearance nor default has been entered, may be cured by filing declaration.—Smith v. Runnells, 94 Mich. 617.

¶ 90. Plaintiff in a suit commenced by capias ad respondendum has until the end of the next term after the return of the writ in which to file his declaration; the statute (How. St. § 7312), and not the rules of court, controlling in such cases.—Reid, Murdock & Co. v. Benzie Circuit Judge, 115 Mich. 418.

§ 28. Copies and sufficiency thereof.

Amendments of copies served, see post § 131.
Amendment of pleadings by service of copy, see post § 134.
Duty to serve copies on appearing defendants, see Jud. Act, chap. XIV, § 5; Comp. L. 1915, § 12457.
Number of copies to be served where one attorney appears for several parties, see 1916 C. C. Rule 31, § 7.

¶ 91. Where the pleading is correct, but an error occurs in the copy served, a demurrer will not be sustained if it appears from the circumstances that the party demurring was aware of the error, and therefore was not misled by it.—People ex rel. Benoit v. Miller, 15 Mich. 354.

II. DECLARATION.

§ 29. Requisites, form, and sufficiency in general.

Effect of Judicature Act, see ante § 9.
General office of pleadings, see ante § 1.
Requisites of pleadings in general, see ante § 2 et seq.
Rules as to definiteness, certainty, and doubleness, see ante §§ 4, 5.
Anticipative and negative allegations, see ante § 7.
Pleading names, descriptions, and capacities of persons, incorporations, and descriptions of things, see ante §§ 11, 12.
Pleading formal writings, records, and contracts, see ante § 13.
Rule as to matters presumed or judicially known, see ante § 14.
Pleading conclusions and matters of law, see ante § 15.
Pleading statutes and ordinances, see ante § 16 et seq.
Filing and serving declaration, see ante §§ 27, 28.
Time for filing declaration, see ante § 27.
Conformity to writ, see post § 30.
Averments of jurisdiction and venue, see post § 31.
Averments of title and right, see post § 32.
Construction as to form of action pleaded, see post §§ 33-36.
Singleness, doubleness, and splitting, see post § 37.
Separation and joinder of causes and counts, see post §§ 38-50.
Election between counts and causes, see post §§ 51-53.
Construction of ad damnum clause, see also post ¶ 128.
Essentials of each separate count, see post ¶ 142.
Pleas to the declaration, see post III.
Nature and office of the bill of particulars, see post § 94.
Proper matters of amendment, see post VI, B.
Changing form or essential nature of action by amendment, see post § 116 et seq.
Total unfitness and insufficiency of declaration to support any judgment, see also post ¶ 836.
Objection under general issue that declaration states no cause whatever, see post ¶¶ 859, 861, 863, 866.
Cure of defects by verdict or judgment, see post § 183 et seq.
Inefficacy of verdict or judgment to cure failure to state cause of action, see post § 183.
For the substantial allegations requisite in particular causes of action or to allege particular facts, see specific topics treating of the cause of action or the issue in question, e. g., Contracts § 282 et seq.; Conversion § 23 et seq.; Damages, X; Customs and Usages § 6.
Occasion and propriety of the common counts in assumpsit, see Assumpsit, II.
In action for injuries from defective highways, see Highways § 273.
In declaration in action for criminal conversation, see Husband and Wife ¶ 523.
In suit for alienation of affections, see Husband and Wife § 168, ¶ 545.
In libel and slander, see Libel and Slander § 58 et seq.
In trespass under Judicature Act as to nature of the trespass, see Trespass, II.
In petitions for dissolution of attachment, see Attachment § 117.
In complaint for arrest of fraudulent debtor, see Civil Arrest § 25.
Complaints for forcible entry or summary proceedings, see Forcible Entry § 17 et seq.
Necessary and sufficient allegations in petition for mandamus, see Mandamus § 135.
Nonsuit or dismissal for failure to plead seasonably, see Discontinuance § 18.
Declarations in justices' courts, see Justices of the Peace, § 88 et seq.
Sufficiency of declaration to state meritorious cause of action exempting plaintiff from furnishing security for costs, see Security for Costs § 1.
Forms of action under the Judicature Act, see Jud. Act, chap. XI, § 1; Comp. L. 1915, § 12350.
Statutory provisions as to permissible forms

of action, see Jud. Act, chap. XIV, § 2; Comp. L. 1915, § 12454.
Rules as to forms of declarations, see 1916 C. C. Rule 22.
Conclusion of declaration and ad damnum clause, see 1916 C. C. Rule 22, § 6.

¶ 92. Plaintiff must set out the combination of the material facts relied on as a cause of action, and follow up the allegation by evidence pointing out and proving the same combination of circumstances, in order to show the precise subject of the controversy. —Denman v. Johnston, 85 Mich. 387.

¶ 93. A declaration that sets up no sufficient cause of action is fatally defective, and supports no proofs.—Parker v. Armstrong, 55 Mich. 176.

¶ 94. A declaration which avers every fact material to be established in order to entitle plaintiff to recover, cannot be held insufficient.—Robinson v. Watson, 101 Mich. 466.

¶ 95. Where a declaration fails to advise the defendant with reasonable certainty, according to the circumstances of the case, of the facts upon which plaintiff proposes to rely, and will seek to prove, it cannot be sustained on special demurrer.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 96. The object of the declaration being to apprise defendant and the court of the grounds of the pleader's claim, and to give defendant fair notice of the case he is called on to meet, a plain and clear statement of the wrong complained of, setting out the grounds of such complaint with reasonable certainty, is sufficient, and it is not required that allegations be needlessly repeated.—McDonald v. Hall, 193 Mich. 50.

¶ 97. A declaration is not demurrable because plaintiff claims too much in his allegation of damages.—McDonald v. Hall, 193 Mich. 50.

¶ 98. A demurrer to an amended declaration for want of particularity in the general facts alleged was properly overruled as too technical where evidence of the facts which defendant contends are not sufficiently alleged, was passed upon by the court at a former trial.—Sauer v. McClintic-Marshall Const. Co., 189 Mich. 577.

§ 30. Conformity to writ.

Effect and materiality of nonconformity, see post ¶ 825.
Taking objection by motion, see post ¶¶ 353-355.
Cure of nonconformity by statute of amendments, see post ¶ 892.
Cure of nonconformity in name by statute of amendments, see post ¶ 901.
Conformity of declaration to writ of attachment, see Attachment § 78.

¶ 99. Variance of declaration from summons in stating defendant's name is not a jurisdictional defect, and is amendable under How. St., § 7633.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

§ 31. Averments of jurisdiction and venue.

Pleas to jurisdiction, see post § 61.
Cure of defects by verdict and judgment, see post § 185.
Facts conferring or ousting jurisdiction and venue, see Courts, V; Venue, I.
Alleging place of performance of labor to support jurisdiction in action begun by service in adjoining county, see Courts ¶ 258.
Necessity and sufficiency of allegations as to county in log lien petitions, see Forestry § 23.
Statutory dispensation with formal or technical allegations of venue, see Jud. Act, chap. XIV, § 3; Comp. L. 1915, § 12455.

¶ 100. A declaration is not demurrable for omitting venue (Comp. L. 1871, § 6193, How. St. § 7777).—Danaher v. Hitchcock, 34 Mich. 516.

§ 32. Averments of title or right.

See generally specific topics treating of the various causes of action.
Necessity of alleging manner and extent of invasion of rights, see also ante ¶ 4.
Alleging statutory facts supporting right to sue, see also ante ¶ 44.
Allegations of joint interests to support joinder of counts, see post ¶ 164.
Amendments as to title and right, see post § 112.
Rule as to pleading assignment to plaintiff, see Assignments §§ 31, 32.
Necessity of alleging assignment in suit by assignee for creditors, see Assignments for Creditors § 41.
Pleading special ownership for purpose of measuring damages, see Damages § 258.

¶ 101. Counts that do not show the extent of plaintiff's rights and the manner in which they have been impaired by the acts complained of are demurrable.—Ives v. Williams, 53 Mich. 636.

¶ 102. An allegation that plaintiff "was lawfully possessed of one certain gray mare, and was lawfully possessed as aforesaid of two yearling colts," sufficiently avers the ownership of the property.—Hasceig v. Tripp, 20 Mich. 216.

¶ 103. Where crops were owned by plaintiff at the time of damage by the flooding in question, there was no reason for averring an assignment from the owners of the land, in an action to recover damages for such flooding.—Hovey v. Grand Trunk W. Ry. Co., 135 Mich. 147.

¶ 104. A declaration by an assignee for the benefit of creditors to recover for goods sold and delivered by his assignor should aver

defendant's indebtedness for the goods and the assignment of the claim by the assignor to plaintiff.—Powell v. Williams, 99 Mich. 30.

§ 33. Construction of declaration as to form, theory, or class of action.

As to tort or contract nature of cause, see post § 34.
As to legal or equitable, see post § 36.
As to individual or representative action, see post § 35.
Construction of pleadings in general, see ante § 19 et seq.
Construction in natural sense of terms, see ante ¶ 59.
Technical terms, see also ante ¶ 61.
Construction of general terms as of same nature as specific principal allegations, see ante ¶ 60.
Construction and effect of separate counts, see post § 39.
Consistency of counts, see post § 50.
Similarity of form as test for joinder of counts, see post § 43 et seq.
Character and theory of causes in equity, see Equity §§ 146, 147.
Construction of allegations, malicious prosecution or false imprisonment, see Malicious Prosecution ¶ 75.
Form of action as determining proper statute of limitation to apply, see Limitations, § 8 et seq.
Construction of declaration as in deceit or on covenant for title to land sold, see also Fraud ¶ 715.
Action on bond as assumpsit or covenant in form, see also Bonds ¶ 50.

¶ 105. The form or class of action is determined by the subject-matter of the pleading, and not by what the pleader calls it.—United States Mfg. Co. v. Stevens, 52 Mich. 330; Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 106. The plea inserted in the declaration does not determine the nature of the action or the class of actions to which it belongs; the cause of action as stated in the body of the declaration being the test.—Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 107. Under our liberal system of pleading a plain and clear statement of the facts constituting the wrong is sufficient, and in actions of case it matters little what the action is named.—Antcliff v. June, 81 Mich. 477.

¶ 108. A declaration in assumpsit upon the covenants of a deed cannot be treated as one in covenant.—Christy v. Farlin, 49 Mich. 319.

¶ 109. A declaration which sets up the execution and delivery of a deed containing the usual covenants against encumbrances and of warranty, and which alleges that the premises conveyed were not free from encumbrances, and that plaintiff could not by the force of said deed quietly and peaceably possess them, and that defendant, though requested, did not defend the title to said premises, is a sufficient declaration in covenant, and is not a declaration in assumpsit.—Cook v. Curtis, 68 Mich. 611.

¶ 110. A declaration in an action on a township treasurer's bond which complains of the defendants "in a plea that they render to the said plaintiff the sum of three hundred dollars, which they owe to and unlawfully detain from the said plaintiff," and reciting the bond, assigning a breach and concluding with an allegation of damages, is a declaration in debt.—Township of Richland v. Cliff, 131 Mich. 628.

¶ 111. An allegation of wrongful entry in an action in case for damages sustained through the burning of a blacksmith shop, caused by a fire started by a trespasser in the forge, does not make it an action for quare clausum fregit where the declaration expressly states that it is in case.—Wyant v. Crouse, 127 Mich. 158.

§ 34. ——Assumpsit or case (contract or tort forms).

Tort allegations in contract action as surplusage, see also ante ¶ 81.

¶ 112. Matters of aggravation set forth in a count in assumpsit do not change it to a count in tort.—Hoey v. Harty, 48 Mich. 191.

¶ 113. In an action by a tenant against his landlord a count for occupying more of plaintiff's space than had been agreed on for making certain improvements, and for interrupting his business longer than was necessary, is hardly a count in assumpsit, even though the evidence to support it must show a breach of contract; if good at all it is as a count sounding in case.—Ives v. Williams, 53 Mich. 636.

¶ 114. A declaration in a plea of trespass on the case evidently intended to claim damages for defendant's wrongful act in permitting plaintiff's horse to be turned into a pasture, knowing of the existence of disease among the other horses therein, was held to be a declaration in case and not in assumpsit.—Costello v. Ten Eyck, 86 Mich. 348.

¶ 115. A declaration that charges defendant with wrongfully entering upon plaintiff's land without leave or license, tearing down fences, digging up and removing the soil, making excavations and embankments, building a roadbed for a railroad thereon, fencing out a strip across the land sixty-six feet wide, and excluding plaintiff from the possession thereof, sets forth a cause of action the gist of which is trespass to real estate.—Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 116. A declaration in an action by the owner of a team of horses, to recover for injuries to such team by overdriving, was one in trespass on the case and not in assumpsit,

where its first part stated the inducement which led plaintiff to let defendant have the team and which then set out a state of facts which amounted to more than a mere breach of the contract and showed a distinct and positive wrong for which trespass on the case would lie.—Walker v. Mellish, 135 Mich. 465.

¶ 117. A count alleging that defendants "falsely and fraudulently" represented a note held by them, and given in exchange for plaintiff's property, to be good and the maker responsible, implies a scienter, is a count in case, not in assumpsit, and may be joined with one in trover.—Beebe v. Knapp, 28 Mich. 53.

¶ 118. A declaration sounding in deceit by means of a false warranty is not made one in assumpsit by the addition of the warranty in the declaration with an averment of its breach.—Carter v. Glass, 44 Mich. 154.

¶ 119. Where a party who has been induced to exchange personalty by means of a false warranty of the property received sets out in his declaration the false warranty as the means whereby he was injured, and avers a breach, his pleading may be held one in case if the essentials of that action appear.—Carter v. Glass, 44 Mich. 154.

¶ 120. A declaration in justice's court set forth that by false warranty of a horse defendant had obtained plaintiff's note for it, and that on discovery of the fraud plaintiff had rescinded the sale, tendered back the horse and demanded the note, but the defendant had refused to surrender it, to plaintiff's damage its amount. Held, that this may be sustained as a declaration in assumpsit.—Thomas v. Schram, 52 Mich. 213.

¶ 121. A count alleging that defendants by false representations induced plaintiff to part with certain corporate stock in order to obtain control of the corporation and to wreck it, and seeking damages therefor, is a count sounding in case for fraud.—Smith v. Thompson, 94 Mich. 381.

¶ 122. A declaration alleging that defendant assured plaintiff that he had the title to certain land subsequently conveyed by him to plaintiff by quitclaim deed, that he promised to convey to plaintiff a good and sufficient title, that plaintiff made the purchase relying upon such assurance and promise, that defendant had not title, and that the money paid therefor and now sought to be recovered was paid without consideration, is not based upon fraud, but upon a failure of consideration, and cannot sustain a recovery.—Cartier v. Douville, 98 Mich. 22.

¶ 123. A declaration alleging the wrongful act of the defendant, the grantor in a deed, in obtaining payment from the grantee after the deposit of the conveyance in escrow with the plaintiff in order to permit the latter to repay himself from the payments of the grantee for money advanced the defendant on the strength of the transaction, held to sound in tort.—Churchill v. Howe, 186 Mich. 107.

¶ 124. A declaration alleged that plaintiff suffered the loss of $20,000 by fire; that defendant fire insurance adjusters and defendant wholesalers of goods agreed with plaintiff that if plaintiff would permit said adjusters to collect the moneys due on plaintiff's policies, said moneys so collected would be deposited to plaintiff's credit in a certain bank; that upon this understanding plaintiff placed his policies in the hands of defendant adjusters, under the supervision and control of defendant wholesalers; that the moneys due under said policies were paid to defendant adjusters, and defendant adjusters and wholesalers did not deposit said moneys in said bank to plaintiff's account, but caused, procured and permitted defendant adjusters to appropriate and convert to their own use the sum of $10,000 of said sum, whereby said plaintiff sustained loss and damage, etc. Held, the declaration stated a cause of action in assumpsit.—Dillon v. Craig, 168 Mich. 216.

¶ 125. Where the declaration in substance charges that plaintiff performed its part of a contract and that defendant has failed to compensate plaintiff therefor, it cannot be said that there is a misjoinder of assumpsit and tort.—Manistee Nav. Co. v. Louis Sands Salt & Lumber Co., 174 Mich. 1.

¶ 126. There is no misjoinder where one count of a declaration alleged the wrongful act of the defendant, the grantor in a deed, in obtaining payment from the grantee after the conveyance had been deposited in escrow with the plaintiff, who was to repay himself from the money to be paid him by the grantee, for money advanced the defendant on the strength of the deposit of the deed; and other counts based on the same state of facts, alleged that the defendant came into possession of money knowing that it was the property of the plaintiff, which the former wrongfully converted and embezzled to his own use, since all the counts sounded in tort.—Churchill v. Howe, 186 Mich. 107.

¶ 127. A count in an action against a city to recover for wrongfully taking water from its mains, setting up an ordinance making it unlawful to do so, sounds in tort and not in a contract, and may be properly joined with a count in trover.—City of Kalamazoo v. Standard Paper Co., 182 Mich. 476.

¶ 128. Where a declaration sets forth causes of action in assumpsit and case, adding a single ad damnum clause "for the damages as aforesaid suffered," will not cure the misjoinder.—Friend v. Dunks, 39 Mich. 733.

§ 35. ——Individual or representative action.

¶ 129. An administratrix' declaration held to state a cause of action to plaintiff in

her representative capacity.—Wolscheid v. Thome, 76 Mich. 265.

§ 36. ——Legal or equitable action.

Sufficiency of complaint to state cause of action in equity, see Equity § 77.

¶ 130. A declaration alleging a contract whereby a defendant corporation agreed to purchase certain patents of the plaintiff and to employ him, paying him a salary and a portion of the profits and which seeks relief for the fraudulent destruction of profits, presents a claim for a money judgment because of a fraudulent breach of contract, which claim can be properly submitted to a jury; wherefore it is not necessary that the case be heard by a court of equity.—Church v. Anti-Kalsomine Co., 118 Mich. 219.

§ 37. Singleness, doubleness and splitting of causes.

See also post ¶¶ 139, 140.

Rules as to definiteness, certainty, and singleness, see ante §§ 4, 5.

Joining several or diverse acts in one count, as single cause, when proper, see post § 42.

Separate count on part of cause, see post ¶ 147.

¶ 131. A count is demurrable for duplicity if it combines a cause of action for a monthly allowance, payable under particular regulations, with a distinct cause of action for a round sum due under different regulations.—Portage Lake Miners' & Mechanics' Benev. Society v. Phillips, 36 Mich. 22.

¶¶ 132, 133. A recovery may be had under one count in case for injury to plaintiff's crops for several years, occasioned each year by defendant's putting flash-boards on its dam, causing the water to flow back on plaintiff's land.—Hamilton v. Plainwell Water-Power Co., 81 Mich. 21.

¶ 134. A declaration which sets out in a single count many articles published by defendant of and concerning plaintiff which are admittedly libelous per se is, it seems, bad for duplicity.—Randall v. Evening News Assoc., 92 Mich. 467.

¶ 135. Assignees of particular portions of a perfected labor claim cannot bring separate actions for the different amounts, even though the divisions of the claim correspond with the periods for which the laborer was hired.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 136. A charge that one of the defendants seduced plaintiff's daughter in a declaration charging joint acts against several defendants is not a separate count against one defendant where such charge is merely introductory and stated by way of inducement to the principal subject of the count, which is a conspiracy of all the defendants to charge plaintiff with a crime.—McDonald v. Hall, 193 Mich. 50.

¶ 137. In an action of tort, a declaration charging generally an assault on plaintiff's daughter, a conspiracy of defendants to charge plaintiff with a crime, an assault on and a malicious prosecution of plaintiff, held to constitute a declaration of four counts.—McDonald v. Hall, 193 Mich. 50.

§ 38. Separate counts.

Necessity for separate counts, see post § 42.

Pleading varying aspects of case in separate counts, see post § 40.

Construction and effect of counts, see post § 39.

Variance and conformity of proofs to diverse counts, see post § 170.

Rule permitting uniting in one declaration inconsistent causes of action separately counted on, see 1916 C. C. Rule 21, § 7.

Rule as to paragraphing counts or divisions, see 1916 C. C. Rule 21, § 2.

Numbering counts of declaration, see 1916 C. C. Rule 22, § 3.

¶ 138. A plaintiff has a right to insert in his declaration as many counts (each being single) as he pleases.—Rawlinson v. Shaw, 117 Mich. 5.

¶ 139. A single count can cover but one cause of action.—Ives v. Williams, 53 Mich. 636.

¶ 140. Each count in a declaration must cover but a single cause of action.—McDonald v. Hall, 193 Mich. 50.

¶ 141. A special count that states no cause of action supports no proof.—Mitchell v. Scott, 41 Mich. 108.

¶ 142. Since the theory of separate counts in a declaration is that each is a separate cause of action, as distinct from the others as if it stood alone in the pleading, or was in a separate declaration, each count in a declaration must contain, either expressly or by reference to other counts, all allegations necessary to make out a cause of action.—McDonald v. Hall, 193 Mich. 50.

§ 39. ——Construction and effect.

Construction of pleadings in general, see ante § 19 et seq.

Construction as to form, theory, or class of action pleaded, see ante § 33 et seq.

Consistency of causes and counts, see post § 50.

¶ 143. A count in a declaration must be construed as an entirety in ascertaining what its gravamen is.—Smith v. Holmes, 54 Mich. 105.

¶ 144. Every special count in a declaration must be regarded as setting up a sepa-

rate claim.—Picard v. McCormick, 11 Mich. 68; Rose v. Jackson, 40 Mich. 29.

¶ 145. A count in pleading is an entire and integral charge in an indictment, declaration, or other pleading, setting forth a cause of complaint.—McDonald v. Hall, 193 Mich. 50.

§ 40. Counts for varying aspects of the cause.

See also post ¶ 199.

Counts on joint and several aspects of contract, see post § 41.

Necessity and occasion for election, see post § 51.

Conformity of proofs to respective theories, see post § 170.

¶ 146. A plaintiff may set out his cause of action in different counts of his declaration with as many different averments of acts of negligence, causing the one injury as he sees fit, provided they are not inconsistent, in order to meet possible evidence as it may first fully develop on the trial.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 147. A cause of action under a special contract cannot be so divided that recovery can be had partly on a general count and partly on a special.—Beecher v. Pettee, 40 Mich. 181.

¶ 148. A count based on rescission and one based on breach of the contract may be joined in an action based on fraud in the sale of corporate stock, and it is error to require an election.—Glover v. Radford, 120 Mich. 542.

§ 41. Declaring on joint or several aspect of cause.

Proof of liability of others with defendant as variance from declaration against defendant, see also post ¶ 800.

¶ 149. At common law the owner of a joint and several obligation might elect to proceed against all the obligors jointly or against each severally.—McKinley v. Small, 178 Mich. 555.

¶ 150. Whether at common law or under the statute where the owner of a joint and several obligation has elected to proceed against all the obligors jointly, or against each severally, he is bound by such election and must accept the consequences.—McKinley v. Small, 178 Mich. 555.

¶ 151. At common law where a joint suit was impossible on a joint and several obligation, the holder of the obligation did not waive his claim against a joint obligor by reason of a separate suit against other joint obligors.—McKinley v. Small, 178 Mich. 555.

§ 42. Combining several or diverse acts in one count.

'er of several counts in one declaration, e post § 43 et seq.

'gainst doubleness and ambiguity in ading, see ante § 5.

Singleness, doubleness, and splitting of causes, see ante § 37.

Necessity that each separate count be single, see also ante ¶¶ 139, 140.

Joining and splitting causes for fraud in same count, see Fraud § 92.

Statutory rules for joinder and severance of actions, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309.

Joining breaches of duty growing out of the same transaction, see 1916 C. C. Rule 22, § 2.

Joining breaches of contract, bond, or obligation in one count, see 1916 C. C. Rule 22, § 2.

Rule against joining in one count common law and statutory obligations and liabilities, see 1916 C. C. Rule 22, § 2.

¶ 152. Where the averments of a declaration are of related facts, not contradictory, logically connected with a single injury, and capable of jointly or separately contributing to or causing it, it is proper to allege said facts in one count.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 153. A series of wrongful acts all aimed at a single result and contributing to the injury complained of, viz., the destruction of one's business, credit and reputation, may in an action on the case be counted upon collectively, as producing that result, though the acts are of the quality of slander, breach of contract, and trespass.—Oliver v. Perkins, 92 Mich. 304.

¶¶ 154, 155. Where a single and continuous purpose runs through an entire transaction made up of various acts, each of which might alone constitute a cause of action, it is proper to set out all the facts in one count as a single cause of action.—McDonald v. Hall, 193 Mich. 50.

¶ 156. Breaches of duty imposed by the common law and breaches of statutory duty, while chargeable in a single action, should be embodied in separate counts.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

§ 43. Joinder of distinct causes or counts.

Combining several acts in one count as single cause of action, see ante § 42.

Diversity of parties and liabilities affecting propriety of joinder, see post § 44.

Diversity in forms of action, case and assumpsit, see post §§ 46-49.

Counts in common and counts in special assumpsit, see post § 45.

Inconsistent causes, see post § 50.

Adding new counts by amendment, see post § 121 et seq.

Effect and materiality of misjoinder, see also post ¶ 828.

Waiver of objection for misjoinder of counts by plea of general issue and trial to merits, see post § 175.

Cure of misjoinder of counts by statute of amendments, see post § 186.

Cure of misjoinder by verdict or judgment, see post § 186.
Making diverse pleas to different counts, see post § 58.
Joinder of causes in equity, see Equity §§ 73-76.
Joining in one action claims arising under same contract, see also Contracts § 282.
Joining causes under Death Act and Survival Act, see also Death by Wrongful Act § 13.
Joinder of writs of certiorari, see Certiorari § 31.
Joinder and misjoinder in affidavit for capias, see Civil Arrest § 8.
Joinder in actions under Watercraft Act, see Shipping, IV.
Direction of verdict as to one or more of several counts, see Directing Verdict § 23.
Application of verdict to one or more of several counts, see Verdicts, IV; and see also Appeal § 337.
Statutory provisions and rule of court respecting joinder of "causes of action" in "one action" or in one declaration of two or more counts, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309, and see 1916 C. C. Rule 22, §§ 2, 4. [The compilers' note to the above statute states that it follows New Federal Equity Rule 26, which is very similar in wording but applies wholly to joinder in equity. It will be noticed that the former rule requiring that the causes be such as are remediable in the same form of action is not made in this statute, and that Rule 22, § 4, expressly sanctions joinder of assumpsit and case in separate counts. It would seem to be open to question whether any other dissimilar legal forms of action might be joined.—Editor.]

¶ 157. Plaintiff may combine in one suit all causes of action on which he could recover in separate suits, in the same form of action, against the same defendant.—Randall v. Wayne Circuit Judge, 96 Mich. 284.

¶ 158. Plaintiff may join all his causes of action in one declaration if in separate suits he could recover on each in the same form of action and on the same proofs.—Tregent v. Maybee, 54 Mich. 226.

¶ 159. It is settled practice in this state that plaintiff may join all his causes of action in one declaration and have them all tried in one suit if in separate suits he could recover on each in the same form of action.—McDonald v. Hall, 193 Mich. 50.

¶ 160. The rule that an action founded on a statute cannot be joined with one at common law has been held to be too broad and not sustainable by the case wherein it was announced.—Hogsett v. Ellis, 17 Mich. 351, and see Bottomley v. Port Huron & N. W. R. Co., 44 Mich. 542.

¶ 161. An action founded upon a statute cannot be joined with one at common law.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 162. Where there are three counts in a declaration in trespass to recover damages for personal injuries received by the plaintiff from the dogs of defendants, two of which counts are founded on the common-law liability for such injury, and the other based upon a special statute, it cannot be said as a legal proposition that they are all for the same cause of action.—Swift v. Applebone, 23 Mich. 252.

¶ 162a. A count in assumpsit for breach of contract may be joined in one declaration with another count based on an arbitration and award for the same matter.—Rawlinson v. Shaw, 117 Mich. 5.

§ 44. ——Causes affecting several parties.

Election between counts regarding different parties defendant, see post § 51, ¶ 220.
Coparties' joinder in single plea, see post § 58.
Propriety of joining counts against two defendants with counts against one of them alone, see also Discontinuance ¶ 5.
Effect of nonjoinder of co-obligor on bond in action thereon, see Bonds ¶ 46.
Joinder of distinct conversions in one declaration against two or more defendants, see Conversion § 22.
Joinder of sureties in single action with principal under Civil Damage Act, see Intoxicating Liquors § 82.
Propriety of joinder of principal and surety on bond of indemnification against principal's negligence, see also Indemnity ¶ 59.
Joinder of parties in actions on bills and notes, see Negotiable Instruments § 98.
Joining causes of action in one action where there are two or more parties, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309.

¶ 163. An action for the joint use and benefit of two or more persons should not be brought where their interests are several.—Durfee v. Abbott, 50 Mich. 479.

¶ 164. A plaintiff who proceeds against two or more persons must show by his declaration that they are jointly liable.—Lee v. Bolles, 20 Mich. 46.

¶ 165. Principals and sureties upon bonds of several liquor dealers may be joined as defendants in an action by a person injured by sales of liquors to another under How. St. § 2283e3.—Franklin v. Frey, 106 Mich. 76.

¶ 166. The separate causes of action against two persons, each of whom has received for safe-keeping a part of a sum of money, cannot be joined in one action of assumpsit.—O'Connor v. O'Connor, 86 Mich. 189.

¶ 167. Cir. Ct. Rule 27, subd. b, permitting discontinuance as to one covers a case in as-

sumpsit, where the declaration in form, charges a joint contract; but where, before offering any proof, plaintiff's counsel stated that one and not both of the defendants did in fact make the agreement sued upon, that plaintiff did not know which one, and wished the jury to determine which one was liable; and where the proofs showed that one did and the other did not make the agreement alleged; and such a declaration was not a misjoinder of defendants.—Root & McBride Co. v. Walton Salt Ass'n, 140 Mich. 441.

§ 45. ——Counts in common and special assumpsit.

Joining assumpsit and tort, see post § 46.
Separate counts for breach and based on rescission, see ante ¶ 148.
Necessity for election between counts and causes, see post § 51.
Joinder of statutory and common law assumpsit, see Assumpsit § 47.
Joinder in assumpsit of the special and the various common counts, see Assumpsit § 47.

¶ 168. It seems that, since the enactment of Comp. L. 1857, § 4550, How. St. § 7778, allowing assumpsit to be brought upon judgments, the common counts may be joined with special counts upon judgments, a count for use and occupation, a count upon a special contract to pay rent, and a special contract to purchase a house and lot.—Hogsett v. Ellis, 17 Mich. 351.

¶ 169. A count of which the gist is that the parties agreed to buy lands jointly, each paying half, and that defendant made the purchase for $1,500, but represented to plaintiff that it was for $2,000, whereby he induced plaintiff to pay him $1,000 instead of $750, and that plaintiff sues him for the excess, with interest, may be joined with the common counts.—Young v. Taylor, 36 Mich. 25.

¶ 170. One who had contracted to deliver all his lumber sold part of it to third persons. Held, that recovery might be sought against him under common and special counts in the same declaration. The special count would lie for breach of contract or wrongful conversion, or both, and the common counts for the conversion.—Hart v. Summers, 38 Mich. 399.

¶ 171. When it is one of the terms of a contract that an engine is good, and if not found so on trial shall be made good, the right to return it in case of failure is in pursuance and not in avoidance of the contract; and a count for breach of warranty is not inconsistent with one averring return, or with the common count for money had and received.—Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310.

¶ 172. Under Comp. L. 1897, § 10421, a declaration consisting of the common counts in assumpsit and two special counts based on fraud in inducing defendants to loan upon worthless security, did not constitute misjoinder of actions.—First Nat. Bank of Ovid v. Steel, 136 Mich. 588.

§ 46. ——Counts in assumpsit with counts for torts.

Joining counts for different forms of action, see post § 49.
Construction as affecting proper joinder, see also ante § 34.
Rule for joining assumpsit and trespass on the case, see 1916 C. C. Rule 22, § 4.

¶ 173. Under Comp. L. 1897, § 10421, How. 2nd ed., § 13954, providing that "in all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property, or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury," special counts which make use of the words fraud and deceit, but complain of the defendant in a plea of trespass on the case upon promises, may properly be joined with the common counts in assumpsit.—Mahder v. Wax, 192 Mich. 479.

¶ 174. In an action commenced by attachment to recover the price paid, upon rescission of a contract for the sale of timber land because in estimating the stumpage the estimator went upon the wrong piece of land, counts alleging fraud and deceit and claiming damages may be joined with the common counts since the charge made and the damages sought by the special counts might have been made and sued for in assumpsit and hence will be treated as such when joined with counts clearly in assumpsit.—Loudon v. Carroll, 130 Mich. 79.

§ 47. ——Counts for different torts.

Counts in case for diverse torts, see post § 48.
Adding count in trespass vi et armis alleging intent to ravish, see also Assault ¶ 74.

¶ 175. Since the enactment of How. St. § 7759, permitting trespass on the case to be brought in any case where trespass lies, a count in trespass may be joined with one in case in the same declaration.—Bellant v. Brown, 78 Mich. 294.

¶ 176. Case and trespass can be joined under the statute (How. St. § 7759) permitting case to be brought where trespass would lie, only if the cause is one where either form would have been proper.—Haines v. Beach, 90 Mich. 563.

¶ 177. All the torts leading to one damage or object may be joined in one count.—McDonald v. Hall, 193 Mich. 50.

§ 48. ——Counts in case for diverse torts.

As depending on proper construction of declaration, see ante § 34.

¶ 178. The ordinary count in trover may be joined with a count in case for obtaining the property by false and fraudulent representations.—Beebe v. Knapp, 28 Mich. 53.

¶¶ 179, 180. A count in trover and one in case for the alleged wrongful taking of personal property by a sheriff for the debt of a third party can be joined, and it is error for the court to compel an election on the trial. —Wait v. Kellogg, 63 Mich. 138.

¶ 181. Counts for maliciously suing out a writ of attachment based upon a false allegation of dishonesty and fraud in the contraction of the debt may be joined with a count for circulating reports of the same general character and referring to the same dealings between the parties, and plaintiff cannot be compelled to an election of counts.—Cadwell v. Corey, 91 Mich. 335.

¶ 182. Libelous articles published on different days and constituting distinct causes of action may be joined in one declaration,—each being set out in a different count,—and plaintiff cannot be compelled to elect on which count he will proceed to trial and to strike out the others.—Randall v. Wayne Circuit Judge, 96 Mich. 284.

¶ 183. A joinder of a cause of action for malicious prosecution and one for slander is proper, and the trial court cannot compel the plaintiff to elect under which count he will proceed.—Slater v. Walker, 148 Mich. 650.

¶ 184. A count for alienating a wife's affections may be joined with a count for seducing and debauching her, thereby causing the alienation of her affections.—Mead v. Randall, 111 Mich. 268.

¶ 185. Since How. St. § 7759, allows trespass on the case to be brought for false imprisonment, such action and case for slander may be joined.—Moore v. Thompson, 92 Mich. 498.

¶ 186. Counts for false imprisonment and malicious prosecution may be joined.—Haskins v. Ralston, 69 Mich. 63.

¶ 187. A mortgagor suing in trespass on the case for damages from the unlawful foreclosure of a chattel mortgage may include and recover under a count in trover for the excess of the proceeds of sale retained by the mortgagee beyond his debt.—Bearss v. Preston, 66 Mich. 11.

¶ 188. A declaration in case may properly be sustained where it joins four counts for obstructing a navigable river whereby plaintiff's logs could not be floated, but were delayed, etc., and for breaking plaintiff's booms and chains whereby his logs were set adrift, etc.—Bellant v. Brown, 78 Mich. 294.

§ 49. ——Counts for different forms of action.

Joining counts for case and assumpsit, see ante § 46.

See reference to statutes and note, ante § 43.

¶ 189. Assumpsit is the proper form of action for the recovery back of moneys paid for liquors, and case is the action to recover damages arising from their sale; and the two causes must not be joined.—Friend v. Dunks, 37 Mich. 25; Friend v. Dunks, 39 Mich. 733; Schafer v. Boyce, 41 Mich. 256.

¶ 190. Trespass may now be joined with case where either form of action is permissible.—Bellant v. Brown, 78 Mich. 294.

¶ 191. In a declaration, trover cannot be joined with trespass.—Haines v. Beach, 90 Mich. 563.

¶ 192. A declaration containing a count in trover and other counts, to the effect that plaintiff was lessee of defendants' rooms which they fastened and prevented him from entering, must be regarded as joining trover and trespass, and as bad.—Haines v. Beach, 90 Mich. 563.

¶ 193. A declaration which seeks to combine in one count a declaration in replevin with one in assumpsit for the balance due on a promissory note is bad.—E. S. Knowles & Son v. Cavanaugh, 144 Mich. 260.

§ 50. ——Inconsistent causes.

See also ante ¶ 146.

Effect and materiality of misjoinder, see post ¶ 828.

Necessity for election, see post § 51.

Misjoinder in declaration of inconsistent counts for recovery of insurance, see Insurance ¶ 1124.

¶ 194. A declaration in a suit by a principal against an agent averring the duty of the agent to pay to the principal certain moneys and property received by him upon a mortgage belonging to the principal, and sufficient in amount to pay the same in full, and also counting upon the agent's promise that, if the principal would make a sale of the mortgaged premises under a decree before then taken on a foreclosure of the mortgage, he would pay him any deficiency arising on such sale, sets forth two inconsistent causes of action.—Perkins v. Hershey, 77 Mich. 504.

¶ 195. In an action to recover the contract price upon rescission of a contract for the sale of land, counts alleging fraud and deceit and claiming damages and common counts are not inconsistent so as to require an election since all treat the contract as voidable, the first for fraud and deceit and the second for fraud or mistake and either justifies rescission and recovery of the price paid.—Loudon v. Carroll, 130 Mich. 79.

¶ 196. A special count in assumpsit for a breach of warranty on the sale of a horse,

and a second count for the recovery of money paid without consideration, setting up the circumstances under which it was obtained, and that the horse purchased was absolutely without value, are not inconsistent, and plaintiff cannot be compelled to elect upon which he will proceed.—Murphy v. McGraw, 74 Mich. 318.

¶ 197. Plaintiff in assumpsit in one count sought to recover money advanced to defendant, who employed plaintiff as a branch manager, on the ground that plaintiff had rescinded the contract for defendant's failure to give him proper instructions in the business. In another count plaintiff sought to recover on the ground that he had rescinded on account of the defendant's fraud. Held, these counts were consistent, and plaintiff could not be compelled to elect between them. —Ward v. Cook, 158 Mich. 283.

§ 51. Necessity or occasion for election.

Right of plaintiff to elect, see post § 52.
Between diverse theories presented by bill of particulars, see post § 100, ¶ 444.
Necessity of election to avoid variance of proof from allegations, see also post ¶ 822.
Consistency of causes, see ante § 50.
Election of remedies, see Election § 4 et seq.

¶ 198. Where counts in a declaration are inconsistent and contradictory, the theory and facts of one conflicting with those of another, plaintiff should be required to elect, and he cannot try his case on one count and recover under a conflicting one.—Way v. Root, 174 Mich. 418.

¶ 199. Where the testimony is along the same lines and a portion of the facts in relation to which there is testimony would justify one verdict and all the facts claimed would, if found by the jury, justify a larger verdict, plaintiff may plead counts to meet the contingency, so long as his position is not inconsistent and misleading, election of counts being then discretionary.—Way v. Root, 174 Mich. 418.

¶ 200. It is not a matter of right to have plaintiff compelled to elect between the counts of the declaration where there is no misjoinder. The union of different statements is allowable.—Cook v. Perry, 43 Mich. 623.

¶ 201. It seems that a motion to require plaintiff to elect between common and special counts in his declaration ought to be granted where the grounds for recovery thereunder may be inconsistent with each other; or else the trial judge should restrict recovery under the special counts to items which fall within the precise terms of the agreement on which the count is based.—McLennan v. McDermid, 50 Mich. 379.

¶ 202. Election between counts need not be required where, in assumpsit for money obtained by defendant through fraud, the common counts are joined to a special count waiving the tort.—Tregent v. Maybee, 54 Mich. 226.

¶ 203. Where a declaration in case contained two counts, one of which alleged the wrongful expulsion of plaintiff from premises occupied, and the other an assault and battery, as no inconsistency between these counts was pointed out, there was no error in refusing to require an election between them.—Taylor v. Adams, 58 Mich. 187.

¶ 204. Where a declaration for libel contains several counts, each constituting a distinct cause of action, plaintiff cannot be compelled to elect one count upon which he will proceed to trial, and to strike out the others. —Randall v. Wayne Circuit Judge, 96 Mich. 284.

¶ 205. If, while relying upon an express agreement, plaintiff also claims that if that should not be shown the facts will imply an understanding and that he will rely on that, he may recover on whichever contract is made out.—Van Fleet v. Van Fleet, 50 Mich. 1.

¶ 206. Where the declaration was against a bank for negligence in and about the collection of a draft, the refusal of the trial court to compel plaintiffs to elect as to which count they would recover upon was held to be a matter of discretion which would not be interfered with on error.—Finch v. Karste, 97 Mich. 20.

¶ 207. Upon the failure of a building contractor to carry out his contract, his bondsmen took up the work, and carried it forward to completion. The contractor died before the work was finished, and the interest of his estate in the contract was assigned to his bondsmen. In a suit brought by them upon the contract, one of the counts of the declaration averred the making of the contract, the faithful and full performance of its terms by the contractor, the existence of an indebtedness to him by reason thereof at the time of his death, and the assignment to the plaintiffs. Another count averred that the contractor abandoned the contract, and that plaintiffs thereupon assumed to complete the same, in consideration of which defendant promised to pay them the unpaid portion of the contract price. Held, that plaintiffs were entitled to recover the balance of the contract price in any event, and that the refusal of the court to compel them to elect upon which count they would rely was not prejudicial error.—Rohde v. Biggs, 108 Mich. 446.

¶ 208. The plaintiff must elect, where, in an action against the seller of a horse, the declaration contains a special count for breach of warranty, and common counts based on rescission of the contract of sale for

fraud; since the rule of damages is not the same in both forms of action.—Snore v. Hammond, 140 Mich. 416.

¶ 209. The counts of a declaration in an action against a board of education for personal injuries sustained by plaintiff by slipping upon snow and ice which fell upon a stairway of plaintiff's house from the roof of an adjoining school building, were not so inconsistent as to require the plaintiff to elect under which to proceed, where one count was based upon a failure to erect sufficient barriers to prevent snow and ice falling from the roof upon such stairway, and another upon a failure to keep such barriers in repair.—Ferris v. Board of Education of Detroit, 122 Mich. 315.

¶ 210. Where plaintiff in one count seeks to recover in assumpsit and in another count to recover in an action on the case for fraud against defendant fire insurance adjusters and creditors for appropriating to themselves the proceeds of policies belonging to plaintiff, it is the duty of the trial court to sustain the motion of defendants made at the beginning and close of plaintiff's evidence to compel him to elect the count on which he wishes to stand.—Dillon v. Craig, 168 Mich. 216.

¶ 211. A count in a declaration to recover the value of machinery stating in effect that the plaintiff had delivered machinery to the defendant in performance of a contract to exchange the same for land, and that the defendant had refused to deed the land and had retained the machinery to the plaintiff's monetary damage, states a good cause of action that will preclude requiring the plaintiff to elect between such count and the common counts.—Bowen v. Chandler, 172 Mich. 678.

¶ 212. Where a plaintiff alleges in one count that the defendant railway negligently injured her by starting the car while she was in the act of alighting, and in another count that the car was started, and struck plaintiff after she had alighted, the two counts are not substantially inconsistent so as to require an election between them.—Hazen v. Bay City Traction & Electric Co., 152 Mich. 457.

¶ 213. A railroad employee declaring for personal injuries under both Act No. 104, Pub. Acts 1909, §§ 4110-4116, How. St., 2nd Ed., and Act No. 285, Pub. Acts 1909, §§ 4009-4463, How. St., 2nd Ed., must elect upon which he will go to the jury.—Boesler v. Copper Range R. Co., 184 Mich. 480.

¶ 214. Where grain was jointly shipped for the mutual benefit of the plaintiff and defendant in a car which showed a large shortage on arrival at its destination, and which the plaintiff made good without the consent of the defendant, the former then suing the latter to recover therefor, and declaring in one count on a sale of grain to him by the defendant, and in another count alleging that he acted in the transaction as the defendant's agent, held that it was reversible error to refuse to compel the plaintiff at the trial to elect on which of the two inconsistent counts he would rely.—Remer v. Goul, 185 Mich. 371.

¶ 215. A person alleging trespass or trespass on the case in different counts need not elect at the trial as to which he will rely upon.—Cribbs v. Stiver, 181 Mich. 82.

¶ 216. Under Act No. 168, Pub. Acts 1905, and Act No. 239, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 14136, abolishing the distinction between actions of trespass and trespass on the case, counts may be joined in a declaration for a trespass to a freehold and consequential injuries therefrom without the necessity of the plaintiff electing at the trial on which count he will rely.—Cribbs v. Stiver, 181 Mich. 82.

¶ 217. It is not error to refuse to require an election on inconsistent counts, one based on nonacceptance and one on acceptance and nonpayment of price where the effect of the instructions to the jury is to submit the case upon the theory of only one of the counts; to wit on acceptance.—Doty v. Nixon, 109 Mich. 266.

¶ 218. An election between special and common counts in an action of assumpsit is unnecessary where the common counts are abandoned by the plaintiff, there being nothing in the case tending to support them.—Carland v. Western Union Tel. Co., 118 Mich. 369.

¶ 219. In a suit for commissions for the sale of real estate, complainant cannot be compelled to elect between a common count claiming $200 and a count claiming $1,400, on an alleged express contract where defendant's counsel admits in open court that the defendant is liable for either $200 or $1,400.—Hoopengarner v. Stipe, 169 Mich. 307.

¶ 220. If one of two defendants is admittedly liable in an action, the plaintiff cannot be required to elect, as to which he will pursue under Circuit Court Rule 27, the question of their respective liability being for the jury.—Mally v. Excelsior Wrapper Co., 181 Mich. 568.

¶ 221. In an action of deceit, counts charging one defendant were joined with counts charging two defendants with fraudulent representations. Defendant made no motion at the beginning of the trial to compel plaintiff to elect. At the close of his evidence plaintiff voluntarily dismissed as to one of the defendants, although he had introduced evidence of misrepresentations made by this defendant. The court instructed the jury to disregard this evidence.

Held, the judgment against the defendant should not be reversed for plaintiff's failure to elect at the beginning of the trial.—Diel v. Kellogg, 163 Mich. 162.

§ 52. Right of plaintiff to elect.

Time for election, see post § 53.

Loss of right to abandon count by introducing evidence under it, see post ¶ 226.

¶ 222. A plaintiff has a right to abandon a special count and seek to recover on the common counts which he has annexed thereto.—Wyman v. Crowley, 33 Mich. 84.

¶ 223. Where a contractor declares specially upon a breach of the contract and upon the common counts for labor expended and expenses incurred in and about its attempted performance, it is not error to allow him to elect, at the close of the testimony, to recover on the quantum meruit what his services were reasonably worth, though in excess of the contract price.—Hemminger v. Western Assur. Co., 95 Mich. 355.

§ 53. Time for election.

Motion to require election, see post § 80.

¶ 224. The objection of misjoinder of counts should be disposed of at the outset of the trial and the plaintiff made to elect between them instead of being allowed to go over the whole range of testimony without doing so.—Ives v. Williams, 53 Mich. 636.

¶ 225. A plaintiff cannot at the opening of a trial be required to elect between consistent counts of his declaration.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 226. Where the allegations made in the common and special counts of a declaration are inconsistent with each other, and the plaintiff has introduced his evidence in reliance on the special count, he cannot then abandon it and recover under the common counts.—Wetmore v. McDougall, 32 Mich. 276.

¶ 227. Mistrial does not occur where plaintiff elects to rely on a particular count after evidence has been submitted, if the proofs received are relevant to the count chosen, and if the others are not so inconsistent with it that the jury can be substantially misled by their averments and render a general verdict. Such a verdict may be applied to the count elected, and, if desired, the record may be amended accordingly.—Barton v. Gray, 57 Mich. 622.

III. PLEA AND NOTICE AND REPLICATION.

A. IN GENERAL; FORMALITIES OF AND TIME FOR PLEAS.

§ 54. Nature and subjects of pleas.

Mode of taking objections to declaration, whether demurrer, plea, or motion, see post § 172.

Requisites and sufficiency of pleas, see post §§ 65, 67-70.

Rule against anticipating defenses, see ante § 7.

General office of pleadings, see ante § 1.

Supplemental pleadings to put in issue matters of abatement subsequent to commencement of action, see Pleading § 136.

Defenses available upon opening judgment, see Judgments § 69.

Examination of opposite party to enable party to prepare pleadings, see Discovery § 7.

¶ 228. Except where certain defects or defenses are waived if not specially pleaded, a plea must set up matters not apparent from the declaration.—Hinman v. Eakins, 26 Mich. 80.

¶ 229. The purpose of a plea is to tender an issue upon some fact not already in the case that proof may be taken in respect to it if the issue is accepted. But if the fact is in the case, and especially if it is so conclusively established by the record that no contrary averment would be admissible, a plea setting up the fact would be idle, and, instead of demurring to it, a motion should be made to strike it from the files.—People v. Harding, 53 Mich. 481.

¶ 230. "Plea in abatement" held to include a plea to the jurisdiction within 1897 Circuit Court Rule 6 giving the right to plead the general issue contemporaneously.—National Fraternity v. Wayne Circuit Judge, 127 Mich. 186.

§ 55. Rule, order or leave to plead.

Leave to plead over demurrer, see post § 93.

Leave to interpose pleas on opening default, see Defaults, VI.

Necessity of notice to attorneys after plea withdrawn to support default, see Defaults § 7.

Necessity of disposing formally of bad pleas before taking default, see Defaults § 12.

Inability or failure to interpose defense as ground for equitable relief from judgment, see Judgments § 80.

Process for commencement of action by service of copy and notice and rule to plead, see Process.

Review of order granting or denying leave to plead, see Appeal § 397.

¶ 231. A rule to plead is not fatally defective because not entitled in the names of all the defendants, where the copy served is indorsed upon a copy of the declaration, in which all parties are correctly named.—Campbell v. Wayne Circuit Judge, 111 Mich. 247.

§ 56. Time, stage, and occasion for pleas.

Rule or order or leave to plead, see ante § 55.

Order of pleas, abatement before bar, see post § 57.

Proper time and modes of taking objections to pleadings, demurrer, plea, or motion, see post § 172 et seq.
Time to plead to amendments, see post § 105.
Time for affidavits of nonexecution and filing affidavits out of time by leave, see post § 149.
Striking tardy plea by codefendant, see also post ¶ 360,
Default for want of seasonable plea, see Defaults, § 3 et seq.
Nonsuit or dismissal for failure to plead seasonably, see Discontinuance § 18.
Time for appearance, see Appearance § 2.
Time for answer before default, see Defaults § 3.
Rule of court shortening time to plead allowed by statute, see Courts § 12.
Time for plea to declaration in attachment, see Attachment § 79.
Pleading abatement in bastardy proceeding after recognizing to circuit court, see Bastards § 7.
Time to plead after receiving bill of particulars, see 1916 C. C. Rule 30, § 1.
Time for plea in action against corporations by service on secretary of state, see 1916 C. C. Rule 31, § 5.
Extension of time to plead, powers of circuit court, circuit judge, or court commissioner, see 1916 C. C. Rule 31, § 8.
Time for filing and serving pleas, see 1916 C. C. Rule 31, § 3.
Extension of time for filing and serving plea by pendency of special motion, see 1916 C. C. Rule 31, § 3.
Rules of practice respecting defaults in pleading, see 1916 C. C. Rule 32.

¶ 232. Under How. St., § 7291, which authorizes the commencement of suits by declaration, defendant may interpose any plea within the twenty days provided by the statute for pleading.—Hake v. Kent Circuit Judge, 99 Mich. 216.

¶ 233. First Circuit Court rule 24, which provides that pleas in abatement or to the jurisdiction, and all other dilatory pleas, shall be filed within ten days after filing and service of declaration, applies only to cases commenced by original writ, and not to actions begun by declaration and rule to plead. —Hake v. Kent Circuit Judge, 99 Mich. 216.

¶ 234. Where defendant in a pending action is garnished in a suit brought by a third person against the plaintiff he should, as soon as possible, plead the garnishment proceeding in abatement of the first suit, and he can do so at any stage before judgment therein. This can only be done by filing notice of the proceeding as a special defense under circuit court rule 106 or by plea puis darrein. —Grosslight v. Crisup, 58 Mich. 531.

§ 57. Sequence and order of pleas.

Order and sequence of demurrers and motions, see post §§ 74, 75.
Effect of plea before bill of particulars is furnished, see post ¶ 416.

¶ 235. A plea in bar is allowable in the court's discretion after a plea in abatement is overruled.—McOmber v. Holmes, 41 Mich. 417.

¶ 236. Dilatory pleas rest on the idea that the questions involved should be disposed of early, in order to save the expense and delay of a needless trial on the general merits.—Bassett v. Shepardson, 57 Mich. 428.

§ 58. Joining and separating coparties' pleas.

Waiver of abatement by one defendant pleading in bar, others pleading in abatement, see post ¶ 878.
Joint plea standing as several plea after codefendant supersedes it by supplemental plea, see post ¶¶ 664, 668.
Joint and several demurrers and motions, see post § 83.
Several plea puis darrein by coparty defendant, see post § 137.

¶ 237. An infant's guardian ad litem should not join codefendants in answering.—Wood v. Truax, 39 Mich. 628.

§ 59. Combining pleas in abatement and in bar.

¶ 238. It is proper to file a dilatory plea or demurrer to one count of a declaration, and plead to the merits to another.—Griffin v. Wattles, 119 Mich. 346.

¶ 239. Under 1897 Circuit Court Rule No. 6 providing that "whenever the defendant interposes a plea in abatement he may also at the same time plead the general issue," etc., a plea to the jurisdiction is included and the general issue may be pleaded at the same time.—National Fraternity v. Wayne Circuit Judge, 127 Mich. 186.

¶ 240. The technical plea in abatement still obtains in the State, and it is not proper to set up matter of abatement specially in the answer.—McKnight v. Lowitz, 196 Mich. 368.

B. ABATEMENT AND OTHER DILATORY PLEAS AND SUGGESTIONS.

Abatement and revival of actions in general, and grounds for abatement, see Abatement and Revival.
Plea in abatement of proceedings under fraudulent debtor act, see Civil Arrest § 25.
Mode of reviewing rulings on pleas in abatement and dilatory pleas, see Appeal, I, III, B.

§ 60. Matters of abatement or delay.

Pleas in abatement as including pleas to the jurisdiction, see also ante ¶ 230.
Matters also amounting to bar and therefore provable under the general issue, see post § 161.
Sequence of pleas, matters in abatement before pleas in bar, see ante § 57.
Waiver of matters of abatement by pleading in bar, see post § 177.

of action, see Jud. Act, chap. XIV, § 2; Comp. L. 1915, § 12454.
Rules as to forms of declarations, see 1916 C. C. Rule 22.
Conclusion of declaration and ad damnum clause, see 1916 C. C. Rule 22, § 6.

¶ 92. Plaintiff must set out the combination of the material facts relied on as a cause of action, and follow up the allegation by evidence pointing out and proving the same combination of circumstances, in order to show the precise subject of the controversy. —Denman v. Johnston, 85 Mich. 387.

¶ 93. A declaration that sets up no sufficient cause of action is fatally defective, and supports no proofs.—Parker v. Armstrong, 55 Mich. 176.

¶ 94. A declaration which avers every fact material to be established in order to entitle plaintiff to recover, cannot be held insufficient.—Robinson v. Watson, 101 Mich. 466.

¶ 95. Where a declaration fails to advise the defendant with reasonable certainty, according to the circumstances of the case, of the facts upon which plaintiff proposes to rely, and will seek to prove, it cannot be sustained on special demurrer.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 96. The object of the declaration being to apprise defendant and the court of the grounds of the pleader's claim, and to give defendant fair notice of the case he is called on to meet, a plain and clear statement of the wrong complained of, setting out the grounds of such complaint with reasonable certainty, is sufficient, and it is not required that allegations be needlessly repeated.—McDonald v. Hall, 193 Mich. 50.

¶ 97. A declaration is not demurrable because plaintiff claims too much in his allegation of damages.—McDonald v. Hall, 193 Mich. 50.

¶ 98. A demurrer to an amended declaration for want of particularity in the general facts alleged was properly overruled as too technical where evidence of the facts which defendant contends are not sufficiently alleged, was passed upon by the court at a former trial.—Sauer v. McClintic-Marshall Const. Co., 189 Mich. 577.

§ 30. Conformity to writ.
Effect and materiality of nonconformity, see post ¶ 825.
Taking objection by motion, see post ¶¶ 353-355.
Cure of nonconformity by statute of amendments, see post ¶ 892.
Cure of nonconformity in name by statute of amendments, see post ¶ 901.
Conformity of declaration to writ of attachment, see Attachment § 78.

¶ 99. Variance of declaration from summons in stating defendant's name is not a jurisdictional defect, and is amendable under How. St., § 7633.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

§ 31. Averments of jurisdiction and venue.
Pleas to jurisdiction, see post § 61.
Cure of defects by verdict and judgment, see post § 185.
Facts conferring or ousting jurisdiction and venue, see Courts, V; Venue, I.
Alleging place of performance of labor to support jurisdiction in action begun by service in adjoining county, see Courts ¶ 258.
Necessity and sufficiency of allegations as to county in log lien petitions, see Forestry § 23.
Statutory dispensation with formal or technical allegations of venue, see Jud. Act, chap. XIV, § 3; Comp. L. 1915, § 12455.

¶ 100. A declaration is not demurrable for omitting venue (Comp. L. 1871, § 6193, How. St. § 7777).—Danaher v. Hitchcock, 34 Mich. 516.

§ 32. Averments of title or right.
See generally specific topics treating of the various causes of action.
Necessity of alleging manner and extent of invasion of rights, see also ante ¶ 4.
Alleging statutory facts supporting right to sue, see also ante ¶ 44.
Allegations of joint interests to support joinder of counts, see post ¶ 164.
Amendments as to title and right, see post § 112.
Rule as to pleading assignment to plaintiff, see Assignments §§ 31, 32.
Necessity of alleging assignment in suit by assignee for creditors, see Assignments for Creditors § 41.
Pleading special ownership for purpose of measuring damages, see Damages § 258.

¶ 101. Counts that do not show the extent of plaintiff's rights and the manner in which they have been impaired by the acts complained of are demurrable.—Ives v. Williams, 53 Mich. 636.

¶ 102. An allegation that plaintiff "was lawfully possessed of one certain gray mare, and was lawfully possessed as aforesaid of two yearling colts," sufficiently avers the ownership of the property.—Hasceig v. Tripp, 20 Mich. 216.

¶ 103. Where crops were owned by plaintiff at the time of damage by the flooding in question, there was no reason for averring an assignment from the owners of the land, in an action to recover damages for such flooding.—Hovey v. Grand Trunk W. Ry. Co., 135 Mich. 147.

¶ 104. A declaration by an assignee for the benefit of creditors to recover for goods sold and delivered by his assignor should aver

defendant's indebtedness for the goods and the assignment of the claim by the assignor to plaintiff.—Powell v. Williams, 99 Mich. 30.

§ 33. Construction of declaration as to form, theory, or class of action.

As to tort or contract nature of cause, see post § 34.
As to legal or equitable, see post § 36.
As to individual or representative action, see post § 35.
Construction of pleadings in general, see ante § 19 et seq.
Construction in natural sense of terms, see ante ¶ 59.
Technical terms, see also ante ¶ 61.
Construction of general terms as of same nature as specific principal allegations, see ante ¶ 60.
Construction and effect of separate counts, see post § 39.
Consistency of counts, see post § 50.
Similarity of form as test for joinder of counts, see post § 43 et seq.
Character and theory of causes in equity, see Equity §§ 146, 147.
Construction of allegations, malicious prosecution or false imprisonment, see Malicious Prosecution ¶ 75.
Form of action as determining proper statute of limitation to apply, see Limitations, § 8 et seq.
Construction of declaration as in deceit or on covenant for title to land sold, see also Fraud ¶ 715.
Action on bond as assumpsit or covenant in form, see also Bonds ¶ 50.

¶ 105. The form or class of action is determined by the subject-matter of the pleading, and not by what the pleader calls it.—United States Mfg. Co. v. Stevens, 52 Mich. 330; Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 106. The plea inserted in the declaration does not determine the nature of the action or the class of actions to which it belongs; the cause of action as stated in the body of the declaration being the test.—Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 107. Under our liberal system of pleading a plain and clear statement of the facts constituting the wrong is sufficient, and in actions of case it matters little what the action is named.—Antcliff v. June, 81 Mich. 477.

¶ 108. A declaration in assumpsit upon the covenants of a deed cannot be treated as one in covenant.—Christy v. Farlin, 49 Mich. 319.

¶ 109. A declaration which sets up the execution and delivery of a deed containing the usual covenants against encumbrances and of warranty, and which alleges that the premises conveyed were not free from encumbrances, and that plaintiff could not by the force of said deed quietly and peaceably possess them, and that defendant, though requested, did not defend the title to said premises, is a sufficient declaration in covenant, and is not a declaration in assumpsit.—Cook v. Curtis, 68 Mich. 611.

¶ 110. A declaration in an action on a township treasurer's bond which complains of the defendants "in a plea that they render to the said plaintiff the sum of three hundred dollars, which they owe to and unlawfully detain from the said plaintiff," and reciting the bond, assigning a breach and concluding with an allegation of damages, is a declaration in debt.—Township of Richland v. Cliff, 131 Mich. 628.

¶ 111. An allegation of wrongful entry in an action in case for damages sustained through the burning of a blacksmith shop, caused by a fire started by a trespasser in the forge, does not make it an action for quare clausum fregit where the declaration expressly states that it is in case.—Wyant v. Crouse, 127 Mich. 158.

§ 34. ——Assumpsit or case (contract or tort forms).

Tort allegations in contract action as surplusage, see also ante ¶ 81.

¶ 112. Matters of aggravation set forth in a count in assumpsit do not change it to a count in tort.—Hoey v. Harty, 48 Mich. 191.

¶ 113. In an action by a tenant against his landlord a count for occupying more of plaintiff's space than had been agreed on for making certain improvements, and for interrupting his business longer than was necessary, is hardly a count in assumpsit, even though the evidence to support it must show a breach of contract; if good at all it is as a count sounding in case.—Ives v. Williams, 53 Mich. 636.

¶ 114. A declaration in a plea of trespass on the case evidently intended to claim damages for defendant's wrongful act in permitting plaintiff's horse to be turned into a pasture, knowing of the existence of disease among the other horses therein, was held to be a declaration in case and not in assumpsit.—Costello v. Ten Eyck, 86 Mich. 348.

¶ 115. A declaration that charges defendant with wrongfully entering upon plaintiff's land without leave or license, tearing down fences, digging up and removing the soil, making excavations and embankments, building a roadbed for a railroad thereon, fencing out a strip across the land sixty-six feet wide, and excluding plaintiff from the possession thereof, sets forth a cause of action the gist of which is trespass to real estate.—Wood v. Michigan Air Line R. Co., 81 Mich. 358.

¶ 116. A declaration in an action by the owner of a team of horses, to recover for injuries to such team by overdriving, was one in trespass on the case and not in assumpsit,

Mode of calling up matters for decision on dilatory questions before trial of merits, see post § 78.
Proof under the general issue, see post § 161.
Necessity of supplemental plea to put in issue matters arising after action begun, see post § 136.
Waiver of objections to form or sufficiency of plea by joining issues of fact, see post § 176.
Cure of defects by verdict or judgment, see post § 183 et seq.
Facts admitted by demurring to plea in abatement, see post § 89.
Appearance by attorney or in person to challenge jurisdiction or plead in abatement, see Appearance ¶ 20.
Abolishment of pleas in abatement and pleas to the jurisdiction and provision for making objections by motion to dismiss or by notice attached to plea, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.

¶ 274. The distinction between pleas to the jurisdiction and pleas in abatement as technically made at the common law by reason of which the former must have been pleaded by the person, while the latter must have been pleaded by attorney, is not recognized in this state.—Fell v. Gorman, 144 Mich. 521.

¶ 275. Pleas in abatement are not favored, and certainty to every intent is required.—Wales v. Jones, 1 Mich. 254; Heyman v. Covell, 36 Mich. 157.

¶ 276. A plea in abatement must have the highest degree of certainty and precision. Every allegation necessary to make out the case covered by it must be distinctly, and not inferentially, set forth.—Belden v. Laing, 8 Mich. 500.

¶ 277. A plea in abatement must expressly state every fact necessary to support it, and exclude everything that would defeat it if alleged on the other side.—Dubois v. Hutchinson, 40 Mich. 262.

¶ 278. A plea in abatement must in general set up matter not apparent from the declaration.—Hinman v. Eakins, 26 Mich. 80.

¶ 279. A plea in abatement must set forth facts and not the conclusions of the pleader.—People v. Lauder, 82 Mich. 109.

¶ 280. In a plea in abatement nothing must be left to inference to support the plea but all intendments are to be taken against the pleader.—People v. Lauder, 82 Mich. 109.

¶ 281. A plea in abatement that does not give the plaintiff a better writ is bad.—Heyman v. Covell, 36 Mich. 157; East v. Cain, 49 Mich. 473.

¶ 282. A plea in abatement must not only point out the error of plaintiff but also indicate the manner of correcting it.—McKnight v. Lowitz, 196 Mich. 368.

¶ 283. A plea in abatement to an action of trespass brought in the name of one plaintiff is bad in merely stating that said plaintiff, "before and at the time of the commencement of the suit," was part owner of the premises with another person specified. It should show that someone besides plaintiff had an interest at the time of the trespass.—East v. Cain, 49 Mich. 473.

¶ 284. A plea in abatement averring that the parties were copartners at the time the cause of action counted upon arose is bad if it fails to allege that the cause of action grew out of partnership transactions.—McIntosh v. McIntosh, 79 Mich. 198.

¶ 285. In a plea that one of the defendants is a married woman, and her husband not a party to the suit, it was held not necessary to show by the plea that she could not sue and be sued as an unmarried woman under the statute, where the bill did not make out a case bringing her within the statute.—Parker v. Parker, W. 457.

¶ 286. A plea in abatement to the jurisdiction must always show another forum where the rights involved have already become subject to judicial authority.—Heyman v. Covell, 36 Mich. 157; and see Carew v. Matthews, 41 Mich. 576.

¶ 287. A plea which prays judgment of a justice's writ of replevin "for that the value of the property described in said writ exceeds $100" contains no averment of fact, and should be overruled.—Burt v. Addison, 74 Mich. 730.

¶ 288. Where a city marshal sued in replevin in the circuit court by the owner of property seized under a tax-warrant pleads in abatement that another court has, under the statute, exclusive jurisdiction of actions against city officers, his plea need not show that the assessment roll was valid.—Chicago & W. M. R. Co. v. Nester, 63 Mich. 657.

¶ 289. When a plea in abatement averred that another suit was commenced at the same time, "upon and for the not performing the same identical promises and undertakings," without adding "in the said declaration in this present suit mentioned," or other equivalent words, it was held bad on that account.—Wales v. Jones, 1 Mich. 254.

¶ 290. In a suit commenced by attachment a plea in abatement was interposed that at the time of the commencement of the suit another suit was pending between the same parties for the same cause of action. Held, that the plea was bad for not stating that the former suit was still

pending.—Wales v. Jones, 1 Mich. 254; Pew v. Yoare, 12 Mich. 16.

¶ 291. A plea in equity of a former suit pending in another court for the same cause of action must set forth the general character and objects of the former suit, and the relief prayed for.—Bank of Michigan v. Williams, H. 219.

¶ 292. While strictness is required in pleas in abatement, still, where no reasonable doubt exists as to the identity of the suits, the plea will be held good.—O'Brien v. Alpena Circuit Judge, 106 Mich. 42.

¶ 293. Where a bill was filed by a cestui que trust against the trustee and the other beneficiaries to obtain an accounting of the proceeds of a judgment recovered by the trustee, and to compel the payment to complainant of his share therein, it was held that a plea was sufficient to show identity, which set forth that at the time of filing the bill a suit was pending in another court of equal jurisdiction, upon a bill filed by one of the defendant beneficiaries, for an accounting respecting the same judgment and the same trust fund mentioned in complainant's bill, affecting the same parties, and asking relief "in the same manner and for the same matters," which cause was still pending and undetermined.—O'Brien v. Alpena Circuit Judge, 106 Mich. 42.

¶ 294. Pleas in abatement setting up an abuse of the process of the court are to be treated as meritorious, and not merely dilatory or captious, and as such they should be liberally construed. A plea, therefore, alleging that defendant, a nonresident, was "decoyed" into the county where suit is brought, at the instigation of the plaintiff, for the purpose of obtaining service upon him, is sufficient.—Campbell v. Hudson, 106 Mich. 523.

¶ 295. In an action against partners a special appearance of the only partner served and motion to quash the proceedings on the ground that he was not a partner is not equivalent to a plea in abatement requiring a replication and proof.—Hirsh v. Fisher, 138 Mich. 95.

C. PLEAS IN BAR AND SPECIAL DEFENSES AND AVOIDANCES.

§ 66. Matters of bar or defense.

Matters properly pleadable in abatement, see ante § 60 et seq.

Mode of pleading misjoinder or nonjoinder, see ante § 62.

Pendency of another action as matter in abatement, see ante § 64.

Rule as to anticipating objections and defenses, see ante § 7.

Combining matters of abatement and bar in one plea, see ante § 59.

Order and sequence of pleas in bar and abatement, see ante § 57.

Matters better raised by demurrer, see post § 76.

Construction and effect of supplemental pleas as in abatement or in bar, see post § 139.

[Note. The necessity of pleading a particular matter in bar is treated in the specific topic which treats of the cause of action or the particular defense, e. g., Adverse Possession § 43; Payment § 46; Frauds, Statute of § 150; Releases, IV; Fraud § 98; Contracts § 293 et seq.; Conversion § 25; Ejectment § 35; Libel § 59; Malicious Prosecution § 19; Trespass, II.]

Necessity of notice to present issue of want or failure of consideration as defense, see also Contracts § 295.

Necessity of notice to let in defense of want of consideration for bond, see also Bonds § 6.

Necessity of pleading illegality of contract in defense, notice sue sponte, see Contracts § 294.

Necessity of specially pleading or noticing defense of ultra vires, see Corporations § 99.

Necessity of notice of matter of justification by process under plea in trover, see Conversion § 28.

Necessity of specially pleading or noticing defense of limitations, see Limitations § 103.

Necessity of pleading estoppels, see Estoppel §§ 23, 57, 58.

Necessity of special notice of defense of limitation of baggage liability, see also Carriers § 256.

¶ 296. The plea ne unques executor is properly a plea in bar.—Vickery v. Beir, 16 Mich. 50.

¶ 297. A former judgment must be pleaded in bar.—Briggs v. Milburn, 40 Mich. 512; Porter v. Leache, 56 Mich. 40.

§ 67. Form and requisites in general.

Requisites and sufficiency of the special notices, see post § 69.

Requisites and sufficiency of supplemental pleas, see post § 138.

Amendments of pleas and notices, see post § 125.

Abolishment of special pleas in bar and substitution of general issue for all defensive pleadings, see Jud. Act, chap. XIV, § 10; Comp. L. 1915, § 12462.

Statutory form of the plea of the general issue, see Jud. Act, chap. XIV, § 11; Comp. L. 1915, § 12463.

Form of general issue and regulations concerning it, see 1916 C. C. Rule 23.

Provisions for offering and tendering judgment, see Jud. Act, chap. XVIII, § 16 et seq.; Comp. L. 1915, § 12588 et seq.

Rule as to waiving general issue when no issue is to be taken on any material

allegation in declaration, see 1916 C. C. Rule 23, § 8.
Rule permitting making of inconsistent defenses by separate paragraphs, see 1916 C. C. Rule 21, § 7.

¶ 298. On authority of Kerr v. Bennett, 109 Mich. 546, a plea consisting of "the general issue, notice of set-off and recoupment," is insufficient because of indefiniteness.—Bacon v. Reich, 121 Mich. 480.

¶ 299. Special pleas in bar are forbidden by the revision of 1846.—Cresinger v. Reed, 25 Mich. 450.

¶ 300. Where the covenant or (in case of a bond with a condition) the condition is merely to indemnify, the plea non damnificatus is sufficient; but where it stipulates to perform any specific act the performance must be specially pleaded [this was under the old system].—Wheelock v. Rice, 1 D. 267.

¶ 301. The general issue could not be pleaded in a cause in the county court, or in the circuit court, under the act to regulate and define the jurisdiction of those courts (Sess. L. 1848, p. 236). The pleadings in both courts must conform to the provisions of R. S. 1846, ch. 92.—Porter v. Kimball, 1 Mich. 239.

§ 68. ——Necessity of notice or special plea.
Immaterial plea, i. e., special plea covered by general issue, as surplusage, see ante § 24.
Plea and notice in justice's courts, see Justices of the Peace § 96.
Statutory requirements as to notice of defense formerly pleadable specially, see Jud. Act, chap. XIV, § 12; Comp. L. 1915, § 12464.
Affirmative defenses and other matters required to be set forth specially in notice attached to plea, see 1916 C. C. Rule 23, § 2.

¶ 302. 1916 C. C. Rule 23, §§ 2, 3, fixes the matters of affirmative defense which do not appear from the declaration, which are not available under a plea of the general issue, and which must be set up in the notice, in order to make them available as a defense upon the trial.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 303. Proof by a carrier that goods shipped were delivered is not an affirmative defense within 1916 C. C. Rule 23, providing that an affirmative defense must be plainly set forth in a notice attached to the defendant's plea.—Oceana Canning Co v. King, 195 Mich. 628.

¶ 304. Notice must be given under the statutory general issue of any defense required at common law to be specially pleaded.—Rawlings v. Cole, 67 Mich. 431.

¶ 305. Unless notice is filed with the plea, the defense is inadmissible that plaintiff, an attorney, bought for prosecution, contrary to statute, the demand sued on (How. St. § 7189).—Randall v. Baird, 66 Mich. 312.

¶ 306. It seems that matters of avoidance should be specially pleaded.—Cleveland v. Rothschild, 132 Mich. 625.

¶ 307. It is unnecessary for a surety on an indemnity bond to give notice of the defense that action was not brought within the time stipulated in the bond in its plea, where such fact appears upon the face of the bond which is attached to the declaration.—Ladies of Modern Maccabees v. Illinois Surety Co., 196 Mich. 27.

¶ 308. 1897 C. C. Rule 7, subd. b, which requires that an affirmative defense must be set forth in a notice added to the plea, has no application to actions of trover and replevin where the declaration does not allege plaintiff's source of title.—Williams v. Brown, 137 Mich. 569.

¶ 309. Title and license are properly set up in the notice under the general issue in trespass.—Druse v. Wheeler, 22 Mich. 439; Walters v. Tefft, 57 Mich. 390.

¶ 310. A defense arising out of suretyship of defendant to the obligation and a release cannot come in unless by plea or notice.—Field v. Plummer, 75 Mich. 437.

¶ 311. In an action for seduction, plaintiff's lack of chastity is not an affirmative defense under 1897 C. C. Rule 7, subd. b, unless it was "affirmative matter [which] seeks to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration"; and it cannot be so considered, because the suit necessarily puts her chastity in issue.—Greenman v. O'Riley, 144 Mich. 584.

¶ 312. The defense of ultra vires is a special defense and is not available under the general issue, but must be specially pleaded.—Blackwood v. Lansing Chamber of Commerce, 178 Mich. 321.

¶ 313. Under the former Circuit Court Rule 7, subd. c, where a purchaser of superheaters from a foreign corporation not licensed to do business within the state claims in an action by the seller for damages for breach of a written contract of sale that the written contract of sale sued upon is void because the installation of the superheaters by the seller is an act of intrastate commerce which the seller cannot legally perform, it must set forth in a notice added to its plea the facts upon which it intends to rely, including the fact that the process

of installation is so simple that the work can be done by local workmen and that the installation by the seller was not an essential requisite to the contract.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

§ 69. Requisites and sufficiency of notices under general issue.

Construction of pleas and declaration to determine what stands admitted and what controverted, see post IX, C.
Admissions by pleas and notices, see post § 155 et seq.
Controverting or denying effect of plea of the general issue, see post § 160.
Restriction of issues to particular defense noticed, see post § 162.
Amendment of notices, see post § 124.
Amendments adding or changing notices to meet proofs, see post § 126.
Cure of defects by verdict or judgment, see post § 183 et seq.
Requisite precision and certainty of pleas in abatement under former practice, see ante § 65.
Alleging discharge in bankruptcy, see Bankruptcy § 20.
Sufficiency of pleading of estoppel, see Estoppel § 57.
Pleading the statute of frauds, see Frauds, Statute of § 149.
Pleas and notices of limitation of action, see Limitations § 103 et seq.
Necessity of notice or special plea to set up fraud, see also Fraud § 98.
Pleas and notices of defense in action on insurance policy, see Insurance § 289.
Notice under the general issue in actions on fraternal benefit contracts, see Fraternal Associations §§ 70, 71.
Necessity of specifying in notice which matters set forth in declaration defendant denies, see 1916 C. C. Rule 23, § 7.
Mode of making defense that instrument declared on is void or voidable or unenforceable by statute or because of nondelivery, failure of consideration, fraud, payment, discharge, or release, see 1916 C. C. Rule 23, § 2.
Notice attached to plea of general issue as itself a pleading, see 1916 C. C. Rule 21, § 1.
Rule as to stating defenses separately, see 1916 C. C. Rule 23, § 5.
Numbering separate notices of defenses, see 1916 C. C. Rule 23, § 5.

¶ 314. A notice of special matter to be given in evidence must contain all the substantial requisites necessary to constitute a special plea which would be good on general demurrer.—Thompson v. Bowers, 1 D. 321.

¶ 315. Notice of special matter of defense to be annexed to the plea of the general issue need not contain the substance of a special plea, but is sufficient if it briefly state the precise nature of the matter of defense.—Cresinger v. Reed, 25 Mich. 450.

¶ 316. A notice that apprises the plaintiff with reasonable certainty of the matter of defense, so that he may not be taken by surprise on the trial, is sufficient under the statute.—Rosenbury v. Angell, 6 Mich. 508; McHardy v. Wadsworth, 8 Mich. 349; and see Porter v. Kimball, 1 Mich. 239.

¶ 317. The sole test of the sufficiency of a notice of special matter of defense is that it shall apprise the plaintiff of the nature of the defense relied on so that he may be prepared to meet it and to avoid surprise on the trial.—Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich. 525.

¶ 318. Notice of special defense attached to a plea of the general issue is not required to be as precise as special pleading.—Farmers' Mutual Fire Ins. Co. v. Crampton, 43 Mich. 421.

¶ 319. A notice under a plea should not be construed with the strictness of a plea; it is sufficient if it serves reasonably to apprise the plaintiff of the defense relied upon.—McLeod v. Crosby, 128 Mich. 641.

¶ 320. Special pleas, though abolished by Comp. L. 1871, § 5792, How St. § 7361, may properly be allowed to stand in place of the notice of defense, where notice is necessary (Comp. L. 1871, § 5794, How. St. § 7363).—Benedict v. Smith, 48 Mich. 593.

¶ 321. A notice of special defense that "three several writs of attachment were issued out of the circuit court for the county of L., and under the seal thereof in due form of law," giving the names of the parties and dates and command of the writs, and the taking of the property by virtue thereof, is sufficient without alleging the making of the affidavits which authorized the attachments; and the affidavits as well as the writs may be given in evidence.—Rosenburg v. Angell, 6 Mich. 508.

§ 70. Pleading diverse and inconsistent defenses.

Plea as superseding demurrers, see post § 75.

¶ 322. Where, in a suit in trover for unlawfully cutting timber after the period contracted for had expired, the defendant pleaded a former settlement of the action, and also a waiver of it by an extension of the time of cutting, these defenses are not inconsistent.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

D. SET-OFF AND RECOUPMENT.

§ 71. In general.

The subject of set-offs and recoupment of damages is separately treated in the topic Set-off and Recoupment, which see. Matters of pleading involved in alleging the matter of set-off or recoupment but not distinctive to set-off and

controlled by ordinary rules of pleading are treated in Pleading, and especially in topics treating of the specific causes of action, e. g., Contracts § 282 et seq.; Damages, X.

Setting off of equitable claims against legal causes, see Set-off, III.

E. REPLICATIONS AND SUBSEQUENT PLEADINGS.

§ 72. In general.

Matters of rebuttal or replication in issue to meet specially noticed defenses, see post § 163.

Proper replications in quo warranto as to corporate existence and right to do business within state, see Quo Warranto, III.

¶ 323. There can be no replication to the notice annexed to the plea of the general issue, but plaintiff goes to trial upon the declaration, plea and notice.—McFarlane v. Ray, 14 Mich. 465.

¶ 324. No replication need be filed by the plaintiff to a notice of matter of defense arising after the joining of issue filed by defendant under C. C. Rule 106, but the case stands for trial upon the declaration, plea of the general issue and notice; and a default for plaintiff's failure to reply is to be set aside.—Burt v. Wayne Circuit Judge, 90 Mich. 520.

¶ 325. Replication to a notice of defense under the old rules was not necessary where the matters set out in the notice were admissible in evidence under the general issue. —Craig v. Grant, 6 Mich. 447.

¶ 326. Payment by substitution is matter of defense to an action for the debt, and is open to reply.—Glover v. First Universalist Parish of Dowagiac, 48 Mich. 595.

¶ 327. New matter stated as inducement to a traverse in a replication must appear to be sufficient in substance to defeat the other party's allegation, and if a defective title be shown the inducement will be bad.—Kinzie v. Farmers' & Mechanics' Bank of Michigan, 2 D. 105.

¶ 328. What certainty required in, and other requisites of a traverse.—Kinzie v. Farmers' & Mechanics' Bank of Michigan, 2 D. 105.

¶ 329. Where suit was brought for a debt, defendant pleaded that the judge in bankruptcy had given him a certificate that it had been adjudged that he had performed a composition with his creditors and was entitled to a discharge. Held, that a replication which merely traversed the effect of the adjudication and discharge tendered an issue that was immaterial and not triable by a jury, and that if plaintiff thought actual performance of the composition was necessary to a defense, he should have demurred to the plea. But where he made such replication instead, defendant, if he relied on the certificate to defeat the action, should have demurred to it instead of going to trial on the issue.—Whittemore v. Stephens, 48 Mich. 573.

¶ 330. A replication to defendant's notice under C. C. Rule 106 that he has been summoned as a garnishee in a suit against plaintiff, stating that the prospective judgment has been assigned, is insufficient, as such fact may be shown in the garnishment case.—Burt v. Wayne Circuit Judge, 82 Mich. 251.

IV. DEMURRERS AND MOTIONS ON THE PLEADINGS.

§ 73. In general; effect of Judicature Act.

Demurrer in justices' courts, see also Justices of the Peace § 94.

Demurrer in justices' court as constituting an appearance, see Justices of the Peace § 44.

Abolishment of demurrers and substitution of motion to dismiss or notice attached to plea, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.

¶ 331. Under the Jud. Act, chap. 14, § 4, Comp. L. 1915, § 12456, abolishing pleas in abatement and to the jurisdiction, and providing that all questions previously raised by motion to dismiss, the question whether proper service has been made upon a foreign corporation may be raised by motion to set aside the service, based upon proper affidavits.—Golden, Belknap & Swartz v. Connersville Wheel Co., 252 Fed. 904.

§ 74. Time and conditions for demurrers, motions and pleas.

Waiver of defects in declaration by plea to merits, see post § 175.

Order and sequence of pleas in abatement and bar under former practice, see ante § 57.

Time for motions attacking pleadings, see 1916 C. C. Rule 31, § 6.

¶ 332. A demurrer and a plea to the general issue are inconsistent, as the first admits what the last denies; demurrer should be taken before going to issue on the fact. —Cicotte v. Wayne County, 44 Mich. 173.

¶ 333. Under Circuit Court Rule 10, subd. a, providing that if amendment of the declaration is made after plea or demurrer, such plea or demurrer shall stand as if to the amended declaration, unless defendant shall, within ten days after amendment, file another plea or demurrer, a demurrer to an amended declaration, filed several months after the filing of such amended declaration, was properly stricken from the files on mo-

tion.—Michigan United Railways Co. v. Ingham Circuit Judge, 155 Mich. 478.

§ 75. ——Pleading one while other pends undisposed of.

¶ 334. A plea to the merits excludes the right to demur and must be withdrawn if the defendant wishes to demur to the same counts; there cannot be issues of fact and of law on the same counts.—Cicotte v. Wayne County, 44 Mich. 173.

¶ 335. A plea to the merits filed after demurrer waives, supersedes or overrules it.—Cicotte v. Wayne County, 44 Mich. 173.

¶ 336. A court cannot dismiss a case on motion, on the ground of a former suit pending for the same cause, when a plea of such suit pending has been replied to and the issue thereon remains undisposed of.—Gruler v. McRoberts, 48 Mich. 316.

§ 76. Office and grounds of demurrer and matters for plea.

Proper time and modes of taking objections to pleadings, demurrer, plea, or motion as proper mode, see post § 172 et seq.
Where question involves facts, see post § 77.
Proper matters in abatement, see ante § 60 et seq.
When objection for duplicity will lie, see ante § 5.
When declaration is regarded as demurrable for duplicity, see ante § 37.
Effect of error in served copy of declaration, see also ante ¶ 91.
Scope of demurrer, questions raised and facts admitted, see post §§ 87-90.
General requisites of pleading, see ante § 2 et seq.
Requisites of declarations, see ante § 29 et seq.
Requisites of pleas and notices, see ante § 54 et seq.
Bill of particulars as matter outside the pleadings reached by demurrer, see post § 94, ¶¶ 403-406.
Frivolousness of demurrers and motions, see post § 90.
Cure of pleadings by statute of amendments, see post § 181 et seq.
Office and grounds of motions, see post § 78 et seq.
Demurrer as general appearance, see Appearance § 7.
Raising defense of limitations by demurrer, see Limitations § 104.
Raising the statute of frauds by demurrer, see Frauds, Statute of § 150.
Proper mode of objection to admission of any evidence under declaration, see Directing Verdict § 33.
Mode of objecting that declaration departs from writ of attachment, see Attachment ¶ 197.
Propriety of demurring to petition for mandamus, see Mandamus § 142.

¶ 337. Whether an objection to a declaration for duplicity can be raised by general demurrer, quære.—Randall v. Evening News Assoc., 92 Mich. 467.

¶ 338. Whether the question of plaintiff's right to use a particular name in bringing suit can be raised by demurrer, quære.—Watson v. Watson, 49 Mich. 540.

¶ 339. Where a declaration is sufficient to sustain a judgment, an objection that it should have been more specific should be raised by demurrer and not by objection to the introduction of any evidence.—Thick v. Detroit, U. & R. Ry., 137 Mich. 708.

¶ 340. If a declaration on a bond assigns a breach in the terms of the condition of the bond, an objection to the assignment as insufficient should be taken by demurrer, else it will be waived.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

¶ 341. Where a declaration in an action of ejectment in a guardian's name for the ward's land fully sets forth the ward's title, objection should be taken by demurrer and the court may permit an amendment to sue in the infant's name.—Kinney v. Harrett, 46 Mich. 87.

¶ 342. In an action for injuries due to a defective bridge, an objection that the declaration does not sufficiently specify the defects in the bridge should be raised by demurrer.—Bettys v. Township of Denver, 115 Mich. 228.

§ 77. ——Questions involving facts.

¶ 343. Action against a common carrier of passengers by steamboat for refusing plaintiff a cabin passage. Notice of defense that, by the regulations and established course of business of the boat, persons of plaintiff's race are not allowed the use of the cabin as passengers; which regulation and course of business are averred to be reasonable. Demurrer to the notice. Held, that the reasonableness of such a regulation was a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court; and could not be determined on demurrer.—Day v. Owen, 5 Mich. 520.

¶ 344. It is bad practice to disclaim in a demurrer to the bill.—Proctor v. Plumer, 112 Mich. 393.

§ 78. Office and grounds of motions.

Motions to strike and for further particulars, see post § 79.
Motions to elect, see post § 80.
Motions for leave to amend, see post § 133.
Necessity of specifications, see post § 84.
Matters triable on motion for nonsuit or dismissal, see Discontinuance § 19.
Insufficiency of motion to raise issues of fact determinative of right, see Motions and Orders § 3.
Pleading res adjudicata by motion to dismiss action and discharge defendant from bail, see Civil Arrest ¶ 186.

Impropriety of trying jurisdictional facts on affidavits, see also Courts § 81.
Withdrawal and substitution of attorneys, see Attorneys § 12.
Provision for motion to bring on questions of abatement or of law before day of trial, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.
Necessity that motion include all objections up to date of motion, see 1916 C. C. Rule 31, § 6.

¶ 345. Under § 4, chap. XIV, of the Jud. Act, Pub. Acts 1915, No. 314, the question of the insufficiency of a notice filed under the general issue cannot be raised by motion, as under former practice it could not be raised by plea or demurrer.—Harrington v. Sheldon, 196 Mich. 388.

¶ 346. A motion under the Jud. Act, Pub. Acts 1915, No. 314, chap. XIV, § 4, to dismiss an action brought in the circuit court by a member of a farmers' mutual fire insurance company, based upon an award made by the adjusting board on the grounds that the subject-matter sued on had been submitted to the company's board of arbitrators, after an appeal from the adjusting board, and an award made which was final and conclusive, and that plaintiff had been extended all rights contemplated by the contract for settlement of disputes in the adjustment of losses, does not set up matters which might have been raised by demurrer, plea in abatement or plea to the jurisdiction under the former practice, and hence is improper, and the matters can only be disposed of on the trial.—Pagenkoff v. Patrons' Mut. Fire Ins. Co., 197 Mich. 166.

¶ 347. The question whether the action is brought in the proper county may be raised and decided on motion based upon affidavits if the facts are not of record or within judicial notice.—Haywood v. Johnson, 41 Mich. 598; Stringer v. Dean, 61 Mich. 196.

¶ 348. To raise questions of jurisdiction of transitory actions, if the facts are not of record or within judicial notice, a plea is not essential, and the party asserting the jurisdiction can waive a formal issue on the motion.—Haywood v. Johnson, 41 Mich. 598; Stringer v. Dean, 61 Mich. 196.

¶ 349. As a foreign corporation having an agent here may be held for a cause of action arising here, a motion to quash the declaration where service has been had on such an agent, and where the declaration does not negative such a cause of action, is not the proper remedy.—Maxwell v. Speed, 60 Mich. 36.

¶ 350. If the validity of a stipulation to settle a case is disputed, even though money has been paid thereunder, it should be brought into the case by plea and not by motion.—Leavitt v. Detroit Superior Court Judge, 52 Mich. 595.

¶ 351. A capias ad respondendum cannot be set aside on a motion based on defendant's affidavit that the name by which the suit was begun was not the plaintiff's true name; the objection, if raised at all, must be raised by plea.—Watson v. Watson, 47 Mich. 427.

¶ 352. The defense of a former suit pending cannot be raised by motion to quash summary proceedings to recover possession of leased premises but only by verified plea in abatement.—Ryan v. Mills, 129 Mich. 170.

¶¶ 353, 354. Variance between writ and declaration should be taken advantage of by motion, and is waived by plea.—Reeder v. Moore, 95 Mich. 594; Brewer v. Boynton, 71 Mich. 254.

¶ 355. A declaration in a suit commenced by attachment is not demurrable on the ground of a variance between the cause of action stated therein and that set forth in the affidavit for the writ. The proper remedy in such case is by a summary application to the court to set the declaration aside for irregularity.—Longyear v. Minnesota Lumber Co., 108 Mich. 645.

§ 79. ——Motions to strike and for further particulars.

Supporting affidavits, see post § 86.
Presumption against pleadings being sham, see ante ¶ 67.
Striking tardy demurrer, see ante ¶ 333.
Plea or motion to strike as proper practice, see ante ¶ 229.
Motion to quash declaration against foreign corporation, see also ante ¶ 349.
Amendments by striking out parts of pleadings, see post § 135.
Striking pleadings to compel payment of costs, see Costs § 149.
Striking pleadings from files for nonconformity to rules, see 1916 C. C. Rule 21, § 10.
Striking pleadings and parts thereof for scandal and impertinence, see 1916 C. C. Rule 21, § 10.
Motion for further and better statement of nature of claim or defense as remedy for indefiniteness, uncertainty, and incompleteness, see 1916 C. C. Rule 21, § 8.

¶ 356. A motion to strike from the files is the proper proceeding to get rid of a defective demurrer; it is not good practice to move that it be not heard.—Comstock v. McEvoy, 52 Mich. 324.

¶ 357. A notice of justification which if true does not justify the published charge, alleged as a libel, may be stricken from the files.—Thibault v. Sessions, 101 Mich. 279.

¶ 358. Where to a declaration in assumpsit the defendant pleaded nonassumpsit and also not guilty, and a jury trial had been had, it was held that the plea of not guilty might be treated as a nullity and stricken

from the record.—The Milwaukie v. Hale, 1 D. 306.

¶ 359. If a general demurrer has been filed, a plea to the jurisdiction presents an immaterial issue and should be stricken from the files.—Thompson v. Michigan Mut. Ben. Ass'n, 52 Mich. 522.

¶ 360. Declaration in an action on a judgment was served on one of two joint defendants and he appeared and pleaded. The other was not served, but at the term when the case was to be tried, and before trial, though after some depositions had been taken, he appeared and pleaded also. On plaintiff's motion his plea was stricken from the files. Held error.—Ralston v. Chapin, 49 Mich. 274.

¶ 361. It seems that where counsel appear in the name of a party by whom they have not been retained, and put in a plea different from one that is afterward entered by counsel duly authorized, the opposite party is entitled to have the plea stricken from the files.—Arno v. Wayne Circuit Judge, 42 Mich. 382.

§ 80. ——Motion to elect.

Necessity and occasion for election, see ante § 51.

Time for election, see ante § 53.

Restriction of recovery under count as alternative of election, see ante ¶ 201.

Review of ruling on motion to elect, see Appeal § 400.

¶ 362. Where, in an action of deceit, counts charging one defendant are joined with counts charging two defendants, the proper course is for defendant to move to compel the plaintiff to elect.—Diel v. Kellogg, 163 Mich. 162.

§ 81. Requisites, form and sufficiency.

Demurrer or motion by two or more coparties jointly or severally, see post § 83.

Necessity of specifications or special demurrer, see post § 84.

Exhibits and showing accompanying demurrer, see post § 85.

Affidavits and showing on motions, see post § 86.

Requisites and sufficiency of pleas in abatement under former practice, see ante § 65.

Form and sufficiency of motions and notices of motions, see Motions and Orders § 1.

Right of party appearing but not pleading to have notice of proceedings in the case, see also Motions and Orders ¶ 9.

Noticing cause for trial or hearing, see Calendar.

¶ 363. Oral demurrers in the circuit court are unauthorized.—Jenks v. Brown, 38 Mich. 651.

§ 82. ——Demurring to several counts.

Admissive effect of demurrer to one of several counts, see post § 89.

Untenability of demurrer to declaration entire where any count is good, see also post § 187.

¶ 364. A demurrer to an entire declaration, which, in addition to the special counts, contains the money counts, which are good, cannot be sustained.—Weston v. Luce County, 102 Mich. 528.

§ 83. Demurrers or motions by or against coparties jointly.

Demurring to one and pleading to other counts, see ante § 82.

¶ 365. A demurrer in which all the defendants joined is joint and not several and cannot be sustained except upon grounds that are good as to all of the defendants.—Phillips v. Jacobs, 145 Mich. 108.

¶ 366. One defendant cannot by demurrer be heard upon questions affecting only the interests of his codefendants.—Michigan Nat. Bank v. Hill, 181 Mich. 7.

§ 84. Necessity of specifications; special demurrers.

Exhibits and showing accompanying demurrer, see post § 85.

¶ 367. A ground of demurrer should be so stated as to apprise the court of the real objection, and if it is not, the party demurring can claim nothing under it.—Kellogg v. Hamilton, 43 Mich. 269.

¶ 368. How. St. § 7358, and Circuit Court Rule 34 (first rules) require every objection, either of form or matter of substance, to be specified in the demurrer. If this is not done, and the declaration sets forth a cause of action, the demurrer will be overruled.—Adrian Water Works v. City of Adrian, 64 Mich. 584.

¶ 369. 1897 C. C. Rule No. 9 requiring that the causes of demurrer be plainly specified does not enlarge Comp. L. 1897, § 549, giving the right of appeal from an order overruling a general demurrer, neither does it in any manner change the classification of demurrers as general and special.—Kerr v. Rupp, 144 Mich. 269.

¶ 370. An objection of form and not substance should be specially demurred to.—Thompson v. Moran, 44 Mich. 602.

¶ 370a. In replevin a defective description of the property in the declaration must be taken advantage of by special demurrer, as it would be held sufficient after verdict, avowry, or plea of property in defendant.—Stevens v. Osman, 1 Mich. 92.

¶ 371. Misjoinder of parties being properly the subject of special demurrer cannot be raised by general demurrer.—Grand Haven

Arbeiter Unterstutzungs Verein v. Soule, 175 Mich. 210.

¶ 372. An objection that certain real property was not particularly described in the declaration in an action for fraud whereby plaintiff was induced to convey it, must be taken by special demurrer where it is described in general terms as a house and lot in a certain city.—McDonald v. Smith, 139 Mich. 211.

¶ 373. A declaration on an assessment upon a subscription to stock in a railway company is sufficient on general demurrer though it does not expressly aver payment of five per cent., but sets it forth by way of recital; so, also, it is good on special demurrer aimed only at other defects.—Peninsular Ry. Co. v. Duncan, 28 Mich. 130.

§ 85. Exhibits and showings accompanying demurrer.

Affidavit and showing on motion, see post § 86.

¶ 374. Where the declaration sets out a contract but not the specifications referred to therein and made a part thereof, defendant may attach to its demurrer a copy of such specifications.—Mathewson v. City of Grand Rapids, 88 Mich. 558.

§ 86. Affidavits and showing for motions.

¶ 375. An affidavit that joint defendants have no joint property within the state is insufficient to sustain a motion to strike from the files a plea entered by one of them who has not been served with the declaration, as it does not negative the possibility that they may have such property when judgment is rendered.—Ralston v. Chapin, 49 Mich. 274.

§ 87. Scope of demurrer and issues of law thereon.

Facts admitted by demurring, see post § 89.
Strictness of construction of pleadings when assailed by demurrer, see ante § 20.
Office or grounds of demurrer, see ante §§ 76, 77.
Scope and effect of motions to dismiss or demurrers (under former practice) in chancery, see Equity § 112 et seq.

¶ 376. A demurrer on technical grounds does not affect the sufficiency of a declaration in matters of substance.—Enright v. Hartsig, 46 Mich. 469.

§ 88. ——Searching the record; defects in earlier pleadings.

Bill of particulars as matter outside of the pleadings, see post § 94.

¶ 377. On demurrer to the replication a formal defect in the plea will not be noticed.—People v. Jackson & M. Plank Road Co., 9 Mich. 285.

§ 89. Admissions of fact by demurrer or motion.

Admissions and traverses in general, see post IX, C.
General appearance by demurring, see Appearance.
Assumption of truth of pleading for purpose of reviewing judgment on demurrer, see Appeal § 351.
Admissive effect of demurrer where allegations set out conclusive judgment and also facts concluded by it, see Former Adjudication ¶ 52.
Admissions by demurrer or motion to dismiss in equity, see Equity § 156.
Admissions by demurrers in mandamus, see Mandamus §§ 165, 167.

¶ 378. The facts only which are relevant and well pleaded are admitted by a demurrer; conclusions of law, when stated, or inferences drawn by the pleader from the facts stated, are not admitted.—Shaw v. Chase, 77 Mich. 436.

¶ 379. A demurrer admits the truth of all material facts alleged in the declaration and which are well pleaded.—Belknap v. Ball, 83 Mich. 583.

¶ 380. A general demurrer admits jurisdiction of the person.—Thompson v. Michigan Mut. Ben. Ass'n, 52 Mich. 522.

¶ 381. Inferences of the pleader are not admitted by demurrer.—Dubois v. Hutchinson, 40 Mich. 262.

¶ 382. A demurrer admits only what is well pleaded.—United States v. Van Auken, 96 U. S. 366, 24 L. ed. 852.

¶ 383. A demurrer to a declaration alleging plaintiff's title to land admits such title.—Stout v. Keyes, 2 D. 184.

¶ 384. A demurrer to special counts would not admit facts stated only in the consolidated common counts.—Rose v. Jackson, 40 Mich. 30.

¶ 385. A demurrer to a plea in abatement admits the facts stated therein.—Clark v. Mikesell, 81 Mich. 45; Chicago & W. M. R. Co. v. Nester, 63 Mich. 657.

¶ 386. A defendant cannot complain if the court assumes that a statement of facts in a demurrer is true although the complainant is not bound by such statement.—Belden v. Blackman, 118 Mich. 448.

¶ 387. In an action in the nature of a creditor's bill, upon a judgment rendered in a foreign state, a demurrer on the ground that the judgment was barred by the statute of limitations admits facts stated in the bill regarding the nonresidence of the defendant, for the purpose of determining the sufficiency of the bill, but not for the purpose of

trial of the merits.—Belden v. Blackman, 124 Mich. 667.

¶ 388. A bill assailing notices of tax sales, alleging that copies and not originals were served, shows the contrary by setting forth as exhibits the notices which appear to be exact duplicates, and the allegation is not therefore admitted by demurrer.—Williams v. Olson, 141 Mich. 580.

¶ 389. A bill to cancel tax sale notices and to restrain trespasses, alleging that the notices were not signed, is not admitted to be true in that respect against the contrary fact shown by exhibits of the notices that they were signed.—Williams v. Olson, 141 Mich. 580.

¶ 390. A court will not aid a demurrer to a bill by taking judicial notice of public records to the extent of finding from such records facts contrary to averments of the bill admitted by the demurrer.—People ex rel. Attorney General v. Michigan Cent. R. Co., 145 Mich. 140.

¶ 391. In an action for libel a demurrer admits the publication and also the allegation of its falsity and malice.—Gustin v. Evening Press Co., 172 Mich. 311.

¶ 392. Where a declaration sets out libelous articles alleged to have been published by defendant, the filing of a demurrer by defendant admits the publication.—Orband v. Kalamazoo Tel. Co., 170 Mich. 387.

§ 90. Frivolousness of demurrers and motions.

Motion for judgment on ground of frivolousness, see post § 91.

Denial of leave to plead over as penalty for frivolous demurrer, see post § 93.

¶ 393. Where, in a suit by an assignee upon an account due from the defendant to a copartnership, the assignment is averred to have been made by the firm, and the identity of the contract sued upon is so plain upon the face of the declaration that no other purpose could have been served by interposing a demurrer, on the ground that the names of the members of the firm are not stated, except that of a delay, no error is committed in holding the demurrer frivolous.—Wyckoff S. & B. Co. v. Bishop, 98 Mich. 352.

§ 91. Mode of objection to demurrer or motion.

Under Judicature Act, see also ante ¶ 345.

Motion to strike bad demurrer, see ante ¶ 356.

¶ 394. A motion to strike from the files is the proper proceeding for getting rid of a defective demurrer; it is not good practice to move that it be not heard.—Comstock v. McEvoy, 52 Mich. 324.

¶ 395. A plaintiff may, after joining in demurrer, move the court, at the proper time, for judgment on the ground that the demurrer is frivolous.—Wyckoff S. & B. Co. v. Bishop, 98 Mich. 352.

§ 92. Hearing and decision on demurrers and motions.

Motion for judgment on ground of frivolousness of demurrer, see ante § 91.

Leave or propriety of pleading over, see post § 93.

Judgments on demurrer, see Judgments § 4.

Entry and rendition of judgments, see Judgments, III.

Mandamus to compel proper rulings on the pleadings and demurrers, see Mandamus § 32.

Opening judgment to pass upon a demurrer, see Judgments ¶ 152.

Writ of error to judgment on demurrer, see Appeal §§ 32, 34, 39.

Review on certiorari of judgment on demurrer of dilatory plea, see Certiorari § 10.

§ 93. Pleading over and repleader and transfer of cause.

Pleading over plea in abatement, see also ante ¶ 235.

Amendments to meet demurrers or motions, see post VI.

Pleading over amendment, see post §§ 105, 128.

Waiver of demurrer by pleading over, see post § 188.

Necessity of withdrawing plea to interpose demurrer, see ante ¶ 334.

Recalling election between counts and electing abandoned count after reversal, see Appeal § 560, ¶ 2379.

Provisions for transfer of action to equity side or from equity side to law side, see Jud. Act, chap. XI, § 2; Comp. L. 1915, § 12351.

¶ 396. Defendant upon his demurrer to a declaration being overruled must plead if the defense is affirmative, such as want of consideration.—Boyer v. Sowles, 109 Mich. 481.

¶ 397. It is not a matter of right for a defendant to plead over after a demurrer has been overruled, particularly when it is determined that the demurrer is frivolous.—Wyckoff S. & B. Co. v. Bishop, 98 Mich. 352.

¶ 398. A plea in bar is allowable in the court's discretion after a plea in abatement is overruled.—McOmber v. Holmes, 41 Mich. 417.

¶ 399. Repleader is never awarded in favor of the party beginning the mispleading and to whose error the subsequent mispleading is traceable.—Whittemore v. Stephens, 48 Mich. 573.

V. BILL OF PARTICULARS.

§ 94. Nature and office of bill.

When demandable or proper, see post § 95.
Demand and waiver of right to particulars, see post § 96.
Requisites and sufficiency of bill, see post § 98.
Objections to form or substance of bill, see post § 99.
Amendments to bill, see post § 129.
Effect of bill or of failure to furnish bill, see post §§ 97, 100.
Effect of amendment of bill to enlarge issues, see post § 129.
Bill of particulars under common count as sufficient to plead assignment to plaintiff, see Assignments § 33.
Bill of particulars as memorandum to refresh memory, see Examination of Witnesses, §§ 21, 23.

¶ 400. The office of a bill of particulars is to prevent surprise by informing the opposite party of the causes of action to be relied on upon the trial which are not specially set out in the declaration.—Davis v. Freeman, 10 Mich. 188; Mason v. Scio Fractional School Dist. No. 1, 34 Mich. 228; Wright v. Dickinson, 67 Mich. 580.

¶ 401. The office of a bill of particulars is to inform the opposite party of the cause of action to be relied upon, which is not stated in the declaration; to furnish, avoiding the uncertainty of general pleading, such information as will facilitate intelligent preparation for trial.—Hamilton v. Frothingham, 71 Mich. 616; Hamilton v. Ingham Circuit Judge, 84 Mich. 393.

¶ 402. A bill of particulars is not part of the declaration, though it may have the effect of a pleading in so far as it restricts the proof; its purpose is to secure such information as will enable the parties to make intelligent preparation for trial.—Cicotte v. Wayne County, 44 Mich. 173.

¶ 403. Pleadings are not amended by service of a bill of particulars, nor is the issue changed by amending the bill; and a plea or demurrer to it would be anomalous.—Cicotte v. Wayne County, 44 Mich. 173.

¶ 404. A declaration on the common counts is not made demurrable by the bill of particulars.—Cicotte v. Wayne County, 44 Mich. 173.

¶ 405. A bill of particulars, filed under a declaration upon the common counts, is no part of the pleading, and does not come upon demurrer.—Cicotte v. County of Wayne, 59 Mich. 509.

¶ 406. A bill of particulars is no part of the declaration, and cannot affect its sufficiency upon demurrer.—Weston v. Luce County, 102 Mich. 528.

¶ 407. A bill of particulars filed and served in response to defendant's request is in effect a part of the declaration, and may obviate the necessity for an amendment.—Hurd v. Northern Acc. Co., 153 Mich. 474.

¶ 408. A bill of particulars is not a pleading in any court; it may restrict, but cannot enlarge, the scope of the recovery permissible under the declaration, and the issue made by the pleadings is not changed by its amendment.—Applebaum v. Goldman, 155 Mich. 369.

§ 95. Occasion and propriety of bill.

Loss of papers as excuse for not furnishing bill, see post ¶ 431.
Requisites and sufficiency of the bill, see post § 98.
Bills of particulars in assumpsit, see also Assumpsit § 51.
Bill of particulars in action for criminal conversation, see also Husband and Wife, ¶ 524.
Bill of particulars in action on insurance policy, see Insurance § 288.
Bills of particulars in garnishment trials, see Garnishment § 76.
Bills of particulars in justices' courts, see Justices of the Peace § 101.
Occasion and duty to serve and file bill of particulars, see 1916 C. C. Rule 30.

¶ 409. The granting or refusal of bills of particulars rests in the sound discretion of the trial court according as justice and fair dealing require.—Gary v. Eaton Circuit Judge, 132 Mich. 105.

¶ 410. A bill of particulars cannot be required in an action on the case for consequential injuries.—People ex rel. Everett v. Marquette Circuit Judge, 39 Mich. 437; Kehrig v. Peters, 41 Mich. 475.

¶ 411. In actions for personal injuries through negligence, bills of particulars are not demandable; for the injury must be specifically averred by the declaration.—Shadock v. Alpine Plank-Road Co., 79 Mich. 7.

¶ 412. The fact that a case has been twice tried without a bill of particulars of the damages sought to be recovered under a special declaration will not prevent the ordering of one for the third trial.—Van Vranken v. Wayne Circuit Judge, 85 Mich. 140.

¶ 413. A bill of particulars is not demandable of right by a garnishee.—Strong v. Hollon, 39 Mich. 411.

¶ 414. Under a special declaration in an action for fraud, in which some of the counts sounded in assumpsit, and in which many of the allegations, among others that large sums of money were spent in litigation and that defendant refused to pay plaintiff his stipulated salary, were general, the defendant was entitled to a bill of particulars, the necessity

for a bill of particulars as to them being the same whether the action be in tort or assumpsit.—Anti-Kalsomine Co. v. Kent Circuit Judge, 119 Mich. 434.

¶ 415. A complaint, alleging fraudulent and unfair practices in that salesmen of the defendant interfered with plaintiff's customers in trade and discouraged them to continue their patronage and transfer it to defendant [see complaint, 118 Mich. 219], need not be accompanied with a bill of particulars as to names of salesmen and customers; but if none is furnished the question is open whether the complaint is sufficient to admit the proofs offered.—Anti-Kalsomine Co. v. Kent Circuit Judge, 119 Mich. 434.

§ 96. Demand and waiver of bill.

Mandamus to correct action in allowing or disallowing bill of particulars, see Mandamus § 82.

¶ 416. A bill of particulars that has been properly demanded is not waived by pleading or noticing the case for trial.—Peterson v. Tilden, 44 Mich. 168.

§ 97. Effect of failure to furnish bill.

See also ante ¶ 415.

Effect of plea before bill is furnished, see ante ¶ 416.

Penalty or consequence of failure to serve bill or of serving insufficient bill, see 1916 C. C. Rule 30, § 2.

¶ 417. Nonsuit cannot be ordered for failure to file a bill of particulars in an action for slander, if the action was begun by affidavits to hold to bail, in which the facts were fully set out; no more can be done than to limit the plaintiff to the cases set out in the affidavits.—Gibbs v. Detroit Superior Judge, 53 Mich. 496.

¶ 418. Omission to file a bill of particulars is unimportant if defendant, by demanding one, could preclude any surprise, and if plaintiff's case proceeded throughout upon the theory on which he recovered.—Berringer v. Cobb, 58 Mich. 557.

¶ 419. Where a plaintiff refuses to comply with a proper demand for a bill of particulars, an objection to his evidence is properly sustained.—Peterson v. Tildon, 44 Mich. 168.

§ 98. Requisites and sufficiency.

Amendments of bills, see post § 129.

¶ 420. Where a bill of particulars in an action on the common counts states the dates and amounts of the several sales and deliveries to the defendant of merchandise to be sold on commission, it is sufficient to indicate the transactions from which arose the claim for money had and received; the claim on account stated, if growing out of these dealings, is governed by the same rule.—Freehling v. Ketchum, 39 Mich. 299.

¶ 421. In an action on the common counts a bill of particulars as full as the accounts customarily rendered among merchants when they have previously sent invoices is sufficient if not objected to, or if no further bill is called for.—Freehling v. Ketchum, 39 Mich. 299.

¶ 422. A bill of particulars, in an action for wages on a labor contract, cannot cover money returned by plaintiff to defendant, as a loan, after receiving it as payment.—Judd v. Burton, 51 Mich. 74.

¶ 423. The bill need not contain all the essential elements of a special declaration. In an action for money had and received it should specify how the demand arose, the items thereof, when they accrued, and the amount claimed, but need not state how and when and by what right plaintiff or his assigns became entitled, or how and when plaintiff acquired such right.—Hamilton v. Ingham Circuit Judge, 84 Mich. 393.

¶ 424. In an action for money had and received a specification in a bill of particulars of an item of plaintiff's demand as two-thirds of whatever sum remained in defendant's hands of $412,250, received by him for certain bonds and stock of a specified railroad company, after paying certain notes, describing them, but not giving their amount, is too uncertain and indefinite.—Hamilton v. Ingham Circuit Judge, 84 Mich. 393.

¶ 425. A bill of particulars in assumpsit to recover an amount claimed to be found due, and stated between plaintiff and defendant on a settlement of partnership dealings, need not state the amount with absolute exactness, but is sufficient if it fairly apprises defendant of the nature of the claim under it; so held, where it stated the amount due to be $1,000 while the proofs showed the sum was $528.50; and where the settlement was made with defendant personally and he still had all the firm books and papers in his possession.—Sogge v. Schwartz, 116 Mich. 635.

¶ 426. A bill of particulars describing generally the character of plaintiff's claim is sufficient, if no demand is made for a more specific bill. So held where, in an action for moneys had and received, the bill set forth a claim upon "divers notes, accounts, contracts, and other evidences of indebtedness placed in the hands of defendant for collection."—Tanner v. Page, 106 Mich. 155.

¶ 427. A bill of particulars claiming a given amount as a balance due for services rendered as bookkeeper, between certain specified dates, is sufficiently specific.—Strutz v. Brown, 110 Mich. 687.

¶ 428. An action was commenced by declaration upon a foreign judgment but which

also contained the common counts. Defendant answered and demanded a bill of particulars. Subsequently, and after the time for such amendment had expired, plaintiff, without leave, filed an amended declaration which gave notice that certain promissory notes, copies of which were attached, would be given in evidence, and on the same day filed a bill of particulars stating that the matter in the amended declaration constituted the entire cause of action. Objection was made to the amended declaration on the ground that it was filed after the time for filing without leave had expired. Held that such objection was valid, but that the amended declaration might be used to make the bill of particulars complete.—Ontario Powder Works v. Powell, 132 Mich. 451.

§ 99. Objections to form or substance of bill.

Mode and time for taking objections, see post § 173.
Reference to eliminated pleading to eke out bill of particulars, see ante ¶ 428.
Demand for more specific bill, see also ante ¶ 426.
Amendments of bills, see post § 129.

¶ 429. If the specifications in a bill of particulars do not accord substantially with the facts, or omit essential matters, advantage of this can be taken on the trial.—Hamilton v. Ingham Circuit Judge, 84 Mich. 393.

¶ 430. A bill of particulars is expected to be explanatory of the declaration and in amplification thereof; and where it was obscure and evasive, giving no additional information, the court should have exercised its discretion, under First C. C. Rule 38, to nonsuit plaintiff, or to require a more particular bill to be furnished; and to allow plaintiff to introduce, against objection, evidence of particulars not given, was error.—Knop v. National Fire Ins. Co., 101 Mich. 359.

¶ 431. Where plaintiff's bill of particulars filed in the circuit court on appeal is objected to as not sufficiently specific, plaintiff may show his inability to furnish the items, and that he filed an itemized bill in justice's court, which bill, as well as plaintiff's books of account, has been lost.—Rossman v. Bock, 97 Mich. 430.

¶ 432. An objection to the sufficiency of a bill of particulars cannot be raised upon the trial, where no motion for a more specific bill was made, even though a further bill may have been demanded of the opposite party.—Strutz v. Brown, 110 Mich. 687.

§ 100. Effect to limit issues or recovery.

See also ante ¶¶ 402, 430.
Office and nature of the bill, see ante § 94.
Effect of setting out contracts in bill to make want of amendment immaterial, see post ¶ 829.
Inefficacy of bill to enlarge issues, see ante ¶ 408.

¶ 433. There can be no recovery for items not in the bill of particulars, nor for more than it alleges.—Bennett v. Smith, 40 Mich. 211.

¶ 434. Where the bill in an action for a balance remaining in the hands of an officer enumerates sundry items as received by defendant, and adds that the specific demand sought is a specified balance with interest, there is no error in permitting inquiry as to sums which defendant has received but which vary from those specified in the bill.—Mason v. Scio Fractional School Dist. No. 1, 34 Mich. 228.

¶ 435. Where suit is brought for the value of labor, and a bill of particulars, filed under a notice of set-off and recoupment, gives no intimation of damages for breach of the contract of hire, evidence of such damages is inadmissible.—Ritter v. Daniels, 47 Mich. 617.

¶ 436. Payments on plaintiff's demand may be shown though not embraced in the bill of particulars of defendant's set-off.—Olcott v. Hanson, 12 Mich. 452.

¶ 437. A bill of particulars filed under a declaration in assumpsit on the common count for money had and received pointed out that plaintiff sought to recover back money paid without consideration on a land contract, set out by attached copy, because the vendor had no title. Held, that evidence was admissible on plaintiff's part to show that the contract was void for other reasons apparent on the face of the contract not alleged in the bill of particulars. Such bill is for the purpose of avoiding surprise at the trial, and such evidence could not surprise defendant.—Wright v. Dickinson, 67 Mich. 580.

¶ 438. In an action for a breach of an advertising contract where the plaintiff claims the loss of profits on advertising already bargained for, and that he was prevented from making other contracts, and his business entirely destroyed, a bill of particulars need only specify with whom plaintiff has been contracting for advertising, the length of time the contracts were to run, and the damages claimed in being prevented from performing them, and upon the trial he is not confined to the exact amount fixed, but may recover any amount he can prove, not exceeding the amount claimed.—Van Vranken v. Wayne Circuit Judge, 85 Mich. 140.

¶ 439. In a suit to recover the balance claimed to be due on the sale of a horse, the date of the transaction as fixed in the bill of particulars is not necessarily controlling.—Tate v. Hamilton, 81 Mich. 221.

¶ 440. Where a bill of particulars in an action upon the common counts for the balance due upon a contract to deliver lumber astern of a vessel at a certain city, contains a charge for "cash paid for labor of men in

watching raft, and looking after the same at request of defendants," it admits evidence of the delivery of a raft of the timber at a certain shipyard, instead of astern of a vessel, and that plaintiff was requested by defendants to look after the raft, and did so and charged the latter for his time.—Duplanty v. Stokes, 103 Mich. 630.

¶ 441. Plaintiff's recovery cannot extend beyond his bill of particulars, and where same is silent as to loss of prospective profits by defendant's breach of contract, no recovery can be had therefor.—Brooks v. Bellows, 179 Mich. 421.

¶ 442. Where, in a suit for goods sold, the defendant sets up a statement and settlement as precluding recovery for certain items, the plaintiff may introduce evidence as to these items although they are not included in the bill of particulars.—Rock Island Plow Co. v. Smith, 162 Mich. 180.

¶ 443. By a written contract defendant promised plaintiff to pay a third person $1,700, due to him from plaintiff, and also $1,300 for plaintiff's services thereafter to be performed. In an action on this contract plaintiff, suing for use of the third person, by his bill of particulars, confined his claim to the contract. This did not preclude him from showing, by parol evidence, the performance of subsequent services beyond those agreed so as to make proof that the full $3,000 was due under it, and that so much remained due on it.—Tefft v. McNoah, 9 Mich. 201.

¶ 444. Where plaintiff's bill of particulars is framed upon two distinct theories, he should be restricted to one theory or the other in his proof.—Meyers v. McQueen, 85 Mich. 156.

VI. AMENDMENTS.

A. IN GENERAL.

§ 101. Grounds, occasion and propriety in general.

Discretion to allow or deny leave, see post § 102.
Terms and condition of leave to amend, see post § 103.
Time for amendments and fitness or condition of the pleadings or case for amendments, see post § 104.
Continuance and time to plead to amendments, see post § 105.
Waiver of leave or of right to amend, see post § 106.
Construction and effect of amendments, see post § 107.
Motion, showing thereon, and order on motion for leave, see post § 133.
Amendments affecting third persons or their rights, see post § 132.
Amendments in equity pleading, see Equity, VII, E.
Amendments in justices' courts, see also Justices of the Peace § 108 et seq.
Amendments on appeal from justices' court, see Justices of the Peace § 216.
Amendment of bastardy proceedings, see Bastards § 6.
Amendments in proceedings to foreclose mechanics' liens, see Mechanics' Liens § 52.
Denial of leave to amend as bar to removal of motion, see also Motions and Orders, ¶ 38.
Power on appeal to allow amendments, see Appeal § 240.
Amendments on appeal or error, see Appeal, XI, F.
Statute of amendments, power to allow amendments, see Jud. Act, chap. XVI, § 1; Comp. L. 1915, § 12478.
Right and time for amendments of declarations without leave, see 1916 C. C. Rule 28, § 1.
Right and time to amend pleas without leave, see 1916 C. C. Rule 28, § 1.
Addition of new counts without leave, see 1916 C. C. Rule 28, § 2.
Addition of new defenses without leave, see 1916 C. C. Rule 28, § 2.

¶ 445. Where all the facts have been examined, and there is no reason to suppose defendant has been misled concerning the issue, great liberality is exercised in allowing amendments to the declaration.—Miner v. O'Harrow, 60 Mich. 91.

¶ 445a. Having declared for trespass without particularly describing the land and defendant having proved title to a tract within plaintiff's general description, plaintiff must amend his declaration to obtain the benefit of a new assignment which he could have had by replication when the system of special pleading was in force.—McFarlane v. Ray, 14 Mich. 465.

¶ 446. Fatal objections to a declaration should be taken by demurrer. If the defendant delays to take them until the trial, and if it is possible to sustain the case by amendments they should be permitted.—Barton v. Gray, 48 Mich. 164.

§ 102. Discretion to allow or deny leave.

See also post ¶ 570.
Amendments without leave, see ante § 101.
Amendment of pleas and notices, see post § 125.
Amendment of bill of particulars, see post § 129.
Making new causes by amendment, see also post § 117 et seq.
Review of discretion, see Appeal § 401.

¶ 447. The allowance or disallowance of an amendment to a declaration is discretionary with the trial court.—Hoyt v. Wayne Circuit Judge, 117 Mich. 172.

¶ 448. Where all the evidence in a case disclosed only one contract, the subsequent allowance of an amendment to the declaration thereon, merely to avoid a variance as

to some circumstances connected with the cause of action, and when it cannot defeat the purposes of justice or operate as a real hardship or surprise upon the defendant, is within the discretion of the court.—Detroit, H. & L. R. Co. v. Forbes, 30 Mich. 165.

¶ 449. In a suit on an insurance policy in a benefit order, the defendant put in a plea of the general issue, with a notice that it would defend on the ground that the insured at the time of making application had falsely represented the nature of his employment. The case was at issue a year and a half before it was reached for trial. When the trial was half over defendant asked leave to amend its plea to show that the insured changed his employment to one forbidden by the by-laws of the order after being received into membership. Held, the trial court did not abuse its discretion in declining to allow the amendment.—Lessnau v. Catholic Order of Foresters, 163 Mich. 111.

¶ 450. In the first trial for alienating a wife's affections the plaintiff at the beginning withdrew the count charging adultery. The evidence given at said time tended to show adultery. On the second trial, the court refused to allow plaintiff to amend his declation by adding the count of adultery. Held, that the same trial court, having heard the evidence in the two previous trials, did not on the third trial abuse his discretion by permitting the said amendment.—Merrill v. Leisenring, 166 Mich. 219.

§ 103. Terms and conditions of leave.

See also post ¶ 520.

Continuance and time to plead, see post § 105.

On allowing amendment of bill of particulars, see post § 129.

Amount and items of costs, see Costs.

¶ 451. While just and reasonable terms may be imposed as a condition precedent t the granting of an amendment, yet the judicial discretion cannot be exercised to impose conditions upon litigants by way of punishment, or because the party or his attorney should have proceeded in some other way at the outset of his case or in making his defense.—Beecher v. Wayne Circuit Judges, 70 Mich. 363.

¶ 452. Where the circuit judge had ordered defendant in an action of libel, as a condition of amending his plea of the general issue with notice of claim of privilege by adding a notice of justification, to pay $1,000 as costs of motion, and to allow plaintiff to amend the ad damnum clause of his declaration so as to claim larger damages, such conditions were held unreasonable and an abuse of discretion, notwithstanding there had already been great expense and several months' delay in the case; and a mandamus was issued directing the successor of the judge to hear the motion to amend on its merits and to set aside the order.—Beecher v. Wayne Circuit Judges, 70 Mich. 363.

¶ 453. Where plaintiff in a suit for fraud asks an amendment which is trivial and does not take defendant by surprise, the court acts within his discretion in allowing the amendment without imposing terms.—Painter v. Lebanon Land Co., 164 Mich. 260.

¶ 454. Where, after trial was well under way, defendant asked leave to amend plea and notice, which was given upon condition that defendant pay plaintiff's taxable costs and case be passed to succeeding term, held that such condition was not unusual or unreasonable and was no abuse of the court's discretion.—Larson v. Feeney, 196 Mich. 1.

§ 104. Time and condition of case for amendments.

Time and stage for amendments without leave, see ante § 101.

For amendment of pleas and notices, see post § 125.

During argument to jury, see also post ¶ 520.

Adding allegations at trial to make out right to sue, see also post ¶ 506.

Limitations cutting off time to amend by making new causes, see post § 124, and post ¶ 568.

Tardiness affecting propriety of leave to amend plea by adding or changing defenses, see post § 126.

Discretion to deny leave because of delay, see also ante ¶ 449.

Proper amendments to meet proofs, see post §§ 122-124.

Amendments after reversal on error, see Appeal § 560.

Power to amend after judgment, see Jud. Act, chap. XVI, § 3; Comp. L. 1915. § 12480.

¶ 455. At the trial the court may allow declaration to be amended by changing date of speaking alleged slanderous words from Nov. 1, 1887, to Feb. 1, 1888; where there is no surprise or disadvantage to defendant.—Beneway v. Thorp, 77 Mich. 181.

¶ 456. In an action brought under Laws 1887, Act No. 313 for the recovery of damages suffered by a wife in consequence of the intoxication of her husband where the objection that the declaration fails to allege defendant's knowledge that the person to whom the liquor was sold was in the habit of getting intoxicated is raised for the first time on the trial, an amendment should be allowed.—Fletcher v. Forler, 83 Mich. 52.

¶ 457. In a suit for injuries the trial court does not abuse its discretion in admitting an amendment claiming damages to cover the amounts of a charge made by the attending physician, where it is learned from the latter for the first time while he is

on the stand that he makes a charge and where defendant proceeds with the trial without making any claim of surprise.—Gates v. Beebe, 170 Mich. 107.

¶ 458. Under section 12969, How. St. 2nd Ed., an amendment may be allowed at the trial, especially where the defendant does not request an adjournment, in order to make a declaration more specific if a new or different cause of action is not stated.—Wolverine Spice Co. v. Fallas, 182 Mich. 361.

¶ 459. In an action by a brakeman against a railroad company for damages for personal injuries received while shunting cars on a side track, held that the court properly allowed an amendment to the declaration setting up new and different state of facts on the day of trial.—Anderson v. Ann Arbor Railroad Co., 187 Mich. 211.

¶ 460. It is not error to permit a proper amendment to the declaration to be made after much of the evidence has been introduced, and then proceed with the trial, where counsel was advised at the beginning of the trial that amendment would be permitted, and no claim that defendant was not prepared to meet the issue as made by the amendment, was made at the time.—Arndt v. Bourke, 120 Mich. 268.

¶ 461. Where a declaration, in an action against a township for injuries to horses due to a defective highway, shows on its face an attempt to describe a highway in defendant township, an amendment at the close of plaintiff's case may be permitted to correct a clerical error in giving the number of the town and range.—McTiver v. Township of Grant, 131 Mich. 456.

¶ 462. It is not error for the trial court to refuse an amendment to the declaration after plaintiff has rested and the court is about to direct a verdict.—Prochaska v. Fox, 137 Mich. 519.

¶ 463. In an action for libel against a newspaper proprietor, the plaintiff after having read the entire article to the jury was properly permitted by amendment to strike out certain portions of the alleged libelous article and base his case upon certain specific portions thereof.—Aronson v. Baldwin, 178 Mich. 565.

¶ 464. Where a cause of action upon which plaintiff attempted to declare, as indicated by the bill of particulars, was the same as the cause of action set forth in an amended declaration, the amendment may be properly allowed after plaintiff has rested his case.—Howland v. Caille, 153 Mich. 349.

¶ 465. The omission of plaintiff in ejectment, until after the case is submitted, to describe his title as required by Comp. L. 1871, § 6213 (How. St. § 7797), may be amended after judgment; but if he has shown an undoubted title in fee the amendment is merely formal, and may still be made when the case on affirmance is remanded for further proceedings.—Fisher v. Hallock, 50 Mich. 463.

¶ 466. An averment in a declaration can be amended even after verdict, where it is mere matter of surplusage.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 288.

¶ 467. Where a plaintiff suffers the time to elapse within which, by the rules, he may amend of course, the right becomes extinguished. Held, therefore, that after a trial of the issue, verdict for the plaintiff, verdict set aside, a new trial granted, leave given to the parties, by special order of the court, "to file new pleadings under the general rules," and amended declaration filed under this order, and demurrer thereto, the plaintiff had no right to file a second amended declaration without special leave granted by the court.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

§ 105. Continuance and time to plead to amended pleading.

Requiring case to go over to next term as condition of allowing amendment, see ante ¶ 454.
Continuance on amendment of bill of particulars, see post ¶ 628.
Amendment to meet amendment of plea, see post ¶ 602.
Amendment of plea to meet amended declaration, see post § 128.
Amendments as ground for continuance, see Continuances § 4.
General law of continuances, see Continuances.

¶ 468. In an action for breach of a written warranty of title to chattels sold it appeared that the warranty was given after the sale and dated back, and evidence was also given of an oral warranty. Held, that an amendment of the declaration to allege an oral warranty made at the time of sale materially changed the issue, and entitled defendant to a continuance, if he desired, with costs for the term.—Jennings v. Sheldon, 53 Mich. 431.

¶ 469. Where, at the opening of a trial in the circuit, an amendment had been allowed as to a matter in the declaration that could not have misled defendant, it was held proper to refuse time to plead as if to an original declaration.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

¶ 470. On allowing amendment of plaintiff's name from that of the guardian to that of the infant suing by next friend, who was the same as the guardian, it was not material that no opportunity was given to

plead over to the declaration, where no reason appeared and no such leave was asked.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 471. If substantially a new cause of action is introduced by the amendment of a declaration at the trial, the defendant must be given sufficient time to meet the new issue.—Ruscyk v. Detroit United Ry., 180 Mich. 399.

¶ 472. It is not error for the court at the trial to permit, under Comp. L. 1897, § 10268, an amendment to a declaration in a personal injury suit by which plaintiff simply describes more in detail the injury to which reference is made in the original declaration, where counsel for defense is told by the court the case will be adjourned to give him time for preparation if he so desires, and said counsel thereupon prefers to proceed to trial.—Leonard v. Leahy, 169 Mich. 406.

§ 106. Waiver of leave or right.

See also ante ¶ 467.

Of right to amend plea by standing on direction of verdict, see also post ¶ 603.

¶ 473. The right to amend a declaration where leave has been given to do so is waived if one accepts the decision of the trial court that the better way to test the question is to have a verdict directed in favor of the other party, and then go to the supreme court.—Tate v. Torcoutt, 100 Mich. 308.

§ 107. Construction and effect of amendments.

Construction of pleadings in general, see ante § 19 et seq.

Construction of declarations to ascertain form of action or nature of cause of action, see ante §§ 33, 34.

Effect of amendments of bills of particulars, see post § 129.

Necessity of amending bill of particulars after amending declaration, see post § 129.

Construction of pleadings shown in the record on appeal or error as amended, see Appeal § 330.

Presumptions on the record as to pleadings and amendments to them, see Appeal § 369.

Effect of amendment to change issues and exclude former testimony of witnesses, see Evidence § 341.

Effect of amendment of issues on admissibility of depositions in evidence, see Depositions § 32.

Effect of notice of lis pendens followed by amendment of pleading, see Lis Pendens ¶ 21.

Effect of amendment to let in bar of limitations by making new cause of action, see Limitations § 77.

Amendment as ground for continuance, see Continuances § 4.

¶ 474. An amendment to a declaration in an action by the administrator of the estate of a railroad fireman against an interstate railroad, based upon the state statute, Pub. Acts 1909, No. 104, How. 2nd Ed. § 4110 et seq., which brings the case clearly within the federal act, but does not set up a new cause of action, relates back to the original declaration so as to render the defense of the federal statute of limitations unavailable, the original declaration having been filed in due time.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

¶ 475. Where leave is obtained to amend a declaration on the common counts and a special count is substituted without mention of the common counts, they are no part of the declaration, and will not support a recovery.—Carroll v. Palmer Mfg. Co., 181 Mich. 280.

B. AS TO WHAT MATTERS OR ALLEGATIONS.

§ 108. In general; proper and necessary amendments.

Names and matters of description, see post §§ 109-111.

Allegations as to title and right to sue, see post § 112.

Allegations of elements of contract and tort causes, see post §§ 113, 114.

Allegations of damages, see post § 115.

Changing form or nature of cause and adding new counts, see post §§ 116-121.

Changes to meet or conform to proofs, see post §§ 122-124.

Amendments of pleas and notices, bills of particulars, affidavits, and copies, see post §§ 125-131.

Amendments affecting third persons, see post § 132.

Amendment of declaration to conform to process, see ante ¶ 99.

Necessity of amendment to admit proof, see also post ¶ 714.

Necessity of amendment to make issues formerly made by new assignment in replication, see post ¶ 788.

Propriety of amendment as test for curability of pleadings under statute of amendments, see post § 181 et seq.

Amendment as to time of uttering slanderous words, see also ante ¶ 455.

Necessity of amending declaration on revival, see also Abatement ¶ 86.

Amendments allowable after revival, see also Abatement ¶ 99.

¶ 476. Action begun by one not knowing plaintiff's name cannot proceed in wrong name or in initials of Christian name.—Fisher v. Northrup, 79 Mich. 287.

¶ 477. Where in a suit on a contract of hiring, plaintiff in his declaration alleges that the period of hiring was for one year, and the defendant under its plea and notice of special matter of defense, admits

such allegation, defendant, to entitle it to dispute such fact, must amend its plea and notice of defense, and is not excused from the duty to amend by the fact that its counsel at the trial contends that the period of hiring was to be terminated at will.—Richards v. Church Balance-Gear Co., 166 Mich. 464.

¶ 478. The suggestion of a party's death appearing on the record and undisputed suffices to have the proceedings construed therewith without amending the declaration, but subsequent proceedings must be properly entitled.—People ex rel. Stimpson v. Seventh Circuit Judge, 41 Mich. 3.

§ 109. Adding, substituting, or changing parties.

Correction of misnomer or misdescription, see post § 110.

¶ 479. A new party cannot be brought in by amending the declaration; but misnomer of a plaintiff which occurred through clerical mistake may be corrected.—Final v. Backus, 18 Mich. 218.

¶ 480. Collateral heirs of an insured member of a mutual benefit association who are entitled to the insurance agreed to be paid in his certificate by reason of the death of the beneficiary named therein prior to the member's death, though without insurable interest originally, may be substituted by amendment as plaintiffs in a suit erroneously brought in the name of the beneficiary's administrator where they are the same persons who would ultimately benefit if the administrator's suit were maintainable.—Wood v. Lenawee Circuit Judge, 84 Mich. 521.

¶ 481. Under How. St., § 7631, authorizing amendments for the furtherance of justice on such terms as may be just at any time before judgment, one to whom plaintiff has assigned an interest in the policy cannot be introduced as a plaintiff by amending the declaration.—Wood v. Metropolitan Life Ins. Co., 96 Mich. 437.

¶ 482. An action to collect a debt due a firm was brought in the name of three partners, one of whom, unknown to the attorneys, was dead. Held, that under How. St., § 7635, subd. 9, the process and pleadings could be amended so as to show a suit by the surviving partners.—Cragin v. Gardner, 64 Mich. 399.

¶ 483. Declaration in action commenced in names of two copartners after death of one may be amended by allowing remaining plaintiff to declare as surviving partner.—O'Connell v. Schwanabeck, 76 Mich. 517.

¶ 484. Where an action is brought against the receivers of a railroad for a cause of action which accrued before their appointment, the company cannot be substituted by amendment where the service of process is insufficient to confer jurisdiction over it.—Price v. Delano, 187 Mich. 49.

¶ 485. Where a cause of action arising prior to the appointment of a receiver is alleged in an action against a railroad company, and process is served on an agent of the company, it is within the discretion of the court to permit an amendment at the trial striking the name of the receiver from the cause and substituting that of the company as defendant.—Daly v. Blair, 183 Mich. 351.

§ 110. Correction of misnomer or misdescription.

See also ante ¶ 479.

Necessity of amendment of name, see ante § 108.

Descriptions of things, see post § 111.

¶ 486. The court has power in a proper case to allow an amendment to correct the name of the plaintiff in the pleadings and proceedings which by mistake was erroneously given in the writ.—Final v. Backus, 18 Mich. 218.

¶ 487. In cases of undesigned misnomer, where the interests of substantial justice will allow it, without a real change in the identity of the opposing litigants, an amendment will be allowed.—Wood v. Lenawee Circuit Judge, 84 Mich. 521; Welch v. Hull, 78 Mich. 47.

¶ 488. The statute of amendments cures the defect, if any, of declaring in the name of the board of supervisors instead of in that of the county; and the court may make the necessary correction.—Johr v. St. Clair County Sup'rs, 38 Mich. 582.

¶ 489. Misnaming the president and trustees of a village as the common council where they should sue in their name of office as highway commissioners may be cured by amendment.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 490. Pleading in the name of a public office without adding the name of the officer, if a defect, is amendable.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 491. An amendment to a declaration on a promissory note so as to show the full name of defendant instead of the initial by which he had signed the note should be allowed at any time if there is no question of identity.—Webber v. Bolte, 51 Mich. 113.

¶ 492. An amendment to a declaration whereby the plaintiff's name was changed from Dilks to Wilks was properly allowed on due showing, after personal service and de-

fault made absolute, and before judgment.—McLaughlin v. Wilks, 42 Mich. 553.

¶ 493. A declaration in the name of a guardian was amended after plea by making the ward the plaintiff, suing by her next friend, who was the guardian aforesaid. The issue was in no way changed, however. Held, that the amendment was allowable.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 494. In suing three partners on a firm debt, the Christian name given one, a non-resident not served with process, was erroneous, but the notice of retainer served by the attorney of the other two defendants recognized the suit as against the firm. Held, that an amendment correcting the misnomer should have been allowed.—Welch v. Hull, 73 Mich. 47.

¶ 495. Whether a declaration in a suit against executors and trustees in their official character, for damages arising by reason of alleged leakage from the roof of a store leased by them to plaintiff, can be amended on the trial by striking out the word "executors," and leaving defendants charged as trustees, quære.—Weise v. Rich, 77 Mich. 325.

¶ 496. It is not error for the court to permit an amendment on the trial in the Christian name of one of the defendants, who has appeared by counsel, and pleaded in the name stated in the summons and declaration, and whose true name is shown by the testimony, which fails to show that he or his counsel is surprised or will be in any way inconvenienced by the amendment.—Tuller v. Ginsburg, 99 Mich. 137.

¶ 497. Where an action was brought in the name of the "Voigt Brewing Company, Limited" when in fact there was no such partnership, an amendment will not be permitted making the plaintiff "Edward W. Voigt, doing business as the Voigt Brewing Company."—Voigt Brewing Co. v. Pacifico, 139 Mich. 284.

§ 111. Changing descriptions of property or things.

¶ 498. An amendment of a declaration by substituting "P. x C.," the mark shown by the testimony to have been upon certain logs to recover for the driving of which suit is brought, for "S. P.," the mark mentioned in the declaration, is permissible.—Keystone Lumber & Salt Mfg. Co. v. Jenkinson, 69 Mich. 220.

¶ 499. Where an original declaration in ejectment contained a description of the entire piece of land owned by plaintiff, only a small part of which was involved in the suit, an amendment describing particularly the disputed piece of land, is permissible.—Hartz v. Detroit, P. & N. Ry., 153 Mich. 337.

¶ 500. It is within the discretion of the trial court to allow an amendment to a declaration in ejectment correcting and narrowing the description of the property claimed and its ruling is not reviewable.—Arnold v. Brechtel, 174 Mich. 147.

§ 112. Averments of title or right to sue.

¶ 501. An insufficient allegation of an assignment of a claim to the plaintiffs may be cured by amendment.—Harris v. Chamberlain, 126 Mich. 280.

¶ 502. The trial court in his discretion may permit the amendment of a declaration so as to properly state the assignment to plaintiff of the contracts sued on.—Darling v. City of Manistee, 166 Mich. 35.

¶ 503. In an action on the common counts to recover the price of articles sold and delivered by plaintiff's assignor, an amendment to cure the want of an averment of an assignment is matter of course.—Kelly v. Waters, 81 Mich. 404.

¶ 504. It is within the discretion of the trial court to permit an amendment of the pleadings, in an action for professional services brought by D. and G. as copartners, so as to show that the services were in fact performed by the firm of D., W. & G., and that the claim therefor has been assigned to the plaintiffs.—Dawson v. Peterson, 110 Mich. 431.

¶ 505. Where, in an action by an indorsee, the declaration sets out the indorsements incorrectly and so fails to show title in plaintiff, an amendment should be allowed.—Hamilton v. Powers, 80 Mich. 313.

¶ 506. A declaration describing plaintiff as administratrix may, in the court's discretion, be allowed to be amended on the trial so as to allege the issue of letters of administration.—Wolscheid v. Thome, 76 Mich. 265.

¶ 507. Where a declaration in ejectment fails to set forth the estate held by claimant, an amendment should be allowed on the trial.—Ludeman v. Hirth, 96 Mich. 17.

¶ 508. Where a declaration in ejectment alleges that plaintiffs are jointly entitled in fee, it is proper—if it appears on the trial that one of the plaintiffs has only an unassigned dower interest, though both occupied the land together—to allow an amendment by adding a new count claiming title in fee in the other plaintiff alone.—McCammon v. Detroit, L. & N. R. Co., 66 Mich. 442.

¶ 509. A declaration in ejectment insufficiently alleging possession in plaintiff after his title accrued may be amended in that

respect by leave of the court.—Newell v. McLarney, 49 Mich. 232.

§ 113. Averments as to nature, terms, and breach of contract.

Changing or making new causes by amendment, see post § 118.

¶ 510. Where, at the opening of trial in the circuit, it was objected to a declaration that it disclosed no cause of action, it was held that the allowance of an amendment by changing the statement of the consideration for the alleged promise on which the action was based, so that it would read that plaintiff "would convey" instead of "had conveyed," could not mislead or surprise the defendant, and was not error.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

¶ 511. An amendment is not objectionable for changing the date of a transaction so as to make it cover a longer time than was at first averred in the declaration, if it does not in any way change the obligation sued on.—Niemarck v. Schwartz, 51 Mich. 466.

¶ 512. In an action ex contractu it was held that if the declaration was not broad enough to admit proof of the facts set up in an amended declaration tendered, an amendment should have been allowed.—Mitchell v. McKinnon, 65 Mich. 683.

¶ 513. In an action on a contractor's bond covering the building season of the year, an averment that the injury occurred within such season may be inserted by amendment of the declaration.—Cox v. Fidelity & Deposit Co. of Maryland, 157 Mich. 59.

§ 114. Averments of nature and elements of tort and injuries.

Amendments in personal injury cases to meet proofs or conform to them, see post § 123.

¶ 514. In a declaration for maliciously suing out an attachment the failure to allege the conclusion of the attachment suit is a formal defect merely, and plaintiff is entitled to an amendment even at the trial.—Sutton v. Van Akin, 51 Mich. 463.

¶ 515. The circuit judge has discretion to permit a declaration for a negligent injury to be amended by inserting therein, after the general description of the injuries alleged to have been sustained, an averment "that said injuries so received and sustained as aforesaid are permanent."—Edwards v. Common Council of Village of Three Rivers, 102 Mich. 153.

¶ 516. A declaration alleging, in substance, that plaintiff purchased a ticket entitling him to a round trip between certain stations, and that, after starting on the return trip, he requested the conductor to give him a lay-over check, or allow him to stop off, at an intermediate station, which request was refused, and, because of plaintiff's inability to pay the additional fare demanded, he was ejected from the moving train and injured, may be amended so as to charge that plaintiff was carried on the outgoing trip as far as said intermediate station, the conductor taking up the outgoing part of said ticket, and that on the following day plaintiff entered a car of the defendant at said intermediate station to complete the outgoing trip and because of his inability to pay the fare demanded for transportation over that part of the route, he was ejected from the moving train, and injured, etc.; the statute of amendments being broad enough to warrant such action.—Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 5.

¶ 517. Detroit City Charter, 1904, § 279, provides that no action should be brought against the city for any negligent injury unless previous notice was given. A notice pursuant thereto showed that plaintiff had fallen on a defective sidewalk, that her right knee was bruised, and that she received a severe shaking up, resulting in an injury to her nervous system, but the declaration counted on an injury to the left knee. Held, that while there could be no recovery for injury to the left knee, the declaration could be amended so as to claim for the resultant injury to plaintiff's nervous system.—Lyle v. City of Detroit, 157 Mich. 438.

¶ 518. The declaration in an administrator's action for the negligent killing of his intestate must show who are the next of kin who have sustained damages by reason of the death.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606, 617; Garrity v. Detroit Citizens' St. R. Co., 112 Mich. 369.

§ 115. Supplying or changing ad damnum clause.

As introducing new cause of action, see post ¶ 558.

Enlarging or correcting ad damnum clause to conform to or to meet proofs, see post § 124.

¶ 519. A general ad damnum clause may by amendment be applied to all counts if in sense restricted to that which it immediately follows.—Sheldon v. Sullivan, 45 Mich. 324.

¶ 520. Where, during the argument to the jury, and without imposing any terms, an amendment to the ad damnum clause of a declaration was granted to cure a clerical error, and when it could not have prejudiced the defendant on the merits, this was a fair exercise of judicial discretion which would not be reviewed on error.—Borden v. Clark, 26 Mich. 410.

¶ 521. A declaration may be amended by filling a blank in the ad damnum clause,

where permission is sought before the jury is selected.—Groat v. Detroit United Ry., 153 Mich. 165.

§ 116. Changing form or nature of action.

Changing from state liability to liability under Federal Employers' Liability Act, see also post ¶ 559.

¶ 522. The circuit court has no power to allow a declaration to be so amended as to change the form of action; e. g., from trover to assumpsit.—People ex rel. Hensler v. Wayne Circuit Judge, 13 Mich. 206.

¶ 523. Counts in debt to recover the penalty for usury, under the statute, could not be amended by substituting counts for money had and received.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 524. An amendment which changes the form of an action from one sounding in tort to assumpsit, or vice versa, is not allowable. —Arnold v. White, 153 Mich. 607.

¶ 525. Where plaintiff declared in trespass on the case for damages resulting from property sold to him under a warranty of title being taken away from him by a chattel mortgagee, an amendment setting up a promise by defendant to pay plaintiff such damages as he should sustain in case he should surrender the property to the mortgagee, changes the cause of action from tort to assumpsit, and is not allowable.—Arnold v. White, 153 Mich. 607.

¶ 525a. Amendment of petition or complaint from common law to statutory action for injury or death or vice versa, or from proceeding under State Employers' Liability Acts to Federal Acts.—See note, 6 N. C. C. A. 225-238.

§ 117. Changing cause or making new cause.

Contract causes, see post § 118.
Tort causes, see post § 119.
Statute barred causes, see post § 120.
Propriety of amendment to meet proofs, see also post § 122 et seq.
Restriction on addition of new counts changing cause of action, see post § 121.
Making new issue by amendment of plea, see post §§ 125-127.
Effect of amendment of bill of particulars to introduce new causes or issues, see post § 129.
New matter at trial as allowing redirect examination on it, see Examination of Witnesses § 94.

¶ 526. An amendment introducing a new and distinct cause of action is not allowable. —Wood v. Lanawee Circuit Judge, 84 Mich. 521.

¶ 527. It is error to amend a declaration by the substitution of a new count setting up a new cause of action.—Tregent v. Maybee, How. N. P. 76.

¶ 528. An amended declaration which counts upon the same contract as the original, and sets up the same damage, although it alleges the breach in a different manner, does not state a new cause of action. So held where, in an action for the breach of a contract for the sale of a patent right, plaintiff alleged that defendant had no title to the patent, and, in an amended declaration, alleged that the patent sold did not cover the article represented by defendant.—Strang v. Branch Circuit Judge, 108 Mich. 229.

¶ 529. The court has power to permit plaintiff to amend his declaration, in which he has improperly described his cause of action, so that he may recover on the precise cause of action for which he originally brought suit.—Jones v. Pendleton, 151 Mich. 442.

¶ 530. In a suit to remove a cloud on title consisting of a deed made to the defendant upon an execution sale, an amendment to the bill alleging that the defendant had taken no steps to determine the rights and equities of the judgment debtor under Comp. L. 1897, § 9167, does not introduce a new cause of action but is an additional reason for the same cause of action.—Kunze v. Solomon, 126 Mich. 290.

¶ 531. Whether a declaration on a joint award made under a joint submission can be amended so as to show the award to have been a sole obligation, quære.—Ballou v. Hill, 23 Mich. 60.

§ 118. ——Causes on contract.

Where limitations has run, see post § 120.

¶ 532. A declaration in an action for the amount of an order may be amended in the discretion of the trial court so as to admit testimony that the person giving the order acted as agent of defendants, the drawers, and that it amounted to a novation of the indebtedness.—Finan v. Babcock, 58 Mich. 301.

¶ 533. Where a declaration upon the common counts in assumpsit is so amended as to be a declaration upon a special contract and to show only a distinct cause of action from that set forth in the original declaration, and one that could not by any evidence be brought within the common counts, the new declaration is for a new and separate cause of action. The fact that with their plea to the original declaration the defense set up notice of this special contract does not tend to show that the cause of action was the same in both declarations, or that the amendment should have been allowed, but the contrary.—People ex rel. Gorman v. Newaygo, 27 Mich. 138.

¶ 534. In an action for breach of warranty in the sale of fruit trees an additional claim

based on the sale of trees in another year is a new cause of action and cannot be brought in by way of an amended declaration.—Angell v. Pruyn, 126 Mich. 16.

¶ 535. Under Comp. L. 1897, § 10268, providing for amendment of pleading, etc., an amendment should not be denied on the ground that it sets up a new cause of action where the original declaration is for the amount due on an agreement of sale of 1,250 shares of a corporation to be incorporated with 5,000 shares of a par value of $10, and the amendment sets up a claim for 250 shares of a corporation with 1,000 shares of a par value of $10, said corporation comprising the same assets and having been substituted for the one proposed.—Cleveland v. Rothschild, 138 Mich. 90.

¶ 536. A declaration upon an insurance policy to recover for a loss cannot be amended so as to claim damages for the failure of the defendant to deliver a policy of insurance in conformity to an alleged oral agreement, the causes of action being independent and distinct.—Connecticut Fire Ins. Co. v. Monroe Circuit Judge, 77 Mich. 231.

¶ 537. A declaration upon an insurance policy which contains a guaranty on the part of the insured "that there shall be a clear space of two hundred feet between staves and heading and mill" cannot be amended so as to eliminate said clause from the policy, under an allegation that the same was inserted either through mistake or fraud, and was never assented to by the insured.—Connecticut Fire Ins. Co. v. Monroe Circuit Judge, 77 Mich. 231.

¶ 538. Amendment of declaration upon fire insurance policy by averring performance by insured of conditions precedent contained in policy does not introduce new cause of action, and is permissible after expiration of time limited in policy for bringing suit.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 539. A declaration upon a fire insurance policy requiring action to be commenced within twelve months after loss may be amended after the expiration of that period by averring the performance by the insured of the conditions precedent contained in the policy. Such an amendment does not introduce a new cause of action.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 540. In an action by a broker for commissions for the sale of real estate, a declaration on the common counts in assumpsit, accompanied by a bill of particulars, does not introduce a new cause of action by an amendment which allows plaintiff to recover on showing that defendant agreed to allow him commissions though the sale was made by other persons.—Jones v. Pendleton, 151 Mich. 442.

§ 119. ——Tort causes.

Where limitations has run, see post § 120.

¶ 541. A declaration for a personal injury averred that the injury was received by reason of the failure of defendants to provide plaintiff a safe place in which to work, and set out at considerable length the facts relied upon to make a case. Held, that an amendment alleging that, in the performance of all the matters aforesaid, plaintiff was in the exercise of due care, and did not in any way contribute to any of the injuries thereinbefore and thereinafter stated, and that he was, in the day and year aforesaid, while in the exercise of due care, caution, and prudence, injured, etc., does not introduce a new cause of action.—Pratt v. Montcalm Circuit Judge, 105 Mich. 499.

¶ 542. The right of action given by How. St. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Laws 1885, Act No. 113 (How. St. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced by amending the declaration into a cause based upon the right given under the first statute.—Hurst v. Detroit City Ry., 84 Mich. 539.

¶ 543. In an action against the city for wrongful death an amended declaration filed after the statute of limitations had run does not set up a new cause of action where it alleges the same facts as the original but in addition alleges the compliance with the requirements of the city charter as to the presentation of the claim to the city council and notice to the law department.—City of Detroit v. Wayne Circuit Judge, 125 Mich. 634.

¶ 544. In an action for personal injuries against the city, a declaration may be amended by alleging that the requisite notice of the claim was served upon the city, without setting up a new cause of action.—Phalen v. City of Detroit, 126 Mich. 683.

¶ 545. A declaration alleging a conversion of certain mortgaged logs by the mortgagee, may be amended so as to charge loss by reason of negligence in towing in, at an improper season of the year, and in other acts where both declarations refer to the same logs, the same persons, and the same acts.—Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363. (Grant, C. J., and Hooker, J., dissenting, upon the ground that an action of trover for the conversion of property could not be changed to an action of negligence in the care of it.)

¶ 546. Quære whether a declaration for wrongful death of an employee under the statute may be amended so as to make it an action for personal injuries surviving to the personal representative without setting up a new cause of action.—Jones v. McMillan, 129 Mich. 86.

¶ 547. An amendment to a declaration of a husband suing to recover damages for the loss of his wife the effect of which is to allow him to appear not as an individual entitled to damages as her husband because of her injury and death, but as administrator of her estate is not permissible, being an entirely different cause of action.—Walker v. Lansing & Suburban Traction Co., 144 Mich. 685.

¶ 548. A declaration whereby plaintiff alleges damages resulting from defendant's negligence cannot, after the death of plaintiff and revival in the name of the administrator, be so amended as to authorize proof of damages for wrongful death, under Act No. 89, Pub. Acts 1905, as it would introduce a new cause of action.—Fournier v. Detroit United Ry., 157 Mich. 589.

¶ 549. In an action begun by capias for obtaining goods by fraudulent representations based upon a false statement furnished the plaintiff, an amendment setting up the failure of defendant to notify plaintiff of a changed financial condition is properly denied as setting up a new cause of action.—Musselman Grocer Co. v. Casler, 138 Mich. 24.

¶ 550. The plaintiff in one count of his declaration alleged that the defendant city constructed a meter box in a public street and negligently left it uncovered, putting the street in a dangerous condition and thereby plaintiff was injured. The count set forth no duty by the defendant to exercise care towards plaintiff. Held, that this count was not an attempt to set up a statutory liability, but might be amended after going to trial by adding an allegation of a common-law duty, and such amendment did not state a new cause of action.—Knudsen v. City of Muskegon, 158 Mich. 185.

§ 120. ——Statute-barred causes and defenses.

See also post ¶ 568.
Amendment of bill of particulars to include barred items, see post ¶ 630.
New count barred by statute except for facts provable under original declaration, see also post ¶ 564.
Intervening bar of limitations as affecting right to make new cause by amendment, see Limitations § 77.

¶ 551. A declaration cannot be amended so as to set forth a new cause of action that has become barred by the statute since the original declaration was filed.—People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138; People ex rel. Michigan Cent. R. Co. v. Kalamazoo Circuit Judge, 35 Mich. 227; Nugent v. Kent Circuit Judge, 93 Mich. 462; Pratt v. Montcalm Circuit Judge, 105 Mich. 499.

¶ 552. A declaration upon the common counts cannot be so amended as to set forth a new and distinct cause of action upon a special contract which has become barred by the statute of limitations since the original declaration was filed; this would be to permit the fiction of relation to nullify an act of the legislature.—People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138.

¶ 553. The amendment of a declaration in an action on a contract by inserting more specific allegations in relation to the breach relied upon is not open to the objection that it introduces a new cause of action, barred by the statute of limitations.—Stanley v. Anderson, 107 Mich. 384.

¶ 554. A declaration on the common counts cannot be amended by inserting special counts setting up a cause of action against which the statute of limitations has run, where proof of such cause of action could not have been given under the original declaration.—Flint & P. M. R. Co. v. Wayne Circuit Judge, 108 Mich. 80.

¶ 555. A declaration on a residuary legatee's bond, alleging as a breach a failure to pay a claim allowed in plaintiff's favor, does not introduce a new cause of action by adding a count alleging the failure to pay a note which constituted the claim, even though such note is six years overdue.—Abbott v. Wayne Circuit Judge, 55 Mich. 410.

¶ 556. A declaration charging a railroad company as common carrier, for loss of goods shipped over its line and destroyed by fire while in its depot awaiting delivery to a subsequent carrier, cannot be amended, after the cause of action has become barred by the statute of limitations, so as to charge the company for negligence as warehousemen.—Michigan Cent. R. Co. v. Kalamazoo Circuit Judge, 35 Mich. 227.

¶ 557. In an action to recover damages for the death in Canadian waters of plaintiff's decedent, caused by the negligence of defendant, a Michigan steamship corporation, the court directed a verdict for defendant on the ground that the cause of action arose wholly without this state. Plaintiff sought leave to amend by setting forth the Canadian statute on the subject, which, however, limited the time for bringing suit to twelve months, and these had elapsed when the amendment was proposed. Held, that the motion to amend was properly denied; the statute of limitation cannot be evaded under the guise of amendment.—Wingert v. Wayne Circuit Judge, 101 Mich. 395.

¶ 558. Amendment of a declaration for libel claiming general damages, so that it claims special damages and adds innuendoes, does not introduce a new cause of action; and may be made after the period of limitations has run.—Hoyt v. Wayne Circuit Judge, 117 Mich. 172.

¶ 559. Where an action by the administrator of the estate of a railroad fireman against an interstate railroad for the

negligent death of deceased is founded upon the state Employers' Liability Act, Pub. Acts 1909, No. 104, How. 2nd Ed. § 4110 et seq., and the declaration does not refer to the federal act, but alleges that defendant owned and operated a railroad extending through the states of Michigan and Indiana, and that decedent was employed by it in the construction, repairing and maintenance of the roadbed of the railroad, an amendment which states the charges of negligence and of injury in substantially the same manner, and which states that the action is brought under the Federal Employers' Liability Act, is properly allowed, as it does not state a new cause of action.—Jorgensen v. Grand Rapids & I. Ry. Co., 189 Mich. 537.

¶ 560. A declaration counting on the fraudulent transfer of an item of "953 bushels of wheat, $1,040," cannot, at a time when the statute of limitations would constitute a bar to a new action, be amended so as to state in lieu of such item "31 acres of growing wheat, $800," thus introducing a new cause of action. —Nugent v. Kent Circuit Judge, 93 Mich. 462.

¶ 561. In an action for personal injuries growing out of a collision between a street car and an automobile in which plaintiff was riding, an amendment to the declaration showing noncompliance with the city ordinance in the operation of the street car is not barred by the statute of limitations.—Brown v. Detroit United Railway, 179 Mich. 404.

§ 121. Addition of counts.

New counts to meet or conform to proofs, see post §§ 122-124.

¶ 562. A declaration may be amended by adding new counts, so as to lay the contract or wrong in a different manner; but a new cause of action cannot be introduced by amendment.—People ex rel. Drew v. Washtenaw Circuit Judges, 1 D. 434.

¶ 563. A declaration on the bond of a residuary legatee alleging the failure to pay a claim is amendable by adding a count alleging the failure to pay a note which constituted the claim, even though the note itself was outlawed; no new cause of action is added by such an amendment.—Abbott v. Wayne Circuit Judge, 55 Mich. 410.

¶ 564. A declaration upon the common counts may be amended by the insertion of special counts setting up a cause of action against which the statute of limitations has run, where proof of such cause of action could have been given under the original declaration, but not otherwise.—Flint & P. M. R. Co. v. Wayne Circuit Judge, 108 Mich. 80.

¶ 565. It is not error to permit plaintiff to amend his declaration by adding a count thereto which sets forth no new cause of action, particularly where no claim of surprise is made by the defendant.—Minkley v. Township of Springwells, 113 Mich. 347.

¶ 566. The court has no power to permit an amendment adding a count for tort in an action of assumpsit for the expense of moving aside the defendant's logs to permit the plaintiff's drive to pass.—Doyle v. Pelton, 134 Mich. 398.

¶ 567. Where a declaration in ejectment alleges that plaintiffs are jointly entitled in fee, it is proper—if it appears on the trial that one of the plaintiffs has only an unassigned dower interest, though both occupied the land together—to allow an amendment by adding a new count claiming title in fee in the other plaintiff alone.—McCammon v. Detroit, L. & N. R. Co., 66 Mich. 442.

¶ 568. An amendment to a declaration for false imprisonment by adding a count for malicious prosecution can be allowed any time before the right of action is barred by the statute of limitations, such new count being for the same cause of action as that originally set up.—People ex rel. Long v. Wayne Circuit Judge, 27 Mich. 164.

¶ 569. Where a declaration for fraudulently procuring plaintiff to loan money on worthless land combined in one count three related transactions, constituting one entire transaction occurring in sequence, claiming a gross sum as damages, it was proper but not necessary to add three counts in which the three transactions were stated separately and separate damages claimed for each. They did not add any new cause of action.—Stubly v. Beachboard, 68 Mich. 401.

¶ 570. Defendant automobile company contracted to make plaintiff its agent for the sale of its machines, and the latter agreed to conduct his sales garage to the satisfaction of defendant. Defendant canceled the contract, and in a suit for damages plaintiff, during the progress of the trial, asked leave to amend his declaration by adding a count to the effect that the defendant was not in good faith dissatisfied with plaintiff's conduct of the garage, but fraudulently canceled the contract in order to gain a larger profit. Defendant made no claim of surprise or request for delay. Held, under Comp. Laws 1897, § 10268, the trial court did not abuse its discretion in permitting the amendment.—Isbell v. Anderson Carriage Co., 170 Mich. 304.

§ 122. Changes to meet or conform to proof.

In personal injury cases, see post § 123.
Enlarging or changing ad damnum clause, see post § 124.
Discretion of court to allow, see ante § 102.
Time and conditions of case for amendments, see ante § 104.
Addition or change of defenses to meet proof, see post §§ 125, 126.
Necessity of actually making amendment to eliminate party, see post ¶ 643.
Amendments in equity to meet proofs, see Equity § 132.

Amendments on error to conform to proof, see Appeal § 246.

Amendments on appeal in penal action to meet proof, see Penalties ¶ 26.

Rule for adding count in assumpsit or case after verdict or judgment to meet the case as established, see 1916 C. C. Rule 22, § 4.

¶ 571. Where evidence is objected to solely for a formal variance from the bill of particulars, it is better to permit an amendment of the bill than reject the evidence, unless there is reason to believe defendant will be prejudiced.—Collins v. Beecher, 45 Mich. 436.

¶ 572. Where in an action for negligent injury both sides have without objection introduced such testimony as fully explains all facts bearing on the manner and cause of the injury, an amendment of the declaration should be allowed as a matter of course, if objected to for variance, so long as it is plain that no one could have been surprised by the testimony.—Wallace v. Detroit City Ry. Co., 58 Mich. 231.

¶ 573. Where in an action for flowing plaintiff's land the cause of action set forth in the declaration is the maintenance of a dam and the consequent obstruction of the flow of the waters of a stream, which are thereby set back and made to overflow plaintiff's land, an amendment alleging that the water upon plaintiff's land, which is low and wet, is held back and kept on the land by reason of the maintenance of said dam, to the injury of the land, does not introduce a new cause of action, but alleges an additional injury from the same cause, and is properly allowed, after the close of the testimony, to cover the proofs in the case.—Shearer v. Middleton, 88 Mich. 621.

¶ 574. An amendment of a declaration in a slander suit, by changing the date of the speaking of the alleged slanderous words from November 1, 1887, to February 1, 1888, is within the discretion of the trial court, under How. St. § 7631.—Beneway v. Thorp, 77 Mich. 181.

¶ 575. Plaintiff was entitled to amend his declaration, and such amended declaration should have been filed either before verdict, or within a reasonable time thereafter, where, in an action on the case for malicious prosecution, the declaration alleged trespass, but the proofs showed a seizure under a writ of replevin issued in due legal form, though without probable cause.—Harris v. Thomas, 140 Mich. 462.

¶ 576. Plaintiff in an action to recover damages for fraudulent representations as to the value of a patent right was properly permitted to amend his declaration, after the testimony was closed and argument had, to meet the proof in respect to a particular false representation to the effect that a certain prominent and wealthy person had purchased a large amount of territory for a large price.—Rathbun v. Parker, 113 Mich. 594.

¶ 577. Where in an action under Comp. L. 1897, § 6294, against a railroad for injuries to cattle through want of a legal cattle guard, the declaration alleged that the ballast had not been excavated from between the ties upon which the guard rested, nor between the joists, and that sand and gravel completely filled the space between the joists so that the guard offered no resistance, and where the proof tended to show that the spaces between the joists had become filled by allowing cinders to accumulate therein, it was proper to allow an amendment by inserting the word "cinders" in the declaration.—Hathaway v. Detroit, T. & M. R. Co., 124 Mich. 610.

¶ 578. Where in an action for fraud by a chattel mortgagee against a chattel mortgagor for fraudulently inducing plaintiff not to record the mortgage, the declaration avers that the property was sold by defendant to a partnership, an amendment substituting that the property was sold to an individual does not state a new cause of action and is proper, the evidence showing that the property was sold to an individual who transferred it to a partnership consisting of his son and the defendant.—Priebisch v. Ottenwess, 176 Mich. 476.

¶ 579. In an action by the purchaser of city lots against the vendor for fraudulently representing that the improvements were all in and paid for where it was alleged in the declaration that the representations complained of were made on the site of the lots and the proof showed that they were made at plaintiff's office it was error to deny plaintiff's request to amend the declaration to conform to the proofs, since the gist of the action was the statement that the improvements were all in and paid for except the paving.—State Security & Realty Co. v. Badger, 200 Mich. 104.

¶ 580. Where the purchaser from a retailer of a fur coat is poisoned by the dye on the coat and avers in his declaration that defendant who sold the coat to the retailer was a manufacturer, it is discretionary, within Comp. L. 1897, § 10268, How. 2nd ed., § 12969, to permit an amendment on terms at the close of all the evidence, to obviate a variance from proof that defendant was a jobber and wholesaler.—Gerkin v. Brown & Sehler Co., 177 Mich. 45.

¶ 581. Under How. St. § 7631, authorizing amendments for the furtherance of justice on such terms as may be just at any time before judgment, where, in an action on an insurance policy, it appears that plaintiff assigned an interest in the policy, the declaration cannot be amended so as to introduce the assignee as a plaintiff.—Wood v. Metropolitan Life Ins. Co., 96 Mich. 437.

¶ 582. Where a widow sues, as her husband's administrator, for a fund to which she is entitled in her own right, she may waive her right in favor of the estate; and where the full merits of the case have been tried, defendant is not injured by permitting, as upon an amendment made before judgment, a recovery.—Enright v. Standard Life & Accident Ins. Co., 91 Mich. 238.

¶ 583. A misstatement, in a declaration upon a fire insurance policy, as to the date of the fire, making it one month later than the true date, but not causing surprise to defendant at the trial, is amendable as of course.—Lum v. United States Fire Ins. Co., 104 Mich. 397.

¶ 584. Plaintiff declared on an insurance policy, alleging its date of issue to be September 11, 1908. The certificate had been lost, and in response to an inquiry, the defendant company had erroneously stated by letter that the date was September 11th instead of the correct date, September 18th. Held, the trial court properly permitted plaintiff to amend his declaration from September 11th to September 18th.—Keating v. Patrons' Mut. Fire Ins. Co. of Michigan, 160 Mich. 648.

¶ 585. In an action for the breach of a warranty in the sale of a horse, under Comp. L. 1897, § 10268, How. 2nd ed., § 12969, the court has the right to permit an amendment to the declaration to meet the proof at the close of plaintiff's case.—Patterson v. Gore, 177 Mich. 591.

¶ 586. In an action of ejectment, the declaration claiming the entire fee, it is error to refuse leave to amend so as to conform to the evidence which shows plaintiff to be entitled to an undivided one-half, where there is also evidence which tends to show an ouster by defendant as to the half interest.—Retan v. Sherwood, 120 Mich. 496.

¶ 587. A declaration in ejectment claiming that plaintiff has title to the entire premises described therein may, on the trial, be allowed to be amended so as to meet evidence that as to part of the land he owns an undivided interest only.—Hoban v. Cable, 102 Mich. 206.

¶ 588. A declaration stating that recovery is sought under the provision of Comp. L. 1897, § 11206, relative to treble damages for trespass on land, may be amended at the conclusion of the trial by striking out all reference to such statute, the case made not being within its provisions.—McIntyre v. Murphy, 153 Mich. 342.

§ 123. ——Personal injury cases.

¶ 589. In an action for personal injuries, it is not error to allow a motion to amend the declaration at the conclusion of all the evidence where the object of the amendment was to make the declaration conform to the evidence, and where the defendant was not surprised or unable to meet any new charge made.—Steketee v. Waters, 193 Mich. 177.

¶ 590. A declaration averring that plaintiff was injured by a defect in a sidewalk at a place about 264 feet west of Putnam street, may, at the trial, be allowed to be amended so as to meet testimony placing the distance at 364 feet, where the real issue was understood from the first.—Grattan v. Williamston, 116 Mich. 462.

¶ 591. In an action for injuries from a defective cross-walk it is proper to allow the declaration to be amended so as to meet the proofs in regard to the defect which caused the injury.—Shippy v. Village of Au Sable, 80 Mich. 280.

¶ 592. Where the declaration in an action for negligence averred that plaintiff was struck by the horses and truck of the defendant, and thereby thrown upon the ground and injured, but failed to aver that the truck wheel ran over plaintiff's leg, which fact was shown by the evidence, held, that an amendment of the declaration to meet such proof was properly permitted at the trial, as it could not operate as a surprise.—Foley v. Riverside Storage & Cartage Co., 85 Mich. 7.

¶ 593. Where the declaration in an action for injury from a defective highway alleges that plaintiff was driving the horse attached to the vehicle in which she was driving at the time of the injury, and where the evidence shows the horse was driven by another woman in the same vehicle, it would be an abuse of discretion to refuse an amendment to cure the variance.—Ross v. Township of Ionia, 104 Mich. 320.

¶ 594. In an action against a railroad company for injuries received at a crossing, it was error to refuse to permit an amendment to the declaration, which alleged that plaintiff, as she approached the crossing, drove "at a very slow rate of speed," and looked and listened for trains, by additionally alleging that she stopped; so as to meet the proof that she stopped her horse, stood up in the carriage, and looked and listened before attempting to cross the track. But it seems such variance would not have been material.—Willet v. Michigan Cent. R. Co., 114 Mich. 411.

¶ 595. Plaintiff in her declaration alleged she was injured in the defendant's mangle, through the absence of a guard. She proved at the trial that there was a guard, but that it was defective. After the jury retired, plaintiff asked to amend her declaration so as to allege the guard to be defective instead of absent. Held, that this amendment was permissible where defendant did not profess to be taken by surprise nor ask for further time.—Garnsley v. Boyce, 158 Mich. 8.

¶ 596. In an action for injuries caused by a fall on a defective sidewalk where the declaration recites that plaintiff was in good health at the time of the accident and that certain adhesions formed after a former operation were torn loose by the fall and severe and permanent internal injuries were sustained and the proof tends to show that plaintiff was injured in the locality of the former operation but that adhesions were formed because of the injury, an amendment of the declaration to the effect that plaintiff had not suffered from the former operation for some time and that certain organs in the locality of the operation were injured by the accident and adhesions thereof were caused is properly allowed and does not introduce a new cause of action.—Hayes v. City of St. Clair, 173 Mich. 631.

§ 124. ——Enlarging or correcting ad damnum clause.

See also ante ¶ 457.

¶ 597. Where the verdict is right the court may allow the ad damnum clause to be increased to cover it.—Cicotte v. County of Wayne, 59 Mich. 509.

¶ 598. A judgment for more than the ad damnum clause of the declaration cannot be supported by a subsequent amendment increasing the damages claimed. The plaintiff should have been allowed either to remit the excess or to make the amendment on condition that a new trial be had.—Kenyon v. Woodward, 16 Mich. 326.

§ 125. Amendments of pleas and notices.

Addition or change of defenses by amendment, see post § 126.

Amendment to meet amendment of declaration, see post § 128.

Addition of affidavit to join issues, see post § 127.

¶ 599. It is within the discretion of the trial court to allow an amendment to be made to the notice of special defense attached to the plea of the general issue.—Browne v. Moore, 32 Mich. 254.

¶ 599a. The special notice of justification under the general issue in trespass may by leave be amended so as to aver a denial.—Hopkins v. Briggs, 41 Mich. 175.

¶ 599b. The special notice of defence in a case of trespass may by leave of court be amended so as to aver license.—Hopkins v. Briggs, 41 Mich. 175.

¶ 600. The denial of a motion for leave to amend a plea during the court's charge to the jury, held not an abuse of discretion.—Saginaw Milling Co. v. Schram, 186 Mich. 52.

¶ 601. Leave should not be granted on the trial to amend the notice of defense by adding a new issue which plaintiff cannot be expected to meet, where the application is very tardy, is not made on anything appearing on the trial, and where no showing is made to support it.—Deline v. Michigan Fire & Marine Ins. Co., 70 Mich. 435.

¶ 602. The amendment of a plea at the trial of an action on a surety bond, by alleging that defendant's execution of the bond was conditioned on its being signed by a certain other party whose name appeared in the bond, but who failed to sign it, was discretionary; and such discretion was not abused where plaintiff was given the option of a continuance or proceeding with the trial.—People for use of National Sewer Pipe Co. v. Sharp, 133 Mich. 378.

¶ 603. A denial of an application to amend a plea after reversal and remand is not prejudicial where defendant's counsel was permitted to make a complete statement of all defenses claimed and the court thereupon directed verdict for plaintiff on the ground that the defenses were not available.—Central Sav. Bank v. O'Connor, 139 Mich. 82.

¶ 604. Under the statute of amendments a notice of defense can be so amended as to make the pleadings conform to the referee's finding in the case; and such an amendment can bring in an item which the referee has disallowed and which would have been wiped out if there had been notice of recoupment.—Mason v. Peter, 58 Mich. 554.

¶ 605. It is discretionary to refuse leave on the trial to defendant to amend his notice filed with his plea by adding that the due-bill sued on had been bought by plaintiff, an attorney, contrary to statute; and the refusal is not an abuse of discretion where plaintiff admits that he does not claim to be a purchaser except subject to equities.—Randall v. Baird, 66 Mich. 312.

¶ 606. In an action for trespass to land certified to the circuit court for trial, defendant gave notice under his plea of the general issue that the land where the alleged trespass was committed was a public highway, legally laid out, established, and used as such, and that the acts complained of were done by him as commissioner of highways. The circuit judge permitted defendant to amend the notice by substituting for the words, "and used as such," the words, "and a public highway by dedication and user." Held, that the amendment did not make a new issue, or affect substantial rights, and its allowance was not error.—Alton v. Meeuwenberg, 108 Mich. 629.

§ 126. ——Addition or change of defenses.

What amounts to making new issue, see also ante ¶ 606.

Right to amend pleading to state inconsistent defenses, see also Election and Waiver ¶ 48.

¶ 607. Under Pub. Acts 1915, No. 314, chap. XVI, § 1, where the notice attached to a plea in an action on an accident insurance policy is not broad enough to make the defense of failure to make affirmative proof required by the policy within the time limited, the trial judge may grant an amendment of the plea.—Sweeney v. Travelers' Ins. Co., 199 Mich. 584.

¶ 608. It was not an abuse of discretion to deny an amendment of the general issue in order to add a special defense, claimed to have been developed on the trial and not before known but which it otherwise appeared must have been to some extent known or contemplated before the trial.—Baker v. Michigan Mut. Protective Ass'n, 118 Mich. 431.

¶ 609. An amendment to permit the defendant to interpose the defense of the statute of limitations is in the discretion of the court, and the denial of an application for that purpose is not reviewable.—Ripley v. Davis, 15 Mich. 75.

¶ 610. After trial is begun the refusal to permit the defendant to amend a plea of the general issue by adding notice of the defense of want of consideration is not an abuse of the court's discretion.—Walbridge v. Tuller, 125 Mich. 218.

¶ 611. In an action on a promissory note which plaintiff claimed to still be in effect because an agreement for the exchange of such note for two smaller notes was invalid on the ground that it was made on Sunday, and that such smaller notes were returned to defendants, held that the notice of payment of the one note under the general issue was properly amended by claiming payment of the two smaller notes, although such amendment was unnecessary because plaintiff had testified that such smaller notes had never been paid in whole or in part.—Prussia v. Bailey, 193 Mich. 77.

¶ 612. On the trial of a suit brought on village bonds the testimony tended to show that the bonds sued upon were not the ones authorized to be issued, but another set of the same amount, and contained recitals upon their face which the plaintiff claimed induced it to purchase in the belief that the bonds were such as the village had power to issue. The village had not denied the execution of the bonds under the rule, and, after the case was submitted to the court for decision, entered a motion for leave to amend its plea by adding an affidavit denying such execution, claiming that the latter bonds were never issued by authority of the village. Held, that the allowance of the amendment, as in the nature of one to cover proofs, was within the discretion of the trial judge.—Portsmouth Savings Bank v. (Gratiot) Circuit Judge, 83 Mich. 646.

¶ 613. Discretion in refusing leave to amend the notice of special defense in an action on an insurance policy so as to allege a misrepresentation in the application for insurance as to the amount of encumbrances on the property, is not abused in a case where defendant had held the application for two years, and where it was not claimed that defendant's knowledge of the mortgage was recent.—Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236.

¶ 614. In an action upon a policy of insurance an amendment introducing under the plea of the general issue a notice of special defense should be allowed if needed to support proof of a failure to submit to arbitration as required by the policy.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 615. Where the question is raised for the first time by a request to charge, defendant claiming that the testimony tends to show that the assured's place of residence was in another state than that given in his application during part of the time covered by his statement, it is within the discretion of the court to refuse to allow an amendment of the notice so as to cover such special defense.—Hann v. National Union, 97 Mich. 513.

¶ 616. The refusal to permit an amendment to defendant's plea in an action on a fire insurance policy, by giving notice of a forfeiture of the policy on the ground of other insurance was not error, where defendant knew of such insurance before the commencement of suit, and made no application for the amendment until after the closing of plaintiff's case.—First Baptist Church v. Citizens Mut. Fire Ins. Co., 119 Mich. 203.

¶ 617. An insurance policy contained a condition that a change of title in the property would avoid the policy. A year before the fire the plaintiff became the sole owner of the property instead of an owner by entireties with her husband. The company did not discover this fact until the trial on the policy had begun, and then moved the court for permission to amend its notice of defenses so as to include this defense of change of title. Held, the motion was properly overruled.—O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187.

¶ 618. In trespass for digging a ditch on plaintiff's land it is proper to allow defendants, after justifying as drain commissioner and contractors, to amend the notice attached to their plea by stating that they dug under a license from the plaintiff.—Hopkins v. Briggs, 41 Mich. 175.

¶ 619. The owner of land assigned to the plaintiff whatever right of action the former might have against the defendant for unlawfully cutting timber. Plaintiff, as assignee, sued defendant in trover for cutting timber after the period contracted for had expired. The defendant set up the plea that

the assignor had settled this right of action with defendant, for a valuable consideration. In a second trial secured by plaintiff, the court permitted defendant to amend the notice accompanying the plea, so as to include as a defense the defendant's contention that by extending the time of cutting, plaintiff's assignor had waived his right of action. Held, that since this amendment did not take plaintiff by surprise, it was in the discretion of the court to grant it.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

¶ 620. A notice under a plea of the general issue of the pendency of a prior suit may be amended so as to allege the recovery of a judgment in such suit, and to claim it as a set-off against plaintiff's claim in the case at bar.—Coe v. Hinkley, 109 Mich. 608.

¶ 621. In an action for material and labor furnished where the plea was the general issue and notice of set-off and recoupment, that the plea of set-off was allowed to be withdrawn and the pleadings amended by giving notice of payment held not to be a change of the theory upon which the case was tried.—Smaltz v. Newhof, 178 Mich. 500.

§ 127. ——Addition of affidavits to join issues.

¶ 622. Allowing plea to be amended so as to add affidavit denying execution of bonds, held to have been within discretion of trial court.—Portsmouth Savings Bank v. (Gratiot) Circuit Judge, 83 Mich. 646.

§ 128. Amendment of plea to meet amended declaration.

Time for demurring to amended declaration, see ante ¶ 333.

Giving time to plead to amended pleading, see ante § 105.

Statutory right to plead over to meet amendment, see Jud. Act, chap. XVI, § 2; Comp. L. 1915, § 12479.

Rule that plea shall stand as plea to amended declaration unless amended within ten days, see 1916 C. C. Rule 28, § 3.

¶ 623. In a suit against the city for work done in grading a street, plaintiff was allowed to amend his declaration so as to count specially on certain extra work not called for in the original specifications. Held, that defendant was, in view of this, entitled to amend his plea so as to set up that the contract for the extra work was ultra vires.—Peterson v. City of Ionia, 152 Mich. 678.

¶ 624. Plaintiff in his original declaration in a suit for personal injuries filed two counts against defendant railway and the city. Later he amended his declaration by adding two counts against the defendant alone, and on the trial discontinued the suit as to the city. Held, the original plea, though unamended, under the Circuit Court Rule put at issue the additional counts.—Moers v. Michigan United Rys. Co., 158 Mich. 659.

§ 129. Amendments of bills of particulars.

Effect of amending bill, see also ante ¶¶ 403, 408.

¶ 625. Where a declaration is so amended as to include all that could be set out in a bill of particulars, the bill filed under the original declaration need not be amended.—Feiertag v. Feiertag, 80 Mich. 489.

¶ 626. A plaintiff may properly be allowed to amend his bill of particulars where the evidence does not tend to prove a demand set forth therein.—Cummin v. Wilcox, 47 Mich. 501.

¶ 627. Allowing an amendment to a bill of particulars is discretionary with the trial court.—City of Battle Creek v. Haak, 139 Mich. 514; Hapke v. Davidson, 180 Mich. 138.

¶ 628. It is within the discretion of the trial court to permit a bill of particulars to be amended by adding items proper to be considered after the trial has commenced and a witness has been sworn; adjournment or continuance should be granted if defendant claims to be surprised.—Lester v. Thompson, 91 Mich. 245.

¶ 629. Where a formal amendment to avoid variance of a bill of particulars as to the date of a particular transaction could not have surprised defendant, it was an abuse of discretion to condition such amendment upon continuance and payment of costs.—Tate v. Hamilton, 81 Mich. 221.

¶ 630. On a second trial in assumpsit by a doctor for professional services, the plaintiff's bill of particulars should not be allowed to be amended so as to add another credit of later date than the last debit item, thus avoiding the bar of the statute of limitations.—Hollywood v. Reed, 57 Mich. 234.

¶ 631. It is not an abuse of discretion to refuse to permit an amendment to a bill of particulars at the trial in the circuit court, where the case has been previously twice tried without the bill being amended, and to have permitted it would have operated as a surprise to the defendant.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 632. It is within the discretion of the court to allow defendant's bill of particulars of set-off to be amended at the trial so as to increase the amount of a claim, where such amendment cannot take plaintiff by surprise.—Mead v. Glidden, 79 Mich. 209.

¶ 633. A bill of particulars limiting plaintiff's demand to compensation for services and to money loaned may, if the proofs show she was otherwise entitled to the judgment recovered by her for money had and received, be treated in the supreme court as amended so as to cover the proof made.—Feiertag v. Feiertag, 73 Mich. 297.

¶ 634. An item for expenses in taking a horse to a neighboring town for treatment may be added to a bill of particulars, and does not enlarge the issue, in an action in assumpsit for breach of warranty on the sale of the horse, where the original bill set out the price of the horse, the amount paid for medical treatment, and the expense of care and keeping.—Connell v. McNett, 109 Mich. 329.

¶ 635. In an action to recover for extra services claimed to have been rendered in the performance of a contract, an amendment of the bill of particulars changing the date upon which the last item of services was alleged to have been rendered does not introduce a new cause of action so as to be barred by a statute of limitations.—Hapke v. Davidson, 180 Mich. 138.

§ 130. Amendments of affidavits accompanying pleadings.

¶ 636. Where an affidavit of merits is apparently made in good faith, but is wanting in some respects, the proper practice is to permit an amendment.—Wells v. Booth, 35 Mich. 424.

§ 131. Amendments of served copies.

¶ 637. A copy of the declaration served may be amended on the trial so as to correspond as to description with the original, where defendants could not have been misled.—Stoinski v. Pulte, 77 Mich. 322.

§ 132. Amendments affecting third persons.

¶ 638. No amendment should be permitted the effect of which would be to destroy or diminish the rights of third persons who are interested in the result of the issue.—Moore v. Graham, 58 Mich. 25.

¶ 639. Garnishment proceedings cannot be amended by making the name of the principal defendant "Jonathan C. Davis" instead of "John C. Davis" where such amendment would injure an intervenor.—Moore v. Graham, 58 Mich. 25.

C. MOTION FOR LEAVE, PROCEDURE THEREON, AND MODE OF AMENDING.

§ 133. Motions, showing, and order thereon.

General motion practice, see Motions and Orders.

Proper judge to hear motion for leave, see Judges ¶ 14.

Denial of new trial as denial of coupled motion for leave to amend, see Motions and Orders ¶ 34.

Right to discontinue voluntarily after amendment denied, see Discontinuance ¶ 31.

Review of ruling on motion to amend, see Appeal § 401.

Mandamus to correct action on or relating to amendments, see Mandamus § 32.

¶ 640. Where a party seeks to amend his pleadings upon a given point, and his affidavit shows that the plea would not accord with the facts, his motion must be denied.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 641. Where, upon objection being raised to the introduction of evidence under the declaration, the court announced that he would permit an amendment, and stated of what it should consist, to which plaintiff's counsel assented, it is immaterial that the amendment was not in fact made.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

§ 134. Making, filing, and recording.

See also ante ¶ 641.

Striking parts in order to amend, see post § 135.

Presumption as to amendments which ought to have been made, see Appeal § 369.

Mode of making amendments without leave by service of copy of amended pleading, see 1916 C. C. Rule 28, § 3.

¶ 642. As a general rule an amendment to a declaration, to be effective, must actually be made.—Rimmele v. Huebner, 190 Mich. 247.

¶ 643. Under Circuit Court Rule 27 where an action is brought against two defendants jointly and, after the close of plaintiff's proofs, the action is discontinued as to one defendant, and the proofs tend to show a liability upon the part of one defendant alone and judgment is rendered against him alone, an actual amendment to the declaration charging a several liability instead of a joint liability need not be made but such declaration may be treated as if actually amended.—Rimmele v. Huebner, 190 Mich. 247.

¶ 644. Under an order allowing a declaration to be amended the amendment must be actually made, and cannot be presumed, unless the record furnishes the data for applying the order so as to show what the precise effect of the amendment will be.—Ballou v. Hill, 23 Mich. 60.

¶ 645. The allowance of an amendment to a declaration without reducing it to writing is within the discretion of the trial judge.—Bosek v. Detroit United Railway, 175 Mich. 8.

¶ 646. Where an amendment to a declaration is allowed and is in the mind of the court, the fact that it is not filed until after judgment is rendered is not error.—Arnold v. Brechtel, 174 Mich. 147.

¶ 647. The neglect of a formal amendment of the declaration so as to show a discontinuance for which leave was given by the court is unimportant.—Cook v. Perry, 43 Mich. 623.

¶ 648. Where testimony objected to as inadmissible under the pleadings was nevertheless admitted, the trial judge saying that he thought it admissible, but that if not an amendment would be permitted, held, that though no formal amendment was made what was done and said was equivalent thereto.—Crane Lumber Co. v. Bellows, 116 Mich. 304.

§ 135. Amendment by striking parts.

Striking out name of receiver and substituting that of corporation, see ante ¶ 485.

¶ 649. Striking out the name of a coplaintiff is within How. St., § 7636, if it appears to be improperly in the declaration. —Hudson v. Feige, 58 Mich. 148.

¶ 650. Where a declaration against a company named its president for the time being as defendant on its behalf (which would have been proper if it had been a joint-stock company, unincorporated and organized under a particular statute), it was held right to allow an amendment striking out his name and thus leaving the case to stand against the company by name as a corporation, service on the president having been proper under any of the statutes, and the object of the declaration being to enforce a company liability.—Kimball & Austin Mfg. Co. v. Vroman, 85 Mich. 310.

VII. SUPPLEMENTAL AND ADDITIONAL PLEADINGS.

§ 136. In general; necessity and propriety.

Requisites and sufficiency of pleas, see post § 138.

Construction and effect of pleas, see post § 139.

Several supplemental plea by one defendant, see post § 137.

Necessity of supplemental pleading to make issues on matters subsequent to commencement of action, see also post § 164.

Scope of issues, matters arising after action begun, see post § 164.

Plea of set-off accruing after action begun as equivalent to plea puis darrein, see also Set-off, IV.

Mode of pleading garnishment in bar or suspension of plaintiff's action, see ante ¶ 234.

Supplemental pleadings in equity, see Equity, VII, E.

Plea puis darrein in mandamus, see Mandamus ¶ 866.

Pleas puis darrein continuance in quo warranto, see Quo Warranto, III.

Puis darrein plea of settlement with client where attorney claiming lien prosecutes, see Attorneys ¶ 220.

Admissibility of equity decree as rebuttal without plea puis darrein, see Former Adjudication ¶ 468.

Review of leave to plead puis darrein, see Appeal § 398.

Pleading vacation of judgment as response to plea of judgment bar, see Former Adjudication ¶ 479.

Statutory provision for supplemental pleadings, see Jud. Act, chap. XIV, § 15; Comp. L. 1915, § 12467.

Rule as to supplemental pleadings and contents thereof and leave to file same, see 1916 C. C. Rule 29.

¶ 651. Comp. L. 1871, § 5792, How. St. § 7361, in abolishing special pleas, was not meant to deprive defendant of the right to make a special defense of matters arising after the filing of the plea of the general issue; and § 5794 (7363), in requiring notice of special matters of defense to be annexed to the plea of the general issue, does not require notice to be given of matters which, if specially pleaded, would be inconsistent with the general issue; it does not therefore apply to pleas puis darrein continuance.—Johnson v. Kibbee, 36 Mich. 269.

¶ 652. A plea puis darrein, when proper at all, may serve in place of notice of defense.—Snyder v. Quarton, 47 Mich. 211.

¶ 653. Where plaintiff establishes a prima facie right to recover at the date of the commencement of suit a conveyance to defendant from strangers to plaintiff's title, made after the commencement of suit, is inadmissible under the plea of the general issue. It must be pleaded puis darrein continuance.—Jennings v. Dockham, 99 Mich. 253.

¶ 654. Tax-deeds issued to defendant in ejectment after the joinder of issue, if admissible at all in defense to the action, cannot be introduced without something on the record in the nature of a plea puis darrein continuance.—Hurd v. Raymond, 50 Mich. 369.

¶ 655. A conveyance of the premises by plaintiff to a third party pending suit is not admissible in evidence for the defense without a special notice in the nature of a plea puis darrein.—Jenney v. Potts, 41 Mich. 52.

¶ 656. Where the plaintiff introduces a contract as a necessary part of his case, the defendant can show when and how it was performed, even though performance had not been pleaded puis darrein continuance. —Haven v. Beidler Mfg. Co., 40 Mich. 286.

¶ 657. That a purchaser has, by using a machine down to the time of trial of an action for its price, estopped himself from setting up a rescission of the contract of sale, may be shown by the plaintiff without a plea of puis darrein continuance.—Linderman Machine Co. v. Shaw-Walker Co., 137 Mich. 28.

¶ 658. A plea of payment of a judgment in garnishment puis darrein continuance was

held good where a former plea, alleging that defendant had been garnished, had been withdrawn by leave of the court and the plea of payment on a judgment in the same proceeding in garnishment had been made in lieu of it.—White v. Kent Circuit Judge, 47 Mich. 645.

¶ 659. Where defendant in a pending action is garnished in a suit brought by a third person against the plaintiff, he should as soon as possible plead the garnishment proceedings in abatement of the first suit by plea puis darrein or by filing notice of the proceeding as a special defense under circuit court rule 106.—Grosslight v. Crisup, 58 Mich. 531.

¶ 660. Matter in abatement arising after the suit has been commenced should be pleaded puis darrein.—Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

¶ 661. Where plaintiff in replevin is made defendant in cross-replevin by the defendant in the former suit, he need not plead puis darrein a judgment on certiorari reversing the judgment rendered against him in the former suit.—Clark v. West, 23 Mich. 242.

¶ 662. Where plaintiff dies and his administrator is substituted, defendant need not plead puis darrein so as to put the representative capacity specially in issue.—Vickery v. Beir, 16 Mich. 50.

¶ 663. A plea puis darrein continuance that plaintiff has assigned his claim since the filing of the referee's report thereon is held to present an immaterial issue and to be properly disregarded.—Moon v. Harder, 38 Mich. 566.

§ 137. Plea by coparty severally.

Effect of severing plea, see also post ¶ 668.

¶ 664. After a joint plea to the merits by two defendants, one was held to be entitled to plead severally, puis darrein, his discharge in bankruptcy subsequently obtained. Such plea is an abandonment by him of the joint plea, which afterwards stands as the several plea of the other defendant.—Wheelock v. Rice, 1 D. 267.

§ 138. Requisites and sufficiency of plea.

Sufficiency of pleas and notices in general, see ante § 67 et seq.

¶ 665. Where, in an action of trover, a plea puis darrein that the property has been taken from defendants on an attachment against the plaintiff does not aver that the attachment suit has been disposed of or the property applied to plaintiff's use, it will not sustain the introduction of the attachment proceedings in evidence.—Erie Preserving Co. v. Witherspoon, 49 Mich. 377.

§ 139. Construction and effect of pleas.

¶ 666. At common law a plea puis darrein destroyed the issue previously formed and required the forming of a new one by replication or otherwise.—Johnson v. Kibbee, 36 Mich. 269.

¶ 667. A plea puis darrein continuance supersedes a previous plea to the general issue with notice of set-off, and places the issue entirely upon the new plea.—Whittemore v. Stephens, 48 Mich. 573.

¶ 668. After a joint plea to the merits by two defendants, it was held that one of them might plead severally, puis darrein continuance, his discharge in bankruptcy subsequently obtained. And such plea would be an abandonment by him of the former joint plea, which would thereafter stand as the several plea of the other defendant.—Wheelock v. Rice, 1 D. 267.

¶ 669. A plea puis darrein continuance is either in abatement or in bar; and when such a plea interposes the special defense that defendant has been garnished as plaintiff's debtor since the beginning of suit, it is a plea in abatement.—Grosslight v. Crisup, 58 Mich. 531.

¶ 670. A plea of estoppel puis darrein continuance, however defective in frame and substance, must be entertained if defendant rests his case entirely upon it.—Whittemore v. Stephens, 48 Mich. 573.

VIII. EXHIBITS, PROFERT AND OYER.

§ 140. In general.

Attaching copies to demurrer, see ante § 85.
Marking documents in evidence as exhibits, see Trial, V.
Rule as to attachment of copy of instrument to pleading as an exhibit, see 1916 C. C. Rule 21, § 6.
Exhibition of instrument with request for admission of genuineness, see 1916 C. C. Rule 35.
Abolishment of profert, see 1916 C. C. Rule 21, § 6.

¶ 671. Of a sealed instrument set out in full in the declaration no further profert is necessary.—Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

¶ 672. In declaring upon a contract executed by agents on behalf of a corporation, they signing their own names and affixing their own seals, which contract is therefore to be regarded as the simple contract of the corporation, no profert need be made.—Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

¶ 673. In a suit by a school teacher on a contract of hire, the plaintiff is not bound

to make profert of her certificate of qualification, and it is not error to allow her to give parol proof that she has one.—Manistee Township School District No. 1 v. Cook, 47 Mich. 112.

¶ 674. When a suit is brought in the first instance by an administrator the practice requires him to make profert of his letters by his declaration.—Vickery v. Beir, 16 Mich. 50.

¶ 675. A suggestion of plaintiff's death entered of record does not, where the action is revived by his administrator, supply the want of profert, nor enable defendant to demand oyer.—Vickery v. Beir, 16 Mich. 50.

IX. ISSUES AND MATTERS TO BE PROVED.

A. IN GENERAL; HOW FORMED AND JOINED; AFFIDAVITS.

Affidavits in support of motion for leave to amend, see ante 133.
Trial of issues in general, see Trial.
Evidence of issues, see Evidence; and see especially topics treating of the issue or cause of action in question.
Trial of issue of jurisdiction and mode of proof, see Courts § 81.

§ 141. Tendering and joining issues in general.

[Note.—Generally speaking the issues are formed by pleas to the declaration whereby the matters in controversy and the facts admitted become separated and defined. Under the rules of practice affidavits and notices added to the pleas are required in order to make certain facts issuable. The necessity and sufficiency of these notices is treated ante III, C, and the necessity and sufficiency of the affidavits, post § 142 et seq. See also cross-references which follow this note.]

Issues of law made by demurrers and notices, see ante §§ 87, 88.
Effect of general issue to deny and controvert all material allegations of declaration, see post § 160.
"Affirmative defenses" requiring special notice, see ante § 68.
Abandonment of one theory as obviating election, see ante § 51.
Supplemental pleas to bring in matters occurring after action begun, see ante § 136.
Effect of supplemental pleas to supersede issues made by pleas, see ante § 139.
Affidavits of claim and amount due, see post §§ 142-145.
Affidavits of merits of defense to prevent summary judgment, see post § 146.
Affidavits of nonexecution, see post §§ 147-150.
Necessity of replication or traverse of plea, see ante § 72.
Matters of rebuttal of or reply to defenses without replication thereof, see post § 163.
Effect of bill of particulars to determine or limit issues, see ante §§ 94, 100.
Issues on original plea standing to amended declaration, see ante § 128, ¶ 624.
Necessity of amendment after admission by plea in order to make issue, see also ante ¶ 477.
Manner of forming issues on garnishment. affidavit and disclosure, see Garnishment § 75.
Affidavit to plea of corporate nonexistence, see also Corporations § 191.
Penalty of costs for failure to give notice of matters denied or admitted, see 1916 C. C. Rule 23, § 8.
Formation of issues to make proof of performance of conditions precedent requisite, see 1916 C. C. Rule 21, § 5.
Necessity of sworn denial of incorporation to make issue, see Jud. Act, chap. XIV, § 8; Comp. L. 1915, § 12460.
Declaring on money counts with copy of bill or note attached, see Jud. Act, chap. XIV, § 9; Comp. L. 1915, § 12461.
Provision for controverting suggestions of fact in same manner as other pleadings, see Jud. Act, chap. XX, ¶ 26; Comp L. 1915, § 12762.

¶ 676. In an action of assumpsit on a judgment discharged by bankruptcy of the debtor, his new promise to pay it need not be averred, where the state of the pleadings is such that defendant must make the discharge a matter of defense in order to avail of it. The new promise may be proved in rebuttal of the defense, if made.—Craig v. Seitz, 63 Mich. 727.

§ 142. Affidavits of claim and amount due.

Service of affidavit, see post § 143.
Use and effect of affidavit as evidence, see post §§ 144, 145.
Affidavit of merits to meet affidavit of claim, see post § 146.
Affidavits to make prima facie proof of account sued on unless denied by counter-affidavit, see Jud. Act, chap. XVII, § 52. Comp. L. 1915, § 12540.
Proceedings to take summary judgments on affidavit of claim unless denied by affidavit of merits, see Jud. Act, chap. XVIII, §§ 9-15, Comp. L. 1915, §§ 12581-12587.

¶ 677. An affidavit supporting an account filed as a set-off under notice that the "annexed account is just, due and unpaid" substantially complies with How. St., § 7525, requiring the affidavit to set out that the account "is justly owing and due"; where the account shows the balance due.—McGowan v. Lamb, 66 Mich. 615, by divided court.

§ 143. ——Service.

Filing of counter affidavit of merits, see post § 146.

¶ 678. The affidavit of amount due with copy of account annexed, which, under stat-

ute (see How. St. § 7525), constitutes prima facie evidence of indebtedness if served with copy of the declaration or other process commencing suit, was, prior to the amendment to said § 7525, allowing it to be made within ten days next preceding the filing of declaration, etc., of no avail, unless made substantially at the time of commencing suit.—McHugh v. Butler, 39 Mich. 185; Locke v. Farley, 41 Mich. 405.

¶ 679. The affidavit of account and amount due is not evidence unless the return of service shows that the affidavit was served at the same time with the declaration or process by which suit was commenced; and there is no presumption that because it was served the same day it was served at the same time.—Gordon v. Sibley, 59 Mich. 250.

§ 144. ——Introduction and use as evidence; objections.

Service and filing as prerequisite to use, see ante § 143.

Use where counter affidavit is partially responsive, see also post ¶ 685.

¶ 680. A defendant who, not being misled, allows an irregular affidavit to be introduced without objection, cannot, after the proofs are closed, object for the first time that the affidavit proves nothing.—Locke v. Farley, 41 Mich. 405.

¶ 681. It is not prejudicial error to admit in evidence, after an open account has been proved by the debtor's admissions, an affidavit of the amount due thereon.—Bjorkquest v. Wagar, 83 Mich. 226.

§ 145. ——Effect to exclude other proofs.

Admissibility of affidavit after resort to other proofs, see ante ¶ 681.

¶ 682. If plaintiff rests his case on an ineffectual affidavit he cannot, after the defense has rested, go back and prove his demand in the ordinary way as matter of right.—McHugh v. Butler, 39 Mich. 185.

§ 146. Affidavits of merits of defense.

Affidavit or claim to necessitate affidavit of merits, see ante § 142.

Amendments of affidavits, see ante § 130.

Necessity of tendering affidavit of meritorious defense to open default, see Defaults § 36.

Affidavits of merits to take or counter affidavits to prevent summary judgment on contract, judgment or statute sued on, see Jud. Act, chap. XVIII, § 9 et seq.; Comp. L. 1915, § 12581 et seq.

Rule as to affidavit of merits of defense, see 1916 C. C. Rule 34.

¶ 683. Under the act of 1844 (Sess. L. p. 11, § 2), which authorized the plaintiff, in actions on contract, to take an inquest or assessment unless an affidavit of merits was filed, it was held that the affiant, whether the affidavit was made by the defendant or his agent or attorney, should swear to a defense upon the merits from his own knowledge of the facts constituting such defense, and not from information and belief.—Brown v. Cowee, 2 D. 432.

¶ 684. An affidavit of merits by defendant to prevent an inquest was held sufficient where it stated that he had fully and fairly stated his case to his counsel, naming them, and had been advised by said counsel, after such statement that he has a full and complete defense on the merits to the plaintiff's cause of action as stated in the plaintiff's declaration and bill of particulars, and that he verily believed such advice to be true.—Wells v. Booth, 35 Mich. 424.

¶ 685. Where, in a suit brought to recover the amount due upon two open accounts, a copy of each account, and an affidavit of the amount due thereon, made pursuant to How. St. § 7525, are attached to the declaration filed as commencement of suit, and copies are served upon the defendant, who, in his counter affidavit, only refers to one of the accounts and affidavits, the remaining affidavit is prima facie evidence of the indebtedness therein sworn to.—Morrill v. Bissell, 99 Mich. 409.

¶ 686. It is not an abuse of discretion for the trial court, on the trial of an action on a promissory note, to permit the filing of an affidavit of merits nunc pro tunc as of a date before the first day of the term, where no claim of surprise nor unpreparedness is made by the plaintiff, or a continuance requested.—Van Slyke v. Rooks, 181 Mich. 88.

¶ 687. Whether, under C. C. Rule 14, an inquest may properly be taken in an action upon a bond given by a contractor for the protection of laborers and material men, because of failure to put in an affidavit of merits, quære.—People v. Grant, 117 Mich. 613.

¶ 688. Inquests under C. C. Rule 99 in the cases specified therein, where no affidavit of merits has been filed, can be taken against a corporation defendant.—Grand Rapids Furniture Mfg. Co. v. Burnham, 34 Mich. 29.

§ 147. Affidavits of nonexecution.

Who may make affidavit, authority of agents, see post § 148.

Time for making and filing out of time by leave of court, see post § 149.

Effect and conclusiveness of affidavit, see post § 150.

Rule as to affidavit and as to admission by failure to make same where contract is not declared on as a written one, see post § 158.

Nonadmission by failure to make affidavit of instrument variant from that declared on or not part thereof, see post § 158.

Applicability of rules as to pleas of non est factum in actions on bail bonds, see Civil Arrest ¶ 203.
Necessity and sufficiency of affidavit of nonexecution to put in issue execution of insurance policy, see Insurance § 293.
Necessity of sworn plea of non est factum to bond, see also Bonds § 6.
Affidavits in actions on negotiable instruments, see Negotiable Instruments § 102.
Necessity of sworn denial of execution where corporation pleads ultra vires to its note, see Corporations § 99.
Defense of ultra vires by county without sworn denial of execution of contract sued on, see Counties § 56.
Affidavits of nonexecution, see 1916 C. C. Rule 33.

¶ 689. A recognizance of special bail is not such a "written instrument" as is intended by C. C. Rule 79, which provides that in any action brought upon a written instrument the plaintiff shall not be put to the proof of its execution, or the handwriting of the defendant, unless its execution be denied by affidavit.—Elliott v. Green, 10 Mich. 113.

¶ 690. Comp. L. 1857, §§ 3714, 3767, How. St. §§ 6875, 6928, in regard to the proof of execution of written instruments declared upon or set off in justices' courts, do not apply to cases which originate in the circuit court.—Spicer v. Smith, 23 Mich. 96.

¶ 691. C. C. Rule 79 does not apply where no opportunity has been given to deny execution; as, where an action on a note had been begun before a justice by declaring on the common counts only, and on being appealed to the circuit a new declaration was filed with a copy of the note attached, but without giving the defendant an opportunity to plead anew.—McMillen v. Beach, 38 Mich. 397.

¶ 692. The rule dispensing with proof of the execution of a written instrument declared upon does not apply on an appeal from justice's court where the pleadings are the same as before the justice, and where no new issue has been framed in the circuit.—Bauer v. Wasson, 60 Mich. 194.

¶ 693. The "execution" of a note in the meaning of C. C. Rule 79 includes only its actual making and delivery.—Freeman v. Ellison, 37 Mich. 459.

¶ 694. Denial by affidavit of the execution of an instrument cannot be required if the instrument is not set up in the declaration.—Montross v. Roger Williams Ins. Co., 49 Mich. 477.

¶ 695. An affidavit of the nonexecution of an instrument sued upon should not be construed technically, but should be held sufficient if evidently intended in good faith to meet the plaintiff's case.—McCormick v. Bay City, 23 Mich. 457; Haight v. Arnold, 48 Mich. 512.

¶ 696. In a suit upon municipal bonds issued under a statute requiring that they shall be issued within sixty days after the vote authorizing them, an affidavit filed with the plea of the general issue denying that the bonds were issued within the sixty days puts in issue the question of their validity if they were issued after that time.—Township of Chickaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 600.

¶ 697. The affidavit required under 1897 C. C. Rule No. 8 to deny execution of a written instrument sued on need not be entitled in the case.—Thompson v. Village of Mecosta, 127 Mich. 522.

§ 148. ——Authority to make.

¶ 698. Under How. St. § 7525, providing that an affidavit of the amount due on an account may be made by plaintiff "or some one in his behalf," an affidavit stating that the affiant is the treasurer of the plaintiff corporation sufficiently shows his authority.—Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116.

§ 149. ——Time for making; filing out of time by leave.

Amendment adding affidavit to plea, see ante § 127.

¶ 699. The court has discretion to allow, or refuse to allow, the filing of an affidavit of nonexecution after the proper time, and may impose conditions upon such permission.—Tupper v. Kilduff, 26 Mich. 394; Polhemus v. Ann Arbor Sav. Bank, 27 Mich. 44.

¶ 700. The filing of an affidavit of nonexecution ought to be allowed at any stage of a cause if injustice will result from excluding it.—Freeman v. Ellison, 37 Mich. 459.

¶ 701. Refusal of leave to deny the execution of a note on affidavit, after appeal from a justice's court, is discretionary.—Chicago & N. E. R. Co. v. Edson, 41 Mich. 673.

¶ 702. Discretion of court in denying leave to file an affidavit denying execution of instruments sued upon as firm notes, is properly exercised if in the alleged execution the actual signing was done by a partner since deceased and the affidavit could have been filed in the cause during his lifetime; and if also the surviving partners have neglected to deny the execution.—Towle v. Dunham, 76 Mich. 251.

§ 150. ——Effect and conclusiveness of affidavit.

Admissions by failure to put in affidavit, see post § 158.

¶ 703. The object of C. C. Rule 79 is to enable plaintiff to make out a prima facie case, not a conclusive one; and the affidavit

does not reach issues other than "execution" of the instrument and "handwriting of the defendant."—Freeman v. Ellison, 37 Mich. 459.

B. NECESSARY PROOFS AND TRAVERSABLE ISSUES.

§ 151. In general; materiality of facts.

[Note.—This section treats only the most general propositions. It is not pertinent to the general law of pleading to treat of the evidence or facts necessary to make out any particular cause of action, defense, or right. For such matters the specific topics treating of concrete subjects should be consulted. The general rules governing and determining the relevancy of evidence to the issues are treated in Evidence, III. The general rules for determining the sufficiency of evidence and the weight and credibility of testimony are treated in Evidence, X; Witnesses, VI.]

Scope of issues made and matters admissible under them, see post § 153 et seq.

Construction of pleadings as to what is surplusage in general, see ante § 22 et seq.

Materiality of variance, see post § 166.

Admissions dispensing with proof, see post § 155 et seq.

Matters necessary to be proved by plaintiff under plea of general issue, see post § 160.

Rule excluding evidence not relevant to the issues, see Evidence, III.

Issues and necessary matters of proof thereunder in actions for fraud, see Fraud §§ 93, 94.

¶ 704. Except in describing a written instrument which bears a written date, allegations of time are not, in general, material in a declaration.—Howland v. Davis, 40 Mich. 545.

¶ 705. An averment as to the source of title is immaterial where the fact of ownership is the material question.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 706. While it is probably true that where fraud is not alleged it cannot be proved, the converse—that in all cases where fraud is alleged it must be proved—is not true.—Holcomb v. Noble, 69 Mich. 396.

¶ 707. Under C. C. Rule 7 (e) admissions made by a defendant in a notice of special defense need not be proven by the plaintiff.—Irwin v. Wolcott, 183 Mich. 92.

¶ 708. Where in a suit for breach of contract defendant files notices of special defenses which by implication admit the making of the contract and its terms, no proof is necessary of its execution or its terms under C. C. Rule No. 7, providing that facts stated in a notice added to a plea shall be treated as admissions of the defendant.—McIntire v. Carr, 171 Mich. 647.

¶ 709. Where proof of a portion of the facts alleged will support a recovery, a failure of proof as to the rest is immaterial, and does not constitute a variance.—Malkowski v. Olfs, 161 Mich. 303.

¶ 710. Where the answer to a bill by an executor to set aside a deed as in fraud of creditors admits that the commissioners on claims gave statutory notice of their meetings, it is not necessary for the executor to make proof of such fact.—Chapoton v. Prentis, 144 Mich. 283.

§ 152. Traversable issues; suggestions of fact.

Mode of forming issues on suggestions of fact, see ante § 141.

¶ 711. The suggestion of plaintiff's death is not issuable.—Larned v. Wilcox, 4 Mich. 333.

C. SCOPE OF ISSUES AND MATTERS ADMISSIBLE UNDER THEM.

§ 153. In general.

What constitutes surplusage, see ante § 22 et seq.

Facts admitted by demurring, see ante § 89.

Limitation and restriction of issues by bill of particulars, see ante § 100.

Restriction of issues under special notice to matter pertinent to defense made, see post § 162.

Materiality of facts alleged and necessity for proof, see ante § 151.

Matters occurring after action begun, necessity of supplemental pleadings, see ante § 136.

Variance of proofs outside scope of the issues, see post X.

Theory of trial and changing on appeal or afterwards, see Appeal §§ 267-269, 468, 559.

Limitation of evidence on affirmative claims to those pleaded as set-off or recoupment, see Set-off, IV.

Issues in actions against carriers, see Carriers §§ 86, 209.

Inadmissibility of evidence on facts admitted or not in issue, see also Evidence § 73.

Opening door to irrelevant evidence by first putting it in, see Evidence § 90.

Judicial notice of files and record in case, see Evidence § 19.

Issues in proceedings to enforce mechanics' liens, see Mechanics' Liens § 50.

Scope of plea or notice in libel and slander, see Libel and Slander § 61.

¶ 712. It is a general rule of pleading that when one has stated the grounds of his complaint he will be limited to them.—Brown v. Greenfield T'p Board, 92 Mich. 294.

¶ 713. Testimony that is not within the averments of the pleading is objectionable.—Parker v. Armstrong, 55 Mich. 176.

¶ 714. Where one who sues in her individual capacity does not ask leave to amend her declaration so that she may sue as administratrix, it is proper to exclude evidence that she is administratrix of her husband's estate and that her husband (to whose estate the claim in suit belongs) died childless.—Wheeler v. Stewart, 94 Mich. 445.

¶ 715. Defendant who has asked no bill of particulars must be prepared to meet any case that would be admissible under the common counts as if there had been no special count, and recovery will not therefore be limited by the terms of a special count where the common counts are also relied on.—Hall v. Woodin, 35 Mich. 67.

¶ 716. Plaintiff can recover only under the material allegations of his declaration.—Pennington v. Detroit, G. H. & M. R. Co., 90 Mich. 505.

¶ 717. It seems that a plaintiff cannot be debarred from trying issues not met by the plea merely because he is in default for not replying to a defense that covers part of the issues only.—Snyder v. Quarton, 47 Mich. 211.

§ 154. Title to land in personal actions.

¶ 718. The rule against trying title to land in personal actions does not apply to prevent the real owner of land from intervening in a log lien case against a tax title claimant in bare possession.—Cook v. Cook, 106 Mich. 164.

§ 155. Admissions by pleas and notices.

Admission by pleading that statute is unconstitutional, see ante ¶ 42.
Facts admitted by demurring, see ante § 89.
Office and effect of bill of particulars, see ante V.
Needlessness of proofs of admitted facts, see ante § 151.
Effect of waiving general issue, see post § 156.
Effect of want of affidavit of nonexecution, see post § 158.
Implied admissions by specially pleading facts, see post § 157.
Construction of admissions made, see post § 159.
Issues made by general issue and notices thereunder, see post §§ 160-162.
Inconclusiveness on plaintiff of admissions by allegations in pleas, see post § 159.
Matters subsequent to commencement of action, see post § 164.
Waiver of objections in law by pleas to merits, see post § 175.
Admissions by garnishee's disclosure, see Garnishment § 59 et seq.
General issue in corporation actions as admission of corporate existence, see Corporations § 193.
Admission by plea of capacity of association to be sued as such, see Associations § 11.
Garnishee's disclosure as equivalent to admission by plea, see Garnishment §§ 59-65.
Effect of general issue by garnishee as admission of sufficiency of main case to support garnishment, see Garnishment ¶ 288.
Statements of fact in notices of defenses as admissions by defendant, see 1916 C. C. Rule 23, § 6.

¶ 719. Defenses by way of confession and avoidance admit the allegations of plaintiff's pleading and relieve him from the burden of proof.—McIntire v. Carr, 171 Mich. 647.

¶ 720. Under C. C. Rule 7 (e) admissions made by a defendant in a notice of special defense, need not be proven by the plaintiff.—Irwin v. Wolcott, 183 Mich. 92.

¶ 721. In a suit on a bond, the defendant pleaded the general issue and in his notice of recoupment stated that the bond was given to secure the purchase price of goods sold by plaintiff to defendant. Held, that under C. C. Rule 7e, such statements were to be taken as admissions by the defendant of the facts recited therein.—Cunningham v. Hawkins, 163 Mich. 317.

¶ 722. Although C. C. Rule 7, subd. e, provides that "any statement of facts set forth in a notice added to a plea shall be treated as an admission by the defendant, and need not be proved by plaintiff," a defendant can show that the date of a contract alleged in his notice was different from that stated in the notice.—Buckeye Brewing Co. v. Eymer, 157 Mich. 518.

¶ 723. Where the defendant to an action for damages for breach of covenant of a lease based its defense upon an eviction by the plaintiff as lessor and in its pleadings set up a notice given it by the lessor of forfeiture of the lease because of such breach and its surrender of the premises pursuant to such notice, held that this was an admission by defendant under C. C. Rule 23, § 6, and plaintiff did not waive the breach.—Stott Realty Co. v. United Amusement Co., 195 Mich. 684.

¶ 724. A corporation plaintiff, in an action on a note given for corporate stock, is in no position to invoke C. C. Rule 23, § 6, providing that any statement of fact set forth in a notice added to a plea shall be treated as an admission by the defendant and to avail itself of a statement in such plea that plaintiff was involved in financial difficulty, and its affairs were placed in the hands of a trustee or receiver for liquidation where the declaration nowhere refers to the insolvency of plaintiff or the fact that it was in liquidation.—East Side Trust & Sav. Bank v. McGinnis, 197 Mich. 432.

¶ 725. Under the provisions of C. C. Rule 23, § 6, that facts set forth in a notice at-

tached to a plea shall be treated as an admission by defendant dispensing with proof, a notice which stated that a sum had been paid to plaintiff under the contract sued on, also that plaintiff had not performed and that repayment had been demanded, held not to be sufficient to admit and thereby to relieve plaintiff from proving that the stated consideration had been paid or furnished by defendant, as it was uncertain from the words employed in the writing whether it did or did not import a consideration rendered by plaintiff for defendant's promise.—Dennis v. Vinton, 199 Mich. 430.

¶ 726. Plaintiff vendor sued to replevy certain property mortgaged by defendant vendee to secure the payment of the purchase price of a huller. The original order contained a guaranty and a clause forbidding any change by any agent without the seller's assent, and the order was subject to acceptance by the seller. Defendant in his plea, claiming the mortgage to be annulled by breach of a second warranty given by plaintiff's agent, stated that the purchase was made May 8, 1906, and the second warranty made July 2, 1906. Held, under this plea, that plaintiff need not prove that the original contract was accepted and in force before the second warranty was made by the agent.—Gaar, Scott & Co. v. Meyer, 156 Mich. 522.

§ 156. ——By waiver of general issue.

¶ 727. Under Circuit Court Rule 42, § 3, providing that whenever in an action the defendant, by notice accompanying his plea, waives the benefit of the general issue and admits the facts alleged in the plaintiff's declaration, but attempts to defeat plaintiff's recovery by set-off or recoupment, or by affirmative defense which, if true, defeats plaintiff's recovery, such defendant shall have the opening and closing in the taking of testimony and in the argument, a defendant who by plea waives the benefit of the general issue and admits facts alleged in declaration, claims the right to open and close and files notice of recoupment does not admit away all right of defense in case.—Sparks v. Lord, 198 Mich. 415.

§ 157. Admissions implied from specific pleas.

¶ 728. A plea of estoppel admits the cause of action, and if the estoppel fails judgment follows in due course against the defendant.—Whittemore v. Stephens, 48 Mich. 578.

¶ 729. A notice of the statute of limitations attached to a plea presupposes the existence of a right of action which has become barred by the length of time.—Hume v. Grand Trunk Western Ry. Co., 192 Mich. 225.

§ 158. Admission by failure to put in affidavit of nonexecution.

Effect and conclusiveness of affidavit, see ante § 150.

Effect of admission of factum of instrument by failure to deny as removing it from facts concluded by the judgment, see Former Adjudication ¶ 459.

Rule that execution of instrument is admitted if not denied under oath, see 1916 C. C. Rule 33.

¶ 730. Where a written instrument is sued upon, a failure to deny its execution by affidavit operates, under C. C. Rule 79, as an admission of the delivery thereof, as the execution includes delivery.—People v. Johr, 22 Mich. 461.

¶ 731. Under a declaration counting expressly upon a replevin bond, its execution is admitted under rule 79, unless denied by affidavit.—Jennison v. Haire, 29 Mich. 207.

¶ 732. In action on a contract that is set out verbatim in the declaration, and alleged to have been jointly executed, the plea of the general issue, without any affidavit, admits the execution of the contract in manner and form as alleged.—Curran v. Rogers, 35 Mich. 221.

¶ 733. Where a declaration counts on a policy of insurance, and no affidavit is filed denying its execution, the execution of the policy is thereby, under rule 79, admitted, and no evidence need be introduced to prove it.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 734. The averment in a declaration on an insurance policy that it was made and issued to plaintiff as described is admitted if not denied by affidavit filed with the plea (Circuit Court Rule 79).—Simon v. Home Ins. Co. of New York, 58 Mich. 278.

¶ 735. Where no affidavit of nonexecution has been filed, defendant in an action on an insurance policy that had been renewed cannot show that plaintiff, who was defendant's agent, had fraudulently renewed the policy after the loss; the policy and renewal constituted the contract whereon the action was brought.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 736. Under C. C. Law Rule 79, if one who is sued for rent omits to deny on oath the execution of the lease, he cannot make any defense inconsistent with its execution.—Jacobson v. Miller, 41 Mich. 90.

¶ 737. In suit upon an indemnity bond no proof is necessary of its execution when not denied by affidavit.—Lee v. Wisner, 38 Mich. 82.

¶ 738. Failure to file an affidavit denying the execution of a written instrument does not prevent the showing that such instrument, though dated Jan. 2, was in fact made Sunday, Jan. 1.—Ames v. Quimby, 106 U. S. 342; 27 L. ed. 100, 1 Sup. Ct. Rep. 116.

¶ 739. The want of an affidavit denying the execution of a written instrument which was executed in duplicate and upon which a claim of set-off is based does not preclude plaintiff from showing that his duplicate differs in its contents from the one retained by defendant.—Ames v. Quimby, 106 U. S. 342; 27 L. ed. 100, 1 Sup. Ct. Rep. 116.

¶ 740. Where to a declaration which sets out a written contract in what purports to be its terms, defendant pleads the general issue without sworn denial of execution, he admits execution in manner and form as alleged.—Jenkinson v. Monroe Brothers & Co., 71 Mich. 630.

¶ 741. Where the contract sued upon is fully set out in the declaration, failure to deny its execution renders proof thereof unnecessary.—Hemminger v. Western Assur. Co., 95 Mich. 355.

¶ 742. Under C. C. Law Rule 79, where the declaration sets forth the contract sued upon, plea of the general issue without denial, etc., admits the execution of the contract and that defendant's signature thereto through his purported agent was duly authorized.—Inglish v. Ayer, 92 Mich. 370.

¶ 743. The declaration against a mutual benefit society, averred that "there was duly prepared a paper, in the usual form, assuring to [decedent] and to this plaintiff the said sum of $2,000 on occurrence of the death of," etc. The execution of the contract was not denied by the defendant, and so was held, under C. C. Rule 79, to have been admitted for the purposes of the trial. —Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

¶ 744. Where, in a suit upon a bond given by an agent to secure the performance of his contract with the principal a copy of the bond is served with the declaration, and defendants plead the general issue, and no affidavit denying the execution of the bond is filed under C. C. Law Rule 79, plaintiff cannot be put to proof of the execution of the instrument or the handwriting of defendants, and testimony tending to show that the bond was not executed until some time after the date which it bears is inadmissible.—Union Cent. Life Ins. Co. v. Howell, 101 Mich. 332.

¶ 745. In an action against a board of education to recover for services as a school teacher, the authority of the board's secretary to make the contract with plaintiff cannot be denied by defendant where the latter, by pleading the general issue without affidavit of denial, has admitted the execution of such contract.—Derry v. Board of Education of East Saginaw, 102 Mich. 631.

¶ 746. A plea of the general issue without affidavit would not admit the execution of an unsealed obligation when a sealed one is declared on.—McCormick v. Bay City, 23 Mich. 457.

¶ 747. Where the declaration in a suit upon a contract fails to set it out verbatim or to aver that it was in writing, the failure of defendant to file with his plea an affidavit of nonexecution (C. C. Law Rule 79) will not prevent him from showing upon the trial that the contract was not his individual obligation.—Armstrong v. Andrews, 109 Mich. 537.

¶ 748. Since an affidavit of nonexecution is unnecessary to let in proofs where the instrument is not declared on, a plea of the general issue is sufficient where a declaration upon an insurance policy alleges renewal but does not purport to set up a written one.—Montross v. Roger Williams Ins. Co., 49 Mich. 477.

¶ 749. A surety pleading the general issue to a declaration on a replevin bond thereby admits its execution and validity; and a contention therefore that the bond signed by defendant was not a legal bond because one had already been filed and there was no order by the court for the making of a new bond is not tenable.—Stafford v. Baker, 141 Mich. 44.

¶ 750. Where a copy of a certificate of insurance was attached to the declaration and no plea in abatement was interposed, but a plea of general issue is entered with notice that the defense will be suicide, and no affidavit was filed or served at the time defendant pleaded or at any other time. denying the execution of the policy, no proof of execution is required.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

¶ 751. C. C. Rule 33, providing that upon the plea of general issue being made in an action upon any written instrument, the plaintiff shall not be put to proof of the execution thereof or of the handwriting of the defendant unless defendant files and serves a copy of the affidavit denying the same, applies only to the instrument sued upon and has no reference to a paper which may be used as evidence to support the plaintiff's claim.—Oceana Canning Co. v. King, 195 Mich. 628.

§ 159. Construction, effect, and conclusiveness of admissions.

Construction of plea to determine whether or not a fact was admitted, see also ante ¶ 724.

Right of defendant to prove fact differing from that admitted by his plea and notice, see also ante ¶ 722.

Effect of failure to deny execution of instrument different from that declared on or not a part thereof, see ante § 158.

¶ 752. A plaintiff is not bound by a claim of defense contained in a notice, or by the facts stated therein, added to a plea under C. C. Rule 23, § 6, providing that such statement of facts shall be treated as an admission by the defendant and need not be proved by the plaintiff, even though he offered such record in evidence.—Dennis v. Vinton, 199 Mich. 430.

¶ 753. An admission in the answer is construed as referring to the time alleged as of which the fact is alleged to be true. —Carmichael v. Lathrop, 112 Mich. 301.

¶ 754. Under C. C. Rule 23, § 6, providing that any statement of fact set forth in a notice added to a plea shall be treated as an admission by the defendant and need not be proved by the plaintiff, the plea and notice are a part of the record and need not be formally introduced in evidence in order to make any admissions they may contain available to plaintiff.—Dennis v. Vinton, 199 Mich. 430.

¶ 755. In an action by the assignee on township railroad and construction bonds issued under the Act of March 22, 1869, under statutes providing that, upon a plea of general issue, in an action upon any written instrument under seal or without seal, the plaintiff should not be put to proof of the execution of the instrument or the handwriting of the defendant unless the plea was verified by affidavit, where the plea of general issue was interposed and the plea was not verified in broad terms, but an affidavit was filed that the township clerk, whose signature was necessary under the law to the due execution of the bonds, could not have signed them before the summer of the year in which they were issued, the effect of the affidavit, in view of the fact that the bonds were authorized by vote in May of such year and of the provision of the Act of March 22, 1869, that if any township voted aid to railroads, which was authorized it "shall within sixty days after the question of aid is determined by a vote of the electors * * * issue its coupon bonds for the amount so determined to be granted," was to raise the question whether the bonds were valid if issued after the sixty days.—Township of Chickaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 620.

§ 160. Issues made by general issue.

Right to question sufficiency of declaration in law under plea of general issue, see post ¶¶ 859, 861, 863, 866.

Proofs requiring plea puis darrein or supplemental plea, see ante § 136.

Matters subsequent to commencement of action, see post § 164.

Issues made by notices, see post § 162.

Admissions by failure to accompany plea with affidavits, see ante § 158, and see also ante §§ 142-146.

Right to prove estoppel under general issue, see also Estoppel § 58.

Former adjudication under general issue, see Former Adjudication § 94.

Issues and proof of payment or tender under general issue, see Payment § 47.

Pleading releases, and sufficiency of the general issue to admit proof of release, see Releases, IV.

Raising statute of frauds under general issue, see Frauds, Statute of § 150.

Insufficiency of general issue to present bar of limitations, see Limitations § 105.

[Note.—The general issue in particular actions is also treated in the topics devoted to such actions. See Assumpsit § 52; Conversion § 27; Ejectment § 36; Trespass, II. Owing to the fact that the general issue admits of a negation of any such facts as the plaintiff must affirm to make his case, the question of scope of the general issue tends to become a concrete question of affirmative elements of the cause of action. For the question in this form, see specific topics treating of the various causes of action.]

Scope of the general issue in trespass for assault, see Assault § 21.

Scope of general issue in assumpsit, and defenses open under it, see Assumpsit § 52.

Evidence by bailee admissible under the general issue, see Bailments ¶ 61.

Defenses allowable under general issue in tort for loss of baggage, see also Carriers § 256.

Issues under the general issue to declaration on contract, see also Contracts § 298.

Proofs admissible under general issue in Trover, see Conversion § 27.

Scope of general issue on questions of damages, see Damages § 288.

General issue in action on log liens, see Forestry § 23.

Proof under general issue with notice of plaintiff's failure to comply with statutes for admission of foreign corporations, see Foreign Corporations ¶ 89.

Matters provable under general issue in malicious prosecution, see Malicious Prosecution § 20.

Admissibility under general issue that claim was not first presented to defendant municipality, see Municipal Corporations § 213.

Admissibility of defense of title by adverse possession under general issue without notice in ejectment, see Ejectment ¶ 120.

General issue in replevin, see Replevin, III.

Evidence in actions on negotiable instruments under general issue, see Negotiable Instruments § 104.

¶ 756. In Michigan a plea of the general issue is now a denial of all material facts and allegations contained in plaintiff's declaration.—Creen v. Michigan Cent. R. Co., 168 Mich. 104.

¶ 757. The general issue, under R. S. 1846, chap. 99, § 22, How. St. §§ 7361, 7362,

in all civil actions traverses every material averment in the plaintiff's declaration which must be proved, whatever the nature or form of the action may be.—Kinnie v. Owen, 1 Mich. 249.

¶ 758. The statutory plea of the general issue is a complete denial of the plaintiff's cause of action, and calls upon him to prove it.—Ingalls v. Eaton, 25 Mich. 32.

¶ 759. The statutory general issue, like the plea of not guilty, is a denial of all the material allegations in the declaration, and is sufficient to enable defendant to contest all such allegations, and to put the plaintiff upon the proof of all or any of them.—Rawson v. Finley, 27 Mich. 268.

¶ 760. Under the general issue defendant may deny whatever the plaintiff is obliged to prove as an essential part of his case.—Edwards v. Chandler, 14 Mich. 471.

¶ 761. The statutory general issue is as broad as at the common law, where it put at issue everything that plaintiff had to show to make out his case.—Osborn v. Lovell, 36 Mich. 246.

¶ 762. A defense that is confined to a refutation of the facts stated in the declaration, and is necessary to be proved in order to enable plaintiff to recover, may be made under the general issue.—Child v. Detroit Mfg. Co., 72 Mich. 623.

¶ 763. Payment may always be proved as matter of direct defense.—Olcott v. Hanson, 12 Mich. 452; Brennan v. Tietsort, 49 Mich. 397.

¶ 764. Matter in estoppel must be specially pleaded, and is inadmissible under the general issue without notice.—Wessels v. Beeman, 87 Mich. 481.

¶ 765. The general issue is a denial of plaintiff's cause of action, and under it an election by him of another remedy is admissible.—Thomas v. Watt, 104 Mich. 201.

¶ 766. The defense of an election to sue in assumpsit may be made under the general issue without notice, if the party afterwards brings trover.—Thomas v. Watt, 104 Mich. 201.

¶ 767. Estoppel of the plaintiff to claim an interest in the goods is admissible under the general issue in trover without notice of it as a special defense.—Rogers v. Robinson, 104 Mich. 329.—Thomas v. Watt, 104 Mich. 201.

¶ 768. The general issue in debt denies every fact necessary to enable plaintiff to recover.—Young v. Stephens, 9 Mich. 500.

¶ 769. Under the general issue in covenant defendant may show that the deed is not his by proving a lack of power in the agent who executed it in his behalf.—State Prison Agent v. Lathrop, 1 Mich. 438.

¶ 770. The general issue does not admit plaintiff's capacity where suit was not originally brought by him, but was revived in his favor, after general issue pleaded, upon suggestion of the original plaintiff's death.—Vickery v. Beir, 16 Mich. 50.

¶ 771. The plea of the general issue admits plaintiff's representative character as administrator or executor.—Vickery v. Beir, 16 Mich. 50; Bachelder v. Brown, 47 Mich. 366.

¶ 772. Lack of authority in a township to bring a certain action is properly pleaded by the general issue to an action of that kind by the township; authority is not admitted by the plea.—Township of Denver v. White River Log & Booming Co., 51 Mich. 472.

¶ 773. In an action for damages caused by water from defendant's mill race, a claim that defendant had a right to flood plaintiff's land by virtue of a deed and by prescription, is an affirmative defense and under 1897 C. C. Rule 7, is not admissible under a plea of the general issue.—Scott v. Longwell, 139 Mich. 12.

¶ 774. It was competent for the defendant in an action on the case, to show, under the general issue, without special notice, that he did not obstruct either a natural water way, or a water way gained by prescription or adverse user, where such conduct was alleged in the complaint; but that he only obstructed a water way caused by the unlawful act of the plaintiff.—O'Connor v. Hogan, 140 Mich. 613.

¶ 775. In an action for damages to land caused by flooding caused by an earth embankment of the space occupied by a trestle erected by a railroad company in its maintenance of its roadbed, a defense that the embankment was built by another company to which the defendant had leased its equipment and franchises for a term of 99 years is available under the general issue.—Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58.

¶ 776. The defense of probable cause for an arrest must, in an action for false imprisonment against a sheriff for arresting without a warrant be specially pleaded, and cannot be shown under the plea of not guilty.—White v. McQueen, 96 Mich. 249.

¶ 777. A plea of the general issue is sufficient in an action of ejectment to admit without notice the defense of title by adverse possession.—Miller v. Beck, 68 Mich. 76.

¶ 778. Where an action of trespass begun before a justice of the peace has been certified to the circuit under Comp. L. 1871,

§ 5330, How. St. § 6895, because the plaintiff's evidence showed that a question of title to land was involved, the defendant's failure to give notice with his plea that title would come in question does not, on the trial in the circuit, operate as an admission of plaintiff's title so as to exclude evidence of title in defendant; the case stands in the circuit subject to the same rules of proof and disproof as though it had been originally begun there.—Rawson v. Finlay, 27 Mich. 268.

§ 161. ——Misnomers and matters pleadable in abatement.

Admissions of plaintiff's capacity or right to sue by plea of general issue, see ante ¶¶ 770-772.

¶ 779. Where a written contract is sued upon, a variance in name may be taken advantage of under the general issue, and the misnomer need not be pleaded in abatement. —Gilbert v. Hanford, 13 Mich. 40.

¶ 780. The pendency of garnishment proceedings cannot be shown under a plea of the general issue and notice in an action by the garnishee's creditor, but should be pleaded in abatement.—Near v. Mitchell, 23 Mich. 382.

¶ 781. One who is sued as for money had and received cannot under the general issue make the defense that the money was credited to a firm whereof he was a member and not to himself; he should have pleaded in abatement the nonjoinder of his copartners. —Coon v. Anderson, 101 Mich. 295.

¶ 782. Failure to plead in abatement for nonjoinder does not enlarge the personal right of recovery of the party bringing suit. —Ives v. Williams, 53 Mich. 636.

§ 162. Issues made by notices.

Sufficiency of notices of set-off and recoupment to tender and make issue, see Set-off, IV.

Issues under plea of limitations, see also Limitations § 108.

¶ 783. The office of a notice attached to a plea is to present tangible issues, and not to introduce matters that form no part of the issue. It cannot make them relevant or material.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 784. Where a special notice is attached to the plea of the general issue, and the proof offered thereunder is sufficient to establish a defense, the defendant is limited to such matters as may be introduced under the plea itself.—Waldo v. Waldo, 52 Mich. 94.

¶ 785. Proof of an affirmative defense under a plea of the general issue with notice of special defense cannot be made beyond the scope of the notice.—Bishop v. Dodge, 196 Mich. 231.

¶ 786. A notice of prescriptive rights attached to a plea denies that an alleged right of action ever existed.—Hume v. Grand Trunk Western Ry. Co., 192 Mich. 225.

¶ 787. It is not competent to show in defense distinct facts that have not been made part of the issue as framed; therefore it is erroneous to admit evidence of a fraud different from that set up in defendant's notice.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

§ 163. Issues in rebuttal or replication.

¶ 788. Since there can be no replication to the notice annexed to the general issue, a plaintiff in trespass quare clausum, who has declared generally, cannot have the benefit that a new assignment in a replication would give him, but he must amend his declaration.—McFarlane v. Ray, 14 Mich. 465.

¶ 789. That which in a replication would not be a departure in pleading may be given in evidence in reply to a defense under the general issue.—Caldwell v. Gale, 11 Mich. 77.

¶ 789a. When plaintiffs have finished their proof and rested their case on one theory, they cannot, under claim of rebuttal, put in a new and different case as a ground of recovery.—Carney v. Hotchkiss, 48 Mich. 276.

§ 164. Issues arising subsequent to joinder of issues.

Necessity of supplemental pleading to make issues, see ante § 136.

Construction and effect of supplemental pleas, see ante § 139.

¶ 790. The plea of the general issue is not an admission of facts subsequently occurring. —Vickery v. Beir, 16 Mich. 50.

¶ 791. In an action upon an appeal bond the satisfaction of the judgment after joinder of issue cannot be shown unless specially pleaded.—Souvais v. Leavitt, 53 Mich. 577.

¶ 792. In action on a replevin bond by defendant to the replevin suit, who was a chattel mortgagee in possession, the obligor on the bond cannot under the general issue without special notice make the defense that the lien of the mortgage had been discharged by foreclosure and the judgment in the replevin based theron likewise discharged so that no damage accrued under the bond.—Stafford v. Baker, 141 Mich. 44.

¶ 793. A conveyance of the premises by plaintiff in ejectment to a third party pending suit is not admissible in evidence for the defense without a special notice in the nature of a plea puis darrein.—Jenney v. Potts, 41 Mich. 52.

¶ 794. Tax-deeds obtained by defendant in ejectment after issue joined cannot, if admissible at all, be introduced without some-

thing on the record in the nature of a plea puis darrein.—Hurd v. Raymond, 50 Mich. 369.

¶ 795. A plea of puis darrien continuance is not necessary to permit the plaintiff in an action for the price of a machine, to show that by using it down to the time of trial the purchaser has estopped himself from setting up a rescission of the contract of sale. —Linderman Machine Co. v. Shaw-Walker Co., 187 Mich. 28.

X. VARIANCE OF PLEADINGS AND PROOFS.

§ 165. In general; conformity required.

Necessity that evidence follow the allegations, see also ante ¶ 92.

Raising questions of variance between writ and declaration by motion, see ante ¶¶ 353-355.

Time for objections, see post § 174.

Avoiding variance by regarding amendment as made, see post ¶ 896.

Sufficiency of partial proofs making out complete cause of action, see ante § 151, ¶ 709.

Conformity of bill of particulars to evidence and effect to limit issues, see ante §§ 98, 100.

Requisite conformity of judgment to pleadings and findings, see Judgments § 13.

Requisite conformity of verdicts and findings to issues, see Verdicts.

Conformity of opening address to case pleaded, see Argument of Counsel § 4.

Variance of opening statement from issues, see Argument of Counsel § 5.

Preclusion of party to shift theory from opening and to introduce evidence on another theory, see also Evidence ¶ 378.

Directing verdict for variance in proofs, see Directing Verdict § 13.

Sufficiency of proof of part of the frauds alleged or of substance of issue of fraud, see also Fraud § 94.

¶ 796. The evidence offered must correspond with and support the material and necessary averments in the declaration or plea. —Lull v. Davis, 1 Mich. 77.

¶ 797. Recovery cannot be grounded upon a fact not counted upon as a ground of recovery in the declaration.—Williamson v. Haskell, 50 Mich. 364.

¶ 798. Where a claim against an estate is for a special deposit of a quantity of government and state bonds with a firm of which decedent was a member, testimony is fatally defective which, while tending to show the deposit of bonds, does not identify their character.—Hatheway's Appeal, 52 Mich. 112.

¶ 799. In declaring upon a written contract the pleader purported to set it forth in full, but omitted the signatures, and on the trial, after proving said signatures, offered the contract in evidence, and objection was made on account of the variance. Held, that the contract was counted upon and sufficiently proved to admit it in evidence.—George W. Roby Lumber Co. v. Gray, 73 Mich. 356.

¶ 800. In an action to recover on a contract, under a plea of the general issue, where the evidence shows others than the defendant are liable on the contract, the plaintiff may still recover, in the absence of a plea in abatement.—McKnight v. Lowitz, 196 Mich. 368.

¶ 801. An action of replevin brought by a father in his own name cannot proceed on the theory that he is suing in his child's behalf as guardian or next friend.—Ash v. Mathes, 52 Mich. 615.

¶ 802. A notice of defense setting up an agreement between defendant and two other parties is not sustained by proof of an agreement entered into with one of said parties. —Hudson v. Emmons, 107 Mich. 549.

§ 166. Materiality of variance.

[Note.—It is intended to treat here only the general rules of variance. Variance in particular actions is treated in the specific topics dealing with such actions. See cross-references which follow and other topics which will suggest themselves.]

As to allegations of description, time, place, etc., see post § 167.

As to terms and character of instruments and records, see post § 168.

As to character and elements of torts, see post § 169.

Conformity of proofs to diverse counts, see post § 170.

Materiality of issues, see ante § 151.

Variance in proof of damages, see Damages, X, D.

Variance in bastardy proceedings, see Bastards § 7.

Variance in action between broker and principal, see Brokers § 34.

Variance under plea of limitations, see Limitations § 108.

Variance in ejectment, see Ejectment § 37.

In actions upon indemnity or for contribution, see Indemnity § 21.

Variance in action against physician for malpractice, see Medicine and Surgery § 14.

Variance in proceedings to enforce mechanics' liens, see Mechanics Liens § 50.

¶ 803. A variance between the declaration and the proof should be disregarded at the trial, when the instrument is otherwise sufficiently described in the declaration, so that defendant cannot be surprised or misled by the evidence.—Lothrop v. Southworth, 5 Mich. 436.

¶ 804. Judgment will not be reversed for a variance which could not have prejudiced plaintiff in error.—Barton v. Gray, 57 Mich. 622.

¶ 805. On writ of error by plaintiff in an action on a contract, held that the questions of fraud involved and evidence admitted were not such as went only to formalities in pleading which might be saved in the supreme court by the statute of amendments, but that they went to the very heart of the case.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 806. Where no plea in abatement for want of parties is filed to a declaration on the common counts for the price of merchandise sold to a third person, the defendant will be held liable if the purchaser is shown to be either his agent or his partner.—Campbell v. Sherman, 49 Mich. 534.

¶ 807. Where the declaration in an action for injury from a defective highway alleged that plaintiff was driving her horse at the time of the injury, the fact being that the horse was driven by another woman in the same vehicle, such variance, not having been objected to in the court below, cannot justify an affirmance in defendant's favor of a judgment that should otherwise be reversed.—Ross v. Township of Ionia, 104 Mich. 320.

§ 167. Descriptive allegations as to time, place, quantity, and the like.

As to amount of pleaded judgment, see post ¶ 817.
Variance as to identity of bonds sued for, see also ante ¶ 798.
Sufficiency of allegations of name and description, see ante §§ 11, 12.
Materiality of time, place, etc., see also ante § 151.
Allegations of name and variance therein, see also Names §§ 2, 3.

¶ 808. Generally allegations of time, place, quantity, quality and value, when not descriptive of the identity of the subject of the action, are immaterial, and need not be proved strictly as alleged.—Hewitt v. Pere Marquette R. Co., 171 Mich. 211.

¶ 809. Whether allegations of time, place, quantity, quality and value are descriptive, is to be determined by the judge in the case before him, and no precise rules can be laid down according to which the fact can be in all cases determined.—Hewitt v. Pere Marquette R. Co., 171 Mich. 211.

¶ 810. A variance in the description of a written instrument in the pleadings will be disregarded where the party could not have been misled, and has allowed the instrument to be received in evidence without objection.—Rorabacher v. Lee, 16 Mich. 169.

¶ 811. In an action for money had and received the declaration mentioning dates need not give the exact date, but it may be stated as "on or about a certain day," and in that case the plaintiff is not restricted to proof of that special day. The question to be determined at the trial in each case is whether the proof is so variant from the date alleged as to mislead the opposite party.—Hamilton v. Ingham Circuit Judge, 84 Mich. 393.

¶ 812. In a suit in assumpsit on the common counts for money loaned, a plaintiff should not fail in his action from the fact that his proof as to the dates of making the loans varies a few days from the dates specified in his bill of particulars.—Bennett v. Maurice, 162 Mich. 254.

¶ 813. Where, in pleading, a writ is alleged to have issued, or a written instrument to have been made, on a certain day, and the writ or instrument, when offered in evidence, bears date a different day, this is no variance.—Lothrop v. Southworth, 5 Mich. 436.

¶ 814. In an action against a railroad company under Comp. L. 1897, § 6295, How. 2nd Ed., § 6649, for damages for the loss of a barn alleged to be due to a fire started from a cinder from a passing engine of defendant, held that a variation of an hour between the averment of the declaration as to the time of the passing of the train alleged to have caused the fire and the proofs was not fatal, especially where the defendant was able to meet the proofs made by the plaintiff.—Malloy v. Grand Trunk Ry. Co. of Canada, 192 Mich. 344. (Moore, Bird and Ostrander, JJ., dissenting.)

¶ 815. There is no variance between the declaration and proof in an action against a city for personal injuries due to a depression in a sidewalk on the ground that plaintiff was allowed to recover on a defect which was not alleged in the declaration where the place of the accident was described in the declaration as at "a point on the south sidewalk on Erie street, between the church and the parsonage of the Methodist Episcopal Church" and the proofs disclosed that the accident happened on the south sidewalk on Erie street, between the church and parsonage, that the defective blocks were taken out and new ones put in, and plaintiff testified that it was at the point where the new blocks were put in that she fell.—Wadkins v. City of Albion, 201 Mich. 130.

¶ 816. Where plaintiff alleged that she was injured at a point 125 feet west of a certain street, and her proof showed the distance to be 93 feet, her failure to amend her declaration was a mere matter of form, which under § 10270, Comp. L. 1897, does not entitle defendant to a reversal.—Williams v. City of Lansing, 152 Mich. 169.

§ 168. As to terms and tenor of instruments and records pleaded.

See also ante ¶¶ 746, 810.
Variance as to assignment pleaded, see Assignments § 34.
Variance in actions upon contracts of guaranty, see Guaranty § 24.

¶ 817. It is not a material variance from a judgment noticed as special matter of defense that the record of judgment offered in defense varied slightly in the amount, and had been so amended as to strike out the name of one of the parties against whom it was rendered, he having been an indorser and not served with the declaration.—Arnold v. Nye, 23 Mich. 286.

¶ 817a. The plaintiffs, by their declaration, claimed the premises as trustees "to sell the said premises, and apply the moneys which they should obtain to the payment of certain debts" of one B. The declaration of trust put in evidence on the trial, and signed by B., provided for the payment of certain notes signed by another person and to which B. was not a party. Held, that it was fairly to be inferred that B. was in some way bound for the payment of these notes; and if not, that his providing for their payment rendered them so far his debts as to satisfy the averment in the declaration.—Ives v. Kimball, 1 Mich. 308.

§ 169. As to character and elements of torts.

Variance as to time or place, see ante § 167.
As to description of actors in torts, see also ante ¶ 807.
See generally topics treating of the various torts, e. g., Assault; Conversion; False Imprisonment; Libel; Malicious Prosecution; Tresspass; Nuisance; Negligence; also topics treating of negligence respecting places and relationships, e. g., Carriers; Highways, XII; XIII; Buildings; Bridges; Railroads, VIII; Street Railways, IV; Waters, II, IV; Master and Servant, III.
Variance as to description of animal in declaration and proof, see Animals ¶ 101.
Variances in actions for fraud, see Fraud § 93.
Variance in actions for libel and slander, see Libel and Slander, § 63.

¶ 818. Damages as for positive malfeasance charged in the declaration cannot be recovered upon evidence of nonfeasance only; and defendant is not required to meet such a showing.—Macumber v. White River Log & Booming Co., 52 Mich. 195.

¶ 819. Under a declaration charging in one count that defendant has defrauded plaintiff of a horse, and in another that he has wrongfully converted it, testimony of fraudulent purchase and conversion is available for both counts.—Dayton v. Monroe, 47 Mich. 193.

§ 170. Conformity of proofs to diverse counts.

Immateriality of variance from special count where common counts cover the proof, see Assumpsit § 57.

¶ 820. When a declaration sets forth separate causes of action, one of which is statutory, and the other at common law, neither can be established except by facts proper to it.—Bottomley v. Port Huron & N. W. R. Co., 44 Mich. 542.

¶ 821. Where a declaration sets up distinct and unconnected causes of action, as by counting on successive official bonds given by defendant upon different appointments to the same office, there must be evidence specifically applicable to any particular count to sustain a recovery upon it.—O'Marrow v. City of Port Huron, 47 Mich. 585.

¶ 822. Pleading a special count in assumpsit does not estop the plaintiff from recovering under the common counts if he abandons the special count at the outset and all his evidence is consistent with the common counts.—Berringer v. Cobb, 58 Mich. 557.

¶ 823. In an action for negligence there cannot be a fatal variance between the declaration and plaintiff's proofs, provided the proof contains one of the two counts of the declaration.—Kinney v. Folkerts, 78 Mich. 687.

¶ 824. Where the declaration upon a note contains three counts, a refusal by the court to withdraw, because of a variance, all consideration of the case under one count is not prejudicial error, where the other two are sufficient to allow a recovery.—Roberts v. Hawkins, 70 Mich. 566.

XI. AIDER, CURE, AND WAIVER OF DEFECTS AND OBJECTIONS.

General law as to curing errors by other rulings or incidents of trial, see Harmless Error, III, A.
Waiver of bill of particulars, see ante § 96.
Waiver of leave to amend by assent to direction of verdict on pleadings to test them, see ante ¶ 473.
Nonaider of demurrer by judicial notice of facts contrary to allegations of declaration, see ante ¶ 390.

§ 171. In general; materiality of defects.

Misstating number of statute in pleading it, see also ante ¶¶ 50, 51, 53.
Immateriality of defects in one count, others being good, see post § 187.
Materiality of variances, see ante § 166.
Errors in pleading harmless in themselves, see Harmless Error, II, A.
Errors in pleading not harmful to party objecting, see Harmless Error § 18.
Necessity of proper objection or action in trial court by objector in order to save for review questions of sufficiency of the pleadings, see Saving Questions.
Errors and irregularities in pleadings as ground for collateral attack, see Judgments § 107.

¶ 825. In nonbailable actions a variance between the declaration and the writ of summons as to the form of action is entirely immaterial, and in bailable actions it would

operate only to discharge the bail and not to nullify the declaration.—People ex rel. Smith v. Wayne Circuit Judge, 27 Mich. 87.

¶ 826. The omission of the words "use of" in the common count for money paid to defendant's use is a mere clerical misprision that ought to be corrected on the trial.—Brown v. McHugh, 35 Mich. 50.

¶ 827. The misstatement of the number of a section of a statute declared on is not reversible error.—Duffiny v. Detroit & Mackinac Ry. Co., 186 Mich. 40.

¶ 828. Joinder of repugnant counts in the same declaration does not preclude recovery on one of them since they do not nullify each other.—Berringer v. Cobb, 58 Mich. 557.

¶ 829. Where a policy of insurance declared on is not set out in full in the declaration, and, in answer to a demand for a bill of particulars, the plaintiff gives the date and amount of a second policy held by him, as well as of an original policy, the effect is the same as if the dates and the amounts of the two policies were stated in the original declaration, and, no amendment being necessary, the question of whether a declaration could be amended, so as to introduce a new cause of action after the expiration of the time within which the suit might be brought, is immaterial.—Hurd v. Northern Acc. Co., 153 Mich. 474.

¶ 830. The failure of the plaintiff to declare on a logging contract as modified was harmless error where defendant was not surprised because of the fact that there had been a previous trial of the case at which he became fully informed as to the position of the plaintiff.—Brooks v. Bellows, 192 Mich. 109.

§ 172. Modes and time of taking objections.

Generally speaking an objection will not be heard on review if it was not made in the court below, or, as often phrased, "an objection cannot be first made on appeal." Hence it is necessary to take some action invoking a ruling by the trial court to save the question. See Saving Questions. In the case of pleadings, however, the ordinary modes for the clarification and settlement of the issues also serve the end of saving the question for review. The law of demurrers, motions, and pleas is treated, therefore, in Pleading. See ante III, IV.

Objections to bills of particulars, see ante § 99, post § 178.

Objections for variance, see post § 174.

Elections and motions to require election, see ante §§ 51, 80.

Intendments against objections not seasonably made, see also ante ¶ 70.

Mode and time of taking objections to evidence based on defects in pleadings, irrelevancy thereto, or variance therefrom, see Trial, V; Saving Questions.

Time for objections for nonjoinder, see also ante ¶ 252 et seq.

Effect of demurrers to search the record, see ante § 88.

Waiver of proper and sufficient objections after same are made, see Saving Questions, V.

Waiver of objections by failure to except to ruling thereon, see Saving Questions, IV, V.

Objections to offer or introduction of evidence, see Trial, V, C.

Direction of verdict on insufficiency or deficiency in pleadings, see Directing Verdict § 23.

Assignments of error on the pleadings, see Appeal § 203.

Necessity of assignments to test sufficiency on error, see Appeal § 119.

Assignments to test sufficiency of allegations to admit evidence, see Appeal § 119.

Objections or pleas to writ of error, see Appeal § 144.

Defects in pleading as ground for new trial, see New Trial § 7.

¶ 831. Formal defects in the declaration should be taken advantage of by demurrer.—Hatheway v. Sackett, 32 Mich. 97; Aldrich v. Chubb, 35 Mich. 350.

¶ 832. If a declaration alleges a substantial grievance any objections for mere inartificiality must be raised by demurrer.—Briggs v. Milburn, 40 Mich. 512.

¶ 833. Mere clerical omissions in a declaration can be reached, if at all, only by demurrer.—Brown v. McHugh, 35 Mich. 50.

¶ 834. Defects in a declaration are not noticed if, being amendable, they have not been demurred to.—Norton v. Colgrove, 41 Mich. 544.

¶ 835. Fatal objections to a declaration should be taken by demurrer and not by objections on the trial, since if it is possible to sustain the case by amendment it will be done.—Barton v. Gray, 48 Mich. 164.

¶ 836. Where the action chosen is foreign to any right claimed, there is no necessity for a demurrer or plea in abatement; the court has no right to give a judgment for plaintiff.—City of Grand Rapids v. Whittlesey, 33 Mich. 109.

¶ 837. Formal defects in pleadings, even if not amendable, should be brought to the court's attention at the earliest reasonable opportunity, if the opposite party means to rely on them. And if the defect is one that would be cured by verdict, the trial judge should either disregard it or direct amendment to be made and the trial to proceed, and if this takes defendant by surprise he

can continue the case on a proper showing. —Sutton v. Van Akin, 51 Mich. 463.

¶ 838. Objection to the sufficiency of a declaration in debt, assigning breach in terms of the bond's condition, can only be taken by demurrer if good at all.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

¶ 839. In the absence of a plea in abatement, nonjoinder of a necessary plaintiff cannot be urged, and the most a defendant can insist on in such case is that plaintiff be restricted to his own damages.—Michaud v. Grace Harbor Lumber Co., 122 Mich. 305.

¶ 840. Duplicity must be challenged by special demurrer and cannot be made the subject of objection at the trial.—Douglas v. Marsh, 141 Mich. 209.

¶ 841. An objection that the declaration in an action for negligent injury does not point out with sufficient particularity the exact place of the accident should be raised by demurrer and comes too late at the trial. —Campbell v. City of Kalamazoo, 80 Mich. 655.

¶ 842. Such technical objections to a declaration in an action against a city for injuries caused by a defective sidewalk, as that the declaration is drawn without referring to or counting upon the statute, that the place of the accident is not sufficiently described, and that the declaration is in the alternative and therefore uncertain, should be raised by demurrer, if available at all, and are properly overruled after the jury has been called.—Fuller v. City of Jackson, 82 Mich. 480.

¶ 843. Plaintiff's omission in a declaration for negligence to allege that it was defendant's duty to exercise due care in respect of the acts complained of should be taken advantage of by special demurrer and cannot be objected to after verdict.—Fox v. Spring Lake Iron Co., 89 Mich. 387.

¶ 844. Objections to a declaration in a suit on a liquor bond to collect a judgment recovered against the principal that it fails to allege the approval of the bond, or that the cause of action on which the judgment was rendered accrued within the lifetime of the bond, are technical, and should be raised by demurrer.—Gullickson v. Gjorud, 89 Mich. 8.

¶ 845. Formal objections to a declaration —e. g., that the declaration upon an undertaking to stay an execution counts upon it as a common-law obligation and not as a statutory stay—should be taken by demurrer and cannot be raised at the trial or on error.—Sweeney v. Lustfield, 116 Mich. 696.

¶ 846. Objections to the sufficiency of a declaration should be raised early in the proceedings, so that parties may be saved the expense and delay of preparation for trial.—Gay v. Farmers' Mut. Ins. Co., 51 Mich. 245.

¶ 847. An objection to a declaration for not being full enough should be taken before going on with the trial.—Pettibone v. Maclem, 45 Mich. 381.

¶ 848. A declaration is not open to objection for defects after pleading to the merits unless the defects are fatal, and even then objection should be taken before the parties are put to the expense of preparing for trial.—Bauman v. Bean, 57 Mich. 1.

¶ 849. Objections to the form of pleadings raised by way of objections to the admission of evidence are not favored.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

§ 173. ——Objections to bills of particulars.

See also ante ¶ 432.

Formal and substantial defects and objections, see ante § 99.

¶ 850. An objection made for the first time on the trial that a bill of particulars is not sufficiently specific comes too late.—Township of Buckeye v. Clark, 90 Mich. 432.

§ 174. ——Objections for variance.

Materiality of variance, see ante § 166 et seq.

Cure of objections by verdict, see post ¶ 925.

Impropriety of objection first made on appeal, see Saving Questions.

¶ 851. An objection to substantial variance may be made at any stage of the cause; it is never too late.—Pennsylvania Min. Co. v. Brady, 14 Mich. 260.

¶ 852. The point of variance between plaintiff's allegations and proofs must be made in the trial court, while amendments are allowable.—Supreme Council Ladies' Catholic Benev. Ass'n v. Scherer, 174 Mich. 25.

¶ 853. An objection that the evidence does not sustain the declaration is in time if made at any time before the judge trying the case without a jury has given judgment.—Moore v. Nason, 48 Mich. 300.

§ 175. Waiver of defects in declaration by pleas and submission of merits.

Defects cured by verdict and judgment, see post § 183 et seq.

Waiver of demurrer by pleading over, see post § 188.

Instructions limiting theory as curing failure to make election, see ante ¶ 217.

Effect of appearance to waive objection to amendments, subsequent amendment, see Appearance § 10, ¶ 40.

Statutory submission to arbitration as waiver of previous defects in procedure, see Arbitration § 14.
Facts admitted by general issue, see ante IX, C.
Pleas to merits as waiver of jurisdictional objections, see also Appearance § 11.

¶ 854. A declaration that sets forth facts intelligibly cannot be objected to in the supreme court for lack of technical accuracy if it has not been demurred to.—Burke v. Wilber, 42 Mich. 327.

¶ 855. A party who has chosen not to demur, and has taken the chance of a trial of fact, cannot obtain a reversal upon an objection that is one of form rather than of substance.—Seiber v. Price, 26 Mich. 518.

¶ 856. Defendant waives formal defects in a declaration by putting in testimony.—Jenks v. Brown, 38 Mich. 651.

¶ 857. When issue has been joined on the facts without demurrer the declaration cannot be held fatally defective unless inconsistent with any reasonable ground of action.—Jackson v. Collins, 39 Mich. 557.

¶ 858. Failure to demur concedes the sufficiency of the declaration unless the defects are such as cannot by any intendment be supplied or overlooked.—Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584.

¶ 859. Plea of the general issue waives all merely technical objections to the declaration; only where the declaration states no cause of actions is defendant justified in pleading the general issue and raising objection to the declaration at the trial.—Fuller v. City of Jackson, 82 Mich. 480.

¶ 860. If the generality of statement in a declaration is not taken advantage of by demurrer, the declaration will be regarded as sufficient, after pleading to the merits, to admit testimony to sustain the cause of action stated.—Williams v. Raper, 67 Mich. 427.

¶ 861. While the plea of the general issue waives technical and formal objections to the declaration, it does not waive the essential allegations of a cause of action.—Stoflet v. Marker, 34 Mich. 313.

¶ 862. By pleading and going to trial on the merits, a defendant waives all technical defects in the declaration.—Sauer v. McClintic Marshall Cons. Co., 179 Mich. 618.

¶ 863. A plea of the general issue does not waive essential allegations of a cause of action.—Sauer v. McClintic Marshall Cons. Co., 179 Mich. 618.

¶ 864. Pleading and going to trial precludes parties from setting up merely technical defects where the declaration contains a good case otherwise.—Grand Rapids & I. R. Co. v. Southwick, 30 Mich. 444.

¶ 865. An objection that the declaration, in an action for damages for alleged fraud, contains no averment that the alleged false representations induced plaintiff to part with his property, should be raised by demurrer, and will not be considered after a plea to the general issue, where the declaration makes such averment by inference.—McDonald v. Smith, 139 Mich. 211.

¶ 866. An objection that a city cannot sue in ejectment for a street is fundamental and fatal to the action and therefore can be made in the Supreme Court on a case made without a demurrer or plea in abatement where it appears affirmatively.—City of Grand Rapids v. Whittlesey, 33 Mich. 109.

¶ 867. An objection that a declaration in an action for negligent injury fails to refer to the statute, by virtue of which alone the right of action exists, cannot be raised upon the trial under the plea of the general issue.—Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 868. A declaration to the effect that the defendant township carelessly and negligently allowed a highway to become and remain out of repair, and in a dangerous and unsafe condition, in that the roadbed was improperly constructed, and that it knew, or by the exercise of reasonable care ought to have known, of the unsafe and dangerous condition of such highway, and that it thereafter had sufficient time to repair the same, and render it reasonably safe, is not open to objection after general issue pleaded, that the allegations do not sufficiently allege notice to the township, a reasonable time thereafter for repair, and a failure to repair.—Moody v. Township of Shelby, 110 Mich. 396.

¶ 869. A declaration in an action against a city for injuries sustained by reason of a defective sidewalk, averring that defendant "then and there wrongfully and negligently suffered the walk to be and remain in bad and unsafe repair * * * of which it then and there had notice," is not open to the objection, after a plea of the general issue, that it does not contain a sufficient allegation of reasonable time and opportunity, after knowledge or notice of the defect, to put the walk in a proper condition, and of failure to use reasonable diligence therein.—Storrs v. City of Grand Rapids, 110 Mich. 483.

¶ 870. When, to a declaration alleging "a good and valuable consideration," defendant pleads the general issue, he thereby waives his right to a more specific allegation, and consents that evidence of the consideration may be introduced.—Kean v. Mitchell, 13 Mich. 207.

¶ 871. Where in an action of deceit, counts charging one defendant are joined with counts charging two defendants, any objection to such joinder is waived by filing a plea.—Diel v. Kellogg, 163 Mich. 162.

¶ 872. Recovery can be had for tort under the common counts in assumpsit, and if no objection is made to the form of action until after all the evidence is in it will not prevail. —McDonald v. Young, 198 Mich. 620.

§ 176. ——Objections to form of pleas by joining issues of fact.

Waiver of matters of abatement by plea in bar, see post §§ 177, 178.

¶ 873. Objections to the sufficiency of the allegations in a plea of abatement should be raised by demurrer, and, if not made until after judgment, are too late to be considered. —Fisher v. Busch, 64 Mich. 180.

¶ 874. Complainant brought a bill to set aside a deed and for a reconveyance of certain property. Defendant pleaded a former adjudication in another state. Complainant made replication to the plea on the merits after said plea had been sustained by the circuit judge and ten days allowed to join issue. Held, complainant could not on appeal object to the sufficiency of the plea in form.—Niles v. Lee, 169 Mich. 474.

§ 177. Waiver of matters in abatement by pleas in bar.

Waiver of plea by pleading over, see post § 188.

Effect of plea in bar by one and in abatement by other defendants, see post § 178.

Pleading to the merits as waiver of objections to capias, see Civil Arrest § 18.

Pleading to the merits as waiver of defects in process or service and return thereof, see Process § 56.

¶ 875. The objection that a county should have sued in its own name upon its treasurer's bond, given to the board of supervisors, is waived if not pleaded in abatement. —Johr v. St. Clair County Sup'rs, 38 Mich. 532.

¶ 876. Filing declaration in debt after summons in assumpsit is not material where defendant pleads that the debt did not accrue within ten years, etc.—Brewer v. Boynton, 71 Mich. 254.

¶ 877. Where an action was brought in the name of the "Voigt Brewing Company, Limited" when in fact there was no such partnership, it constituted a failure to name the true plaintiff and the objection need not be raised by plea in abatement but is fatal upon the trial.—Voigt Brewing Co. v. Pacifico, 139 Mich. 284.

§ 178. ——By codefendant pleading severally.

¶ 878. Where one of several defendants in a tort action has pleaded the general issue, the jurisdiction of the court as to him will not be affected although a plea in abatement as to joint defendants because of want of jurisdiction, is sustained.—Rosenthal v. Rosenthal, 151 Mich. 493.

§ 179. Waiver of variance.

Taking and making objections to evidence and offers of evidence, see Trial, V: Saving Questions.

¶ 879. Objection to variance between evidence and the pleading under which it is offered must be held to be waived where the evidence is received and submitted to the consideration of the jury without the objection being taken.—M'Hardy v. Wadsworth, 8 Mich. 349.

¶ 880. Where all the evidence relating to a transaction has been given by the parties to the suit themselves, and there is a variance between the plaintiff's declaration and his proofs, by which the defendant is neither misled nor injured, and to which he raises no objection till the case has been summed up, and then for the first time requests a charge upon it, the objection will not be sustained. The case is within the statute of amendments (Comp. L. 1871, § 6051, How. St. § 7635).—Stone v. Covell, 29 Mich. 359.

¶ 881. The objection that the declaration does not admit proof of certain facts comes too late after such proof has been admitted. —McCoy v. Brennan, 61 Mich. 362.

¶ 882. Where testimony is introduced, and the party relying upon variance makes no objection on that ground until his request to charge, and then brings it to the court's attention for the first time, the objection must be deemed waived.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 883. A declaration on a contract averred performance for five years and defendant's refusal at the end of that time to permit further work. The proofs showed performance for three years and then a postponement at defendant's request, after which defendant discharged the plaintiff. Held, that the question of variance could not be raised for the first time after all the evidence had been submitted and the jury instructed on the basis of it.—Barton v. Gray, 57 Mich. 622.

¶ 884. A variance between the pleading and proof caused by a slightly inaccurate description of plaintiff in the notice of recoupment is waived where not raised until the conclusion of the trial by a request to charge after the evidence was all in.—Alderton v. Williams, 139 Mich. 296.

¶ 885. Where in a suit for injuries the defendant fails to call the attention of the trial court, either at the trial or upon motion for a new trial, to a variation between

the declaration and the proof, and where such variation might have been cured by amendment, the supreme court will treat the declaration as if amended.—Scendar v. Winona Copper Co., 169 Mich. 665.

¶ 886. A variance between the declaration and the proofs in a personal injury suit will not be considered in the supreme court where the point is not raised in the trial court.—Habitz v. Wabash R. Co., 170 Mich. 71.

¶ 887. It cannot be urged on error that certain evidence was inadmissible under the pleadings where if such objection had been made in the trial court an amendment might have been allowed.—Nelson v. Stewart, 174 Mich 127.

§ 180. Cure of defects by other parts of pleadings.

See also ante ¶ 63.

Effect of wording ad damnum clause in singular number to cure misjoinder, see ante ¶ 128.

Aider of deficient plea of limitations by allegations in bill, see also Limitations ¶ 406.

¶ 888. Adding a single ad damnum clause "for the damages as aforesaid suffered" will not cure the misjoinder of causes of action in assumpsit and case.—Friend v. Dunks, 39 Mich. 733.

§ 181. Cure by statute of amendments and jeofails.

The general doctrine that technical errors and defects working no harm to the objector will not constitute prejudicial error supporting a reversal is fully treated in Harmless Error, which see. In that topic is also treated the doctrine that an error or defect in procedure is cured where some other ruling, act, or proof has neutralized it or supplied what was lacking.

The presumption or intendment indulged on review that all necessary amendments were made or things done essential to sustain the judgment, except those which must appear on the record, is fully treated in Appeal, XII, C, and in Certiorari § 59, and Mandamus § 161. The sufficiency of the record against collateral attack is treated in Judgments, VII.

Cure of misnomer or misdescription, see post § 182.

Cure by verdict or judgment, see post §§ 183-186.

Variance cured by the statute, see also ante ¶ 880.

Omission to make amendment formally, see also ante § 134.

Regarding bill of particulars as amended, see also ante ¶ 633.

Provisions of the statutes of amendments, see Jud. Act, chap. XVI; Comp. L. 1915, § 12478 et seq.

¶ 889. The statute of amendments does not permit substantial defects of description to be aided.—Benalleck v. People, 31 Mich. 200.

¶ 890. The statute of amendments protects a judgment after verdict where, although an averment in the declaration was dropped by the abandonment of the counts containing it, both sides went fully into proofs relating to it, without objection, and it was apparent that the defense was not misled.—Barton v. Gray, 57 Mich. 622.

¶ 891. Where an objection to a declaration which could have been raised by special demurrer is raised for the first time on the trial, an amendment should be allowed, and will be regarded as made.—Fletcher v. Forler, 83 Mich. 52; Wright v. Treat, 83 Mich. 110.

¶ 892. Where declaration varies from summons in stating defendant's name, an amendment will, after judgment rendered in the cause, be regarded as made.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

¶ 893. The fact that a plaintiff partnership has changed its membership since the contract sued on was made, and that no assignment from the original partners to the new firm is pleaded, does not entitle defendant to a reversal of the judgment below, for all he would have been entitled to below was an amendment averring the assignment, which, under section 10270, Comp. L. 1897, is a mere matter of form.—Miller v. Tanners' Supply Co., 150 Mich. 292.

¶ 894. The date of the fire, which was not averred under a videlicet, was fixed in the declaration as having occurred one month later than the true date, as shown by the evidence. The proofs of loss were made within the time fixed by the policy, and defendant was not taken by surprise on the trial. Held, that the misstatement was one which the court would have amended as of course, and it will be treated as so amended.—Lum v. United States Fire Ins. Co., 104 Mich. 397.

¶ 895. A misjoinder of assumpsit, which lies to recover moneys paid for liquors, and tort for the damages resulting from their sale, is cured by the statute of amendments where judgment has been rendered without objection taken to the declaration.—Schafer v. Boyce, 41 Mich. 256.

¶ 896. Where the proper theory of plaintiff's case has been determined by the supreme court on a former trial, so that defendant has notice of what the claim must be, even though plaintiff does not ask leave to amend his declaration, it should be regarded as amended unless defendant demurs to it, or objects to the reception of evidence under it; and if he raises no objection until after the testimony is in, he is not entitled

to a verdict on the ground of a variance between the declaration and the proof.—Johnson v. Spear, 82 Mich. 453.

¶ 897. Where in a suit in justice's court, intended to be brought in the corporate name of a religious society, the trustees' names are stated in the summons, followed by the clause, "Trustees of the" corporation, but omitting the word "as," and defendant pleads the general issue, and denies under oath that plaintiff is a corporation, and, on the trial of an appeal from the justice's judgment, for the first time raises the objection that the suit was commenced by plaintiffs in their individual capacity, and not as the church or corporation, the supreme court will consider an amendment made in the furtherance of justice, it appearing that defendant has not been misled or prejudiced.—Stoffiet v. Strome, 101 Mich. 197.

§ 182. ——Misnomer or misdescription.
See also ante ¶¶ 488, 489.

¶ 898. A declaration by "P. S. & J. T., trustees, for the use of," etc., will, after verdict be regarded as amended so as to read "P. S. & J. G., as trustees," in order to show that they sue in an official capacity.—Smith v. Pinney, 86 Mich. 484.

¶ 899. After verdict a declaration which merely describes plaintiff as trustee will be presumed to have been amended so as to show that he sued in his representative character.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 900. Judgment in replevin was given by a justice in a suit brought against a defendant designated as D. T. Baldwin instead of David T. Baldwin, but no misnomer was pleaded, and the judgment was appealed by Baldwin under his full name after pleading to the merits. Held, that the informality, if any, could be amended by reference to the records and was no longer material.—Baldwin v. Talbot, 43 Mich. 11.

¶ 901. Variance of declaration from summons in stating defendant's name is not a jurisdictional defect, and amendment will, after judgment, be treated as made.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 239.

¶ 902. Where a note was declared on as payable to order of J. H. S. & Co., and the evidence showed that it was made to the order of J. H. S. and was indorsed by J. H. S. & Co., the supreme court considered an amendment as having been made; for defendant could not have been surprised, and the trial court had power to make such amendment.—Warder, Bushnell & Glessner Co. v. Gibbs, 92 Mich. 29.

§ 183. Cure of defects by verdict or judgment.
See also ante ¶ 843.

Modes and times for taking objections, see ante § 172.
Cure by consent, order or judgment, see post § 184.
Cure of want of venue or allegations of place, see post § 185.
Cure of misjoinder of counts or matter, see post § 186.
Voluntary dismissal as curing failure to elect as to which defendant, see ante ¶ 221.
Construction of verdict or findings with respect to pleadings and issues, see Verdicts, IV; and see also Appeal §§ 336, 337.
Presumptions and intendments on error to support verdict or judgment, see Appeal, XII, C.
Aided by verdict for plaintiff of failures to allege termination in favor of plaintiff in malicious prosecution, see Malicious Prosecution ¶ 73.
Statutory enumeration of matters cured by verdict, see Jud. Act, chap. XVI, § 5; Comp. L. 1915, § 12482.

¶ 903. On an appeal from a hearing on pleadings and proofs, all matters of mere form are to be disregarded if the pleadings are good in substance.—Dye v. Mann, 10 Mich. 291; Phillips v. Stauch, 20 Mich. 369.

¶ 904. On error judgment will not generally be disturbed for technical defects in a declaration that is sufficient to sustain it and has not been demurred to.—Heymes v. Champlin, 52 Mich. 25.

¶ 905. The statute curing the omission of allegations of matter without proving which such verdict should not have been rendered, was intended to adopt the common-law rule.—Kean v. Mitchell, 13 Mich. 207; Delashman v. Berry, 21 Mich. 516.

¶ 906. A verdict on the merits cures a formal defect in a declaration.—Sutton v. Van Akin, 51 Mich. 463.

¶ 907. A fact necessary to be proved to justify a recovery, not averred in the declaration, if it be plainly inferable from any fact stated in, or by the case made by, the declaration, will, after verdict, be presumed to have been proved.—Delashman v. Berry, 21 Mich. 516.

¶ 908. Defects or omissions in any pleading which would have been fatal upon demurrer are cured by the verdict, where the issue joined is such as necessarily required proof of the facts defectively stated or omitted.—Smith v. Cowles, 123 Mich. 4.

¶ 909. A verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action.—Township of Lincoln v. Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518.

¶ 910. Where a declaration disclosing a cause of action is not demurred to, it will be

considered sufficient after verdict.—Knowles v. Mulder, 74 Mich. 202.

¶ 911. A declaration which will not support a judgment and does not state a cause of action is not cured by failure to demur.—Sauer v. McClintic Marshall Cons. Co., 179 Mich. 618.

¶ 912. Where to infer a fact omitted to be alleged, but necessary to be proved, would be to go outside of the declaration and to depart from the theory of the action presented by it, the omission is not cured by verdict.—Delashman v. Berry, 21 Mich. 516.

¶ 913. An averment in a declaration in an action of debt upon a bond given on appeal from a judgment of a circuit court commissioner to the circuit court, in a proceeding to obtain restitution of premises under Laws 1861, pp. 466, 467, § 25, How. St. § 8307, that the defendant "did not forthwith pay the rent due or to become due," is not equivalent to an averment that any rent was actually due; and for that reason the declaration would be demurrable; yet it contains, nevertheless, such an argumentative statement that some rent was due, or was at least claimed to be due, that, after verdict, proof of this fact may be presumed, and the judgment entered thereon sustained. But where, on such a declaration, the plaintiff's right to recover depends upon the fact that he has obtained restitution of the premises, an averment that the circuit court "adjudged that the said complainant in said suit have restitution of the premises," and the breach assigned being that the complainant had "obtained restitution of the same as aforesaid," would not only be demurrable, but the defect would not be cured by a verdict; because the pleader does not base his right to recover upon the actual restitution of the premises—which was an essential fact in the condition of the bond—but upon his having obtained a judgment of restitution; thus claiming that the judgment itself constituted restitution. Upon such a theory there can be no inference of actual restitution; and a judgment founded upon it would be erroneous.—Delashman v. Berry, 21 Mich. 516.

¶ 914. A defective allegation of consideration will be cured by verdict when, from the issue as actually made, it can fairly be presumed that the evidence necessary to establish a case was given under it.—Kean v. Mitchell, 13 Mich. 207.

¶ 915. A defective statement of the consideration cannot be taken advantage of on the trial of an issue of fact by objection to the admission of evidence to establish the plaintiff's case; and after verdict for the plaintiff the allegation will be sufficient to sustain it.—Kean v. Mitchell, 13 Mich. 207.

¶ 916. A statement of a consideration in a declaration in assumpsit, so defective as to be demurrable, will nevertheless be held good after verdict if the consideration referred to can possibly be valid.—Dickinson v. Dustin, 21 Mich. 561.

¶ 917. A declaration in assumpsit on the common counts with copy of note attached, which, after stating the several causes of action, omits to allege an express promise, though bad on special demurrer is cured by judgment.—Hoard v. Little, 7 Mich. 468.

¶ 918. If the pleadings put in issue a mere nudum pactum, no consideration can be presumed to have been proved, because none appears to have been claimed to exist; and a verdict will not cure the defect.—Delashman v. Berry, 21 Mich. 516.

¶ 919. The use in a declaration of the word "fraudulently," in reference to the course of the defendant, implies a scienter, and is an argumentative allegation of the defendant's knowledge, which, if not demurred to, is cured by the verdict.—Beebe v. Knapp, 28 Mich. 53.

¶ 920. Where not demurred to, a declaration for negligent injury must be held sufficient, after verdict, if it stated a cause of action though it did not specify the negligence, and especially if it counted upon other negligence, which it did set forth. So held where a workman sued his employer for an injury suffered from the use of defective machinery and did not point out the defect, but also averred as negligence that he had been set at work that was outside the scope of his employment.—Broderick v. Detroit Union Depot Co., 56 Mich. 261.

¶ 921. A declaration in assumpsit on the common counts, which, after stating the several causes of action, omits to allege an express promise, though bad on special demurrer, is cured by judgment.—Hoard v. Little, 7 Mich. 468.

¶ 922. Where a declaration contains in substance a cause of action, and the general issue is pleaded, the court will, after judgment, presume that all inaccuracies and defects in the plaintiff's statement of his cause of action were supplied by proof upon the trial.—Stange v. Clemens, 17 Mich. 402.

¶ 923. Where a declaration based upon a promise, though framed on the theory that the action should be one on the case, sufficiently sets forth the contract and the breach, and shows how plaintiff was damnified by being compelled to pay the demand himself under legal compulsion, it is held sufficient after judgment if the note to which the promise related was a joint and several one.—Potter v. Brown, 35 Mich. 274.

¶ 924. The omission of any averment in a count in slander that the defendant maliciously published the matter alleged is cured

by verdict, though it would be fatal on special demurrer.—Taylor v. Kneeland, 1 D. 67.

¶ 925. A court will not on error by plaintiff consider a question of variance, where the trial judge stated that he would permit an amendment of the declaration to conform to the proofs if he regarded them sufficient to sustain a verdict and afterwards directed verdict for defendant.—Habina v. Twin City General Elec. Co., 150 Mich. 41.

§ 184. ——By consent judgment or decree.

Default judgment curing failure to allege proper residence for suit, see post ¶ 928.

¶ 926. A consent order on a bill waives all defects in the form of the bill.—Collins v. Rea, 127 Mich. 273.

§ 185. ——Want of venue or allegations of residence.

¶ 927. In an action against a railroad company for damages caused by its neglect to fence its road where it crossed the plaintiff's land, the want of venue in the declaration was held cured by Comp. L. 1871, § 6051, How. St. § 7635, subd. 11, where the injury complained of was located territorially upon land in the county where the suit was brought. Trials by the court stand in the same equity as trials by jury in this regard. —Grand Rapids & I. R. Co. v. Southwick, 30 Mich. 444.

¶ 928. A judgment on default is not affected by a defective statement in the declaration of the residence of parties, the defect being cured by Comp. L. 1871, § 6051, subd. 4 (How. St. § 7635, subd. 4).—Elliott v. Farwell, 44 Mich. 186.

§ 186. ——Misjoinder or improper union of matters.

Cure by statute of amendments, see also ante ¶ 895.

¶ 929. Misjoinder in a single count of two incompatible causes of action, such as tort and assumpsit, is, it seems, cured by judgment if no demurrer or other objection is interposed.—Schafer v. Boyce, 41 Mich. 256.

§ 187. Bad counts, pleas, or allegations in pleadings otherwise good.

¶ 930. Uniting immaterial charges of negligence with those that are material and necessary in a declaration containing only one count will not preclude a recovery, it being the duty of the trial court to eliminate the immaterial charges from the consideration of the jury, and limit their consideration to the other acts alleged, which, if found to exist, constitute negligence.—Thompson v. Toledo, A. A. & N. M. R. Co., 91 Mich. 255.

¶ 931. A declaration containing several counts is not defective because one count claims damages below the jurisdiction of the court.—Picard v. McCormick, 11 Mich. 68.

¶ 932. Where, to the whole of a declaration containing several counts, defendant pleaded nonassumpsit and also not guilty, and the jury passed upon but one issue, it was held that either plea was good after verdict, and that, as the plea of nonassumpsit met the whole declaration, the other plea might be stricken off, even after error brought.—The Milwaukie v. Hale, 1 D. 306.

§ 188. Waiver of demurrer or plea by pleading over.

See also ante ¶ 364.

Pleading over demurrer, see ante § 93.

Pleading over as waiver of right to make point on appeal, see Appeal § 227.

Pleading over as abandonment of plea in abatement of proceedings under Fraudulent Debtor Act, see Civil Arrest ¶ 95.

¶ 933. Where a demurrer has been overruled and no appeal taken and defendant has pleaded to the issues, the questions settled by the overruling of the demurrer cannot again be raised.—Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233.

¶ 934. Questions raised by demurrer are not subject to review after pleading the general issue and going to trial upon the merits. —Williams v. City of West Bay City, 119 Mich. 395.

¶ 935. A defect in the declaration is waived by pleading over and going to trial on the merits.—Peterson v. Fowler, 76 Mich. 258.

¶ 936. When a demurrer is overruled and the party pleads over, the right of objection is thereby waived, and he cannot afterwards object, on error, that it was erroneously overruled (sed, quære).—Wales v. Lyon, 2 Mich. 276.

¶ 937. Where a defendant does not elect to stand upon his demurrer when overruled, but pleads issuably, and goes to trial on the merits, he cannot raise the question presented by the demurrer on the trial by objecting to the introduction of any evidence under the declaration.—Kraatz v. Brush Electric Light Co., 82 Mich. 457.

¶ 938. Under Act No. 310, Public Acts 1905, How. St., 2nd Ed., §§ 12737, 12738, a defendant loses no rights by pleading the general issue after the overruling of a plea in abatement, where exception is duly taken to such ruling.—Matthews v. Montreal Min. Co., 183 Mich. 541.

¶ 939. Where a defendant has pleaded in abatement, and pleads the general issue after the overruling of his plea he thereby waives the objection made in his plea.—Frohlich v. Independent Glass Co., 144 Mich. 278.

PLEAS to PLEASURE GROUNDS.

Cross-References.

Pleas—
See generally Pleading, III; Equity, VII.
To indictments, see Indictment, V.

Pleasure Boating—
As a navigable use of waters, see Navigable Waters §§ 3, 6.

Pleasure Grounds—
As proper object of dedication, see Dedication, § 2.

PLEDGES.

TREATS of the hypothecation of personal property by delivery for the securing of a debt or obligation. It excludes Chattel Mortgages, which see, wherein the hypothecation is by means of a writing and the delivery of possession, if any, is for the purpose of affecting third persons with notice. It also excludes conditional sales and leases convertible into sales (see Sales, XII), wherein a transfer of ownership is agreed reserving title until payment has been made, and trusts for security (see Assignments for Creditors; Trusts).

Analysis.

I. In general; subject-matter and validity.

§ 1. Nature and requisites of pledge.

II. Rights and liabilities under the pledge.

§ 2. In general.
§ 3. Redemption of pledge.
§ 4. Redelivery or accounting to pledgor.
§ 5. Conversion by pledgee.
§ 6. Loss of pledge or failure to realize value.
§ 7. Conflicting claims and liens and priorities among them.
§ 8. Subpledges or sales and rights thereunder.

III. Enforcement of debt and application or sale of pledge.

§ 9. In general; suits on the debt.
§ 10. Rights of action on paper held as collateral.
§ 11. Sales and application of proceeds.
§ 12. Mode of application.
§ 13. Authority of pledgee to receive payment and discharge collaterals.
§ 14. Enforcement by holder or trustee of pledge for others.

I. IN GENERAL; SUBJECT-MATTER AND VALIDITY.

§ 1. Nature and requisites of pledge.

Cessation of pledge and reverter, see post ¶ 5.

Nature of the rights and liabilities created, see post II.

Leviability of pledged goods, see Executions § 16.

Garnishment of property pledged, see Garnishment § 25.

Pledges of mortgaged chattels by party in possession, see Chattel Mortgages § 78.

Power of corporation to pledge its own bonds, see Corporations § 81.

Pledges of building association stock to association as security for loan, right to withdraw stock, see Building Associations ¶ 15.

Assignments of choses as security, see also Assignments § 23.

Assignment of lease as security, see Landlord and Tenant § 84.

Assignment of mortgage as security or indemnity and rights thereunder, see Mortgages § 110.

Right of warehouseman to pledge portion of grain in mass in warehouse by delivery of warehouse receipt, see also Warehousing.

Broker as pledgee of principal in stock and margin transactions, see Brokers § 12.

Consideration for note given as collateral and not to be enforced, see Contracts § 135.

¶ 1. A pledge merely passes the possession, or at most a special property, to the pledgee, with a right of retainer until the debt is paid or the other engagement is fulfilled.—Tannahill v. Tuttle, 3 Mich. 104.

¶ 2. A "pledge" is something more than a simple lien. It is a deposit or delivery of possession and control of property, made as security for debt, vesting a right to the property in the pledgee to the full extent necessary to protect and collect the debt.—Austin v. Hayden, 171 Mich. 38.

¶ 3. A writing given by a debtor to his surety for the debt, providing that on the debtor's failure to pay the debt the surety may take possession of goods in the debtor's possession, sell so much as will pay the debt, and redeliver the rest, is not a pledge, no possession being given with it.—Holmes v. Hall, 8 Mich. 66.

¶ 4. Where a sum of money is deposited with the seller of goods by the purchaser, not to be applied on orders, but to be retained until the termination of the contract, provided a full and complete settlement of all accounts is made, and the seller becomes bankrupt, the relation of the parties is that of creditor and debtor and not of pledgor and pledgee.—Wilcox v. Gauntlett, 200 Mich. 272.

II. RIGHTS AND LIABILITIES UNDER THE PLEDGE.

§ 2. In general.

Right to redeem and to have redelivery of pledge or accounting for proceeds or value, see post §§ 3, 4.

Conversion by pledgee, see post § 5.

Liability for loss or failure to realize or conserve value, see post § 6.

Conflicting claims, liens, and priorities, see post § 7.

Subpledges and sales and rights under them, see post § 8.

Rights of action to enforce principal debt or to apply pledge, see post III.

Mode of sale by pledgee and application of proceeds, see post §§ 11, 12.

Authority to receive payment of pledged debts, see post § 13.

Leviability of interests of parties in pledged goods, see Executions § 16.

Liability of pledged property to garnishment, see Garnishment § 25.

Effect of taking other collaterals as extinguishing lien, see Liens ¶ 46.

Evidence of payment of debt to show revestiture of title in pledgor, see also Chattel Mortgages ¶ 412.

Evidence of fraud in transfers for security, see Fraud, I, B.

Rights of pledgees and pledgors of corporate stock, see also Corporations § 286.

Holder of bank stock in pledge as stockholder liable for debts, see Banking § 67.

Rights of pledgee or purchaser under pledge in stock subject to lien of bank for debt, see Banking §§ 69, 70.

Right of pledgee of corporate stock to maintain creditors' suit against corporation, see Corporations § 200, ¶ 734.

Rights of corporate officers as pledgees or privies to pledgees of corporate bonds, see Corporations § 170.

Right of pledgee of stock to have new certificate issued in his name, see Corporations § 286.

Protest of pledged negotiable paper, see Negotiable Instruments § 57.

Pledgee of negotiable paper as bona fide purchaser, see Negotiable Instruments § 76.

Pledging collaterals as affirmance of agreement of settlement they were given to secure, see Accord and Satisfaction ¶ 57.

Right of holder of bonds as pledge to have recourse to property pledged for security of the pledged bonds, see also Corporations ¶ 281.

Measure of damages recoverable by pledgor or pledgee of injured goods, see Damages, IV.

¶ 5. A pledge ceases to be operative when its object is effected, and the whole beneficial interest in the security pledged then becomes absolute in the equitable owner.—Ward v. Ward, 37 Mich. 253.

¶ 6. A creditor of a corporation to whom the stock of a majority stockholder has been pledged as collateral security for the indebtedness of such corporation is not entitled to an equitable lien in the nature of a mortgage upon the property of the corporation.—Osborn v. Detroit Kraut Co., 193 Mich. 664.

§ 3. Redemption of pledge.

Cessation of pledgee's rights on payment, see ante ¶ 5.

¶ 7. Where one standing in position of mortgagor of a mortgage was present at and assented to a subsequent assignment of the mortgage by his assignee, to secure a debt of the latter less than the amount that it was first assigned to secure, it was held that he was not thereby estopped from asserting his right to redeem, since he must be understood as assenting only to an assignment of such interest as his assignee had in the mortgage.—Graydon v. Church, 7 Mich. 36, overruling Graydon v. Church, 4 Mich. 646.

¶ 8. Statements made by the pledgor of a mortgage at the time of the assignment of the mortgage by his assignee, that if the debt he was owing was paid from the mortgage he would be satisfied, would not estop him from redeeming.—Graydon v. Church, 7 Mich. 36.

¶ 9. Where a receiver in chancery, to whom a mortgagor of a mortgage had assigned, was called upon by a subsequent assignee to redeem his interest in the mortgage, and was told that, unless such redemption was made, such assignee was about to transfer the mortgage to another, and the receiver declined to redeem, and told the assignee he might sell to whom he pleased, whereupon the assignee did sell, but to one who was

aware of the conditional nature of the assignments, it was held that the receiver was not thereby estopped from asserting his right to redeem.—Graydon v. Church, 7 Mich. 36.

§ 4. Redelivery or accounting to pledgor.

See also post ¶ 28.

Absolute right of pledgor on payment extinguishing pledge, see ante ¶ 5.

Right to redelivery of identical certificates of stock pledged, see post ¶ 15.

Accounting to other creditors holding as assignees, see post ¶ 35.

Liability of pledgee on money counts, see Assumpsit § 14.

Rights of pledgor of mortgage to surplus realized on mortgage foreclosure over amount of pledgor's debt, see Foreclosure ¶ 507.

¶ 10. Where a bond was conditioned to procure the discharge of a mortgage, and the condition was performed to the satisfaction of the obligee, a surety who took securities to indemnify him, and who has realized on them, cannot refuse to refund to his principal on the ground of any technical objections to the discharges procured.—Blackwood v. Brown, 34 Mich. 4.

¶ 11. A creditor holding his debtor's note, and the notes of third persons as collateral security, under an arrangement that if the debt were not paid at a specified time the collateral notes should become his absolutely, having sued the principal note, recovered judgment and collected the full amount thereof, and having, pending the suit, sold the collateral notes and failed to account in any way for the proceeds, or to credit the amount upon the judgment, is held liable to the debtor for the amount received on the sale of such collaterals.—Dorrill v. Eaton, 35 Mich. 302.

¶ 12. Where it is established, in a suit by a pledgor against a bank for an accounting as to certain bonds, that they were delivered over to defendant as collateral to complainant's indebtedness, it will be presumed, in the absence of contrary evidence, that they either remain in defendant's possession or have been disposed of for its benefit.—Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407.

¶ 13. A mortgage for $400 was assigned to a bank as security for a loan on $100, and the mortgage was foreclosed and the land purchased at the sale by the cashier of the bank. Complainant redeemed from the sale and the cashier entered a marginal discharge on the record. Six years later, at the instance of complainant, this was changed by a marginal entry that the debt secured by the assignment was paid and that the discharge was an error. Meanwhile the mortgagor had sold the land as free from the mortgage. Complainant brought foreclosure proceedings which were defeated and he sued the bank for an accounting. Complainant's testimony in the two actions was conflicting, and it was shown that the original discharge of the mortgage was made at his instance. Held that he was not entitled to recover under the evidence coupled with the long delay in seeking redress. Lowry v. Paw Paw Sav. Bank, 132 Mich. 228.

¶ 14. Defendant, the employer of complainant, agreed to sell him twenty shares of stock in the defendant company, to be paid for out of dividends, with the privilege of buying back the same for the sum credited thereon if complainant should leave the employ of the company. The shares were issued and held as collateral by the company. Held, in a bill for accounting and specific performance, the request for accounting being not merely incidental to the prayer for specific performance, was a ground for the interposition of equity, and should be granted, the defendant being treated as a pledgee.—Johnston v. Frederick Stearns & Co., 160 Mich. 247.

§ 5. Conversion by pledgee.

Accountability for proceeds realized where principal obligation has been otherwise discharged, see ante § 4.

Liability for losing pledge or failing to realize value, see post § 6.

What constitutes conversion of stock by pledgee, see also Corporations § 286.

Conversion of shares as jury question, see also Conversion § 39, ¶ 193.

¶ 15. One who pledges certificates of corporate stock as security is entitled to have the original stock returned if it can be identified from other shares held by the pledgee; and a wrongful sale by the pledgee may be treated as a conversion.—Allen v. Dubois, 117 Mich. 115.

¶ 16. A sale of stock by a pledgee, without notice, is a conversion of stock.—Feige v. Burt, 118 Mich. 243.

¶ 17. If a pledgee sells property without calling on the pledgor to redeem, the latter may maintain an action for the value of the thing pledged, without tendering the debt, because by the wrongful sale the pledgee has incapacitated himself to return the pledge and it would therefore be nugatory to make the tender.—Feige v. Burt, 118 Mich. 243.

¶ 18. A wrongful sale of certificates of corporate stock pledged as collateral security may be treated as a conversion if the certificates can be identified and separated from other stock held by the pledgee.—Allen v. Dubois, 117 Mich. 115.

¶ 19. Where a stock certificate is indorsed in blank at the time it is delivered as collateral security for a note to the pledgee and the latter does not cause it to be transferred to himself upon the books of the company, but

still has possession of it at the time of trial of an action on the note and never at any time refuses to deliver it upon tender of payment of the note, there is no conversion of such certificate.—Allen v. Hook, 198 Mich. 122.

§ 6. Loss of pledge or failure to realize value.

Depreciation in price of pledged stocks while being held, see also post ¶ 29.

Authority to realize by receiving payment, see post § 13.

¶ 20. Where choses in action are pledged as collateral security, the pledgees, not having entered into any obligation to collect them, are not to be charged with the consequences of a want of diligence; but they will be accountable for any sums collected by any of the agencies employed by them.—Rice v. Benedict, 19 Mich. 132.

§ 7. Conflicting claims and liens and priorities among them.

Right of pledgor of mortgage to redeem land therefrom, see also ante § 3.

Subpledges and sales subordinate to pledge, see post § 8.

Liens and priorities incident to various transfers and incumbrances, see Chattel Mortgages, III; Mortgages, V; Attachment, VIII; Executions, V; Liens.

Lien of bank on pledged stock for debt of pledgor, see Banking § 70.

Marshalling pledge with other securities, see Marshalling Assets.

¶ 21. A pledge of corporate stock as security for a loan will be upheld as against one who, with notice of the transfer, purchases the stock at a sale under execution levied upon it as the pledgor's property, although the transfer to the pledgee never was recorded upon the corporation's books.—May v. Cleland, 117 Mich. 45.

¶ 22. A pledgor's creditor, who, with the pledgee's consent and subject to his rights, attaches the property pledged, holds as the pledgee's representative, and can maintain his possession, regardless of the invalidity of the attachment, against one whose lien is subordinate to the pledgee's.—Farr v. Kilgour, 117 Mich. 227.

§ 8. Subpledges or sales and rights thereunder.

See also post ¶¶ 35, 36.

Sales by pledgee as conversion, see ante § 5.

Priorities among diverse transferees, see also ante § 7.

Pledge subordinate to chattel mortgage or other qualified possession, see Chattel Mortgages § 78; Sales, XI.

Pledge and repledge of stock by broker, see Brokers § 13.

General doctrine of notice and bona fides on sale of personalty, see Sales, XI.

¶ 23. The directors of a corporation pledged its bonds to a bank to secure a loan made to the corporation. They then pledged the corporation's remaining interest in such bonds to a lumber company. The corporation defaulted in payment of interest to the bank, which foreclosed, and the lumber company purchased at the foreclosure. Held, that the lumber company was entitled to collect interest from the date to which the corporation had paid the interest to the bank, and not from the date of purchase by the lumber company.—Union Trust Co. v. Electric Park Amusement Co., 163 Mich. 687.

¶ 24. Defendant gave his non-negotiable promissory note, payable to a corporation in which he was a stockholder, and turned over to the corporation certain shares of his stock to enable it to borrow money of plaintiff bank. The corporation borrowed of the bank on its own notes, using defendant's note and stock as collateral. Held, plaintiff bank could sue on the note despite the fact that it was non-negotiable.—People's Bank v. McMahon, 160 Mich. 46.

¶ 25. As the financial condition of a firm of stockbrokers became desperate, they used as collateral for money borrowed of defendants, stockbrokers also, stocks which they had no right to pledge, but which they were holding for others. The firm failed to keep up its margins with defendant, to make remittances when promised, to deliver promptly customer's stock, and drew accommodation notes on defendant. Finally defendant made an examination of the books of the firm. Held, that such facts and circumstances were known by defendant as fairly imputed to defendant knowledge of the equities of the owners of the stock.—Austin v. Hayden, 171 Mich. 38.

¶ 26. One who has pledged securities is not injured by a transfer of them by the pledgee's administrator, the right of redemption remaining the same as before.—Drake v. Cloonan, 99 Mich. 121.

¶ 27. A pledgee can sell the pledge after an adjudication in bankruptcy against the pledgor.—Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

III. ENFORCEMENT OF DEBT AND APPLICATION OR SALE OF PLEDGE.

§ 9. In general; suits on the debt.

Liability for loss of pledge by failure to collect when due, see ante § 6.

Right to sue on pledged choses in action, see post § 10.

General law of suits on contracts, see Contracts, X; Negotiable Instruments, XIV; Assumpsit; Pleading.

Replevin for pledged property against pledgee who has disposed thereof, see Replevin ¶ 78.

¶ 28. One who holds collateral securities is not compelled to resort to them or to sur-

render them before suing upon his principal claim; but when that claim is satisfied he may be compelled to release or reassign the collaterals.—Wallace v. Finnegan, 14 Mich. 170.

¶ 29. The holder of corporate stock as collateral security for a note has the right to retain it until the note is paid, and he is under no obligation to sell the collateral before bringing suit, nor can he be charged with negligence in failing to do so, even though the stock depreciates in value after maturity.—Allen v. Hook, 198 Mich. 122.

¶ 30. In an action on a promissory note, as collateral to which a certificate for shares of stock was indorsed in blank and delivered to plaintiff at the time the money was loaned, evidence held insufficient to show that there was any understanding at the time the note was given that if it was not paid plaintiff would sell stock or would hold same as payment.—Allen v. Hook, 198 Mich. 122.

§ 10. Rights of action on paper held as collateral.

Right to sue on the principal debt, see ante § 9.
Suit by holder in trust for other creditors, see post § 14.
General law of actions on negotiable instruments, see Negotiable Instruments, XIV.
Conditions precedent to actions on pledged negotiable paper, see Negotiable Instruments § 91.
Parties to suits on pledged negotiable paper, see also Negotiable Instruments § 95.
Effect of nonrecourse to collaterals to discharge maker of note to indorser, see Negotiable Instruments § 24.
Right to sue on note pledged as security for performance of contract, see also Indemnity § 4.
Foreclosure of pledge of shares to building association, see Building Associations § 13.

¶ 31. One holding a note as collateral security may, with the owner's assent, sue it in his own name.—Lobdell v. Merchants' & Manufacturers' Bank of Detroit, 33 Mich. 408.

§ 11. Sales and application of proceeds.

Mode of application, see post §12.
Rights between pledgor and pledgee on sale, see ante II.
Mode of selling stock held under pledge, see also Corporations § 286.
Statutory regulations for public or private sales to satisfy pledge, see Comp. L. 1915, §§ 11917-11919.

¶ 32. An agreement that a promissory note will be paid when the maker recovers in another cause of action does not give the owner of the note, who is also assignee of the same cause of action as security for expenses of litigation advanced, the right to settle the cause of action without authority and apply the proceeds to the payment of the note.—Curtis v. Curtis, 134 Mich. 220.

§ 12. Mode of application.

Accountability of pledgee for proceeds, see ante § 4.
Refund to pledgor where pledgee realizing on pledge was surety and has been discharged, see ante ¶ 10.
General rules for application of payments and of marshalling assets, see Payment, III; Marshalling Assets.

¶ 33. A letter stating that certain collateral security has been received as "general or blanket security" does not justify a claim that the proceeds thereof should be applied part to each note held "under the blanket security theory," where the letter further stated that the proceeds would be "applied wherever there should be a deficiency upon any" of several notes held and especially upon two which were stated to be uncollectible.—Stoddard v. Courtright, 130 Mich. 134.

§ 13. Authority of pledgee to receive payment and discharge collaterals.

Payment of insurance to pledgee, see Insurance § 258.

¶ 34. One who holds an assignment of a mortgage as collateral security may receive payment and give a valid discharge, and with stronger reason where the assignment contained an express authority to receive payments and give a discharge.—Lowry v. Bennett, 119 Mich. 301.

§ 14. Enforcement by holder or trustee of pledge for others.

¶ 35. The holder of collateral pledged as security for a debt having undertaken in a court of equity to account to other creditors of its debtor who have succeeded by assignment to the beneficial interest in the collateral, subject to the payment of the debt secured, owes a duty to show that it has taken from the fund no greater sum than was secured by the deposit.—Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106.

¶ 36. On a suit by the holder of collaterals to enforce them for the benefit of assignees of the debt, the suit must fail where it appears that the debt with the interest thereon has been paid, and that a further sum, claimed as interest and separately promised by the debtor, is usurious if regarded as interest and is not a charge connected with the debt.—Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106.

PLUMBING to POOLS.

Cross-References.

Plumbing—
Plumber as contractor within mechanics' lien law, see Mechanics' Liens § 18.

Liabilities of landlords and tenants for defects, see Landlord and Tenant, IV.
Pluries Writs—
See Attachment § 37; Executions § 10; Process, I.
Pointing Fire Arms—
As crime, see Crimes § 134.
Unintentional killing as manslaughter, see Homicide § 13.
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See Elections, §§ 7, 36.
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As crime, see Crimes § 48; Indictment.
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See Waters.
Pooling Agreements—
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Pools—
Selling or playing pools as gaming crime, see Crimes, II.

POOR PERSONS.

TREATS of the settlement, protection and support of indigent persons by the public or by relatives as a statutory duty.

Analysis.

§ 1. In general; definition and status.
§ 2. Settlement or residence and changes.
§ 3. Care and support by public.
§ 4. Commitment or admission to poorhouse.
§ 5. Liability of county for support.
§ 6. Liability of township or city.
§ 7. County charged with support of indigent insane.
§ 8. ——Liability of state for support.
§ 9. Liability of person bringing in or transporting pauper.
§ 10. Liability of relatives.

§ 11. ——Procedure to enforce support or charge relatives.
§ 12. Insane paupers.
§ 13. Poor officers, and their powers, rights and liabilities.

Nonliability of county for injuries to workman employed by contractor on county poor buildings, see Counties § 86.
Impecuniosity as excusing laches, see Equity § 50.

§ 1. In general; definition and status.

Settlement or residence, see post § 2.
Care and support by public or by relatives, see post §§ 3-11.

¶ 1. A woman and her husband, both well and strong and she with $20, he with $40, and with household goods and provisions sufficient for their support for a considerable time on the day when they removed from one county to another, cannot be regarded as having then been paupers.—Superintendents of Poor of Livingston County v. Superintendents of Poor of Oakland County, 141 Mich. 667.

§ 2. Settlement or residence and changes.

Settlement of indigent insane, see post § 7.
Liability of county or township for support of poor changing residence without gaining new settlement, see post § 5.
Right of one county to recover from another county where pauper is legally settled, see post ¶ 16.
Liability of person causing pauper to change residence and become a charge on new community, see post § 9.
Conflict of laws governing status and settlement of poor persons, see Conflict of Laws § 89.

¶ 2. The word "settlement" used in pauper statutes has a different meaning from the word "resident" in other statutes, as for voting purposes twenty days' residence is enough, while a year has long been necessary to entitle a party to support as a pauper.—Superintendents of Poor of Jackson Co. v. Superintendents of Poor of Hillsdale Co., 124 Mich. 17.

¶ 3. As between townships of one county, the period of one year has been fixed as necessary to gain a settlement under the poor laws.—Superintendents of Poor of Jackson Co. v. Superintendents of Poor of Hillsdale Co., 124 Mich. 17.

§ 3. Care and support by public.

Commitment or admission to poor house, see post § 4.
County liability, see post § 5.
Township or city liability, see post § 6.
Liability for support of indigent insane, see post §§ 7, 8.
Liability of relatives for support, see post § 10.
Liability of persons bringing or transporting pauper into county, see post § 9.
Liability of county where poor have no township settlement, see post § 5.
Authority and powers of poor officers, see post § 13.
Power of county board to erect poorhouses, see Counties § 19.
Fees to counsel for defending poor person as county charge, see Counties § 84.
Contracts with physicians for treatment, see Health § 16.
Sufficiency of contract of employment of physician, see also Health § 15.
Appeal to circuit court from disallowance of claim for medical treatment, see Health § 18.
Power of city to engage in selling needful commodities to relieve distress, see Municipal Corporations § 27, ¶ 107.
Illegitimate children and provisions for their support, see generally Bastards.
Statutory provisions as to public support, see Comp. L. 1915, chap. 98.
Provisions relating to union almshouses, see Comp. L. 1915, chap. 99.

¶ 4. How. St., §§ 1786-1789, raises an implied promise on the part of a township chargeable with the support of a pauper to furnish such support; and the amount to be expended for any one poor person is not limited by the statutes, nor is it at all placed in the discretion of the supervisor, or of any other township officer, to determine who is a poor person, or the amount to be expended in his behalf.—Eckman v. Township of Brady, 81 Mich. 70.

¶ 5. A township is liable for necessaries furnished a poor person, with whose support the township is chargeable, after due notice to the supervisor that such a person is a township charge, and his refusal or neglect to furnish such support.—Eckman v. Township of Brady, 81 Mich. 70.

¶ 6. A woman, who with her two children by a former marriage was deserted by her husband after he had removed them to a county, and who thereby became poor and needy, was entitled to be aided by the poor authorities of the county into which they came under the provisions of Comp. L. 1897, § 4502.—Superintendents of Poor of Livingston County v. Superintendents of Poor of Oakland County, 141 Mich. 667.

¶ 7. The court did not err in an instruction to the jury in assumpsit against a township brought by the sister of a pauper for such person's support, that the supervisor or township board must have notice that the person in whose behalf aid is required is actually in need of such aid, and until such

notice was given there could be no recovery for necessaries furnished; and that, if they found that no distinct notice was given to such officers that a larger amount was asked or required than had been before that time paid, the plaintiff could not recover.—Eckman v. Township of Brady, 81 Mich. 70.

¶ 8. A board of supervisors which, as authorized by How. St. §§ 483, 484, has adopted the distinction between township and county poor, cannot, unless it rescinds the resolution, direct the expenditure of county funds in support of poor who have gained a settlement in any township or city.—Township of LaGrange v. Superintendents of Poor of Cass County, 115 Mich. 181.

¶ 9. Section 4536, Comp. Laws 1897, How. St., 2nd Ed., § 3527, does not preclude the superintendents of the poor contracting for the support of an indigent person outside of the county of the latter's settlement.—Moden v. Superintendents of Poor, 183 Mich. 120.

¶ 10. The commencement of a suit against a township, by a person who is receiving a certain sum per month for the support of a pauper, to recover a greater sum, is notice that the amount so received is deemed insufficient.—Eckman v. Township of Brady, 81 Mich. 70.

§ 4. Commitment or admission to poorhouse.

Commitment of indigent insane to asylum, see post § 7.

Liability of relatives for support in state institutions, see post § 10.

Physicians' certificates for admittance as documents, see Evidence § 551.

¶ 11. Under How. St. § 1786 and the amendatory act of 1883 (How. St. § 1789), poor persons must be supported at the expense of the township or city where such settlements are had; and the provisions of sections 1762, 1793, 1794, for removing to the county poorhouse persons found to be in indigent circumstances, and for a determination by the county superintendents as to their legal settlement, must be construed in connection with those statutes.—Township of LaGrange v. Superintendents of Poor of Cass County, 115 Mich. 181.

§ 5. Liability of county for support.

Health board expenses in treating epidemic contagious diseases as county, city or township charge, see Health § 12.

Right of paying county or division to sue county or township where settlement was for health and quarantine expenses, see Health § 13.

Statutory provisions, see Comp. L. 1915, § 5206 et seq.

¶ 12. The board having by two-thirds vote adopted the distinction between township and county poor (How. St. § 483) cannot, without rescinding resolution by two-thirds vote, direct expenditure of county funds in support of poor who have gained settlement in any township or city.—Township of LaGrange v. Superintendents of Poor of Cass County, 115 Mich. 181.

¶ 13. Under How. St. § 1755, providing for the support of poor persons by the county in which they may be, and section 1786 providing that in counties where the distinction between township and county poor has not been abolished, the poor having no settlement in any township shall be supported by the county in which they may be, a county cannot recover money expended for the support of poor persons, from a county from which such poor persons have voluntarily removed in the absence of any showing that they were removed or enticed from the former home county with the intent to make the county of their new residence chargeable with their support, as prohibited by How. St. § 1767 et seq.—Superintendents of Poor of Kalkaska Co. v. Superintendents of Poor of Grand Traverse Co., 120 Mich. 247.

¶ 14. One county supplied relief to a resident of another county under Comp. L. 1897, § 4424, and before Act No. 7, Pub. Acts 1903, was passed. The action to recover from the latter county was not begun until after the passage of Act No. 7, Pub. Acts 1903, amendatory of Comp. L. 1897, § 4424. Held, that the amendatory act would not be given a retroactive effect so as to prevent recovery under the original act.—Board Sup'rs Arenac Co. v. Board Sup'rs Iosco Co., 158 Mich. 344.

¶ 15. No intent to transport poor persons to another county and make it chargeable with their support is shown by the fact that a deserted wife and her children settled in the county and became needy by desertion, that she requested aid to enable her to return to the county of her former residence where all her friends and acquaintances lived and assured the poor authorities that if she was there she would be taken care of, that thereon without any suggestion by them that she should return she was furnished with means of transportation and travel and went back, though she told a different story to the poor authorities of the county to which she came; and accordingly the other county is not liable to such county under Comp. L. 1897, §§ 4514-4518, which base such liability on the intent with which the removal was made, requiring that it be with intent to make the other county chargeable.—Superintendents of Poor of Livingston County v. Superintendents of Poor of Oakland County, 141 Mich. 667.

¶ 16. Where one county properly supplies relief to a patient while in its borders who is a resident of another county, it can recover of the second county for the relief furnished without exhausting its remedies against

private persons.—Board Sup'rs Arenac Co. v. Board Sup'rs Iosco Co., 158 Mich. 344.

§ 6. Liability of township or city.

Liability of county or township, see ante § 5.
Liability for support of indigent insane, see post § 7.
Statutory provisions, see Comp. L. 1915, § 5237 et seq.

¶ 16a. The determination by a supervisor that a certain person is one entitled to relief is an official act which is binding upon the township in favor of those who in good faith furnish medical attendance or supplies in reliance upon the order and direction of such supervisor.—Belknap v. Township of Benton, 169 Mich. 58.

§ 7. County charged with support of indigent insane.

State liability for support of insane persons, see post § 8.
Liability of relatives and proceedings to enforce same, see post §§ 9, 10.

¶ 17. Under statutes, Comp. L. 1897, § 4584, prescribing that a year's residence was necessary to a settlement, section 4536, making the township liable if he has a settlement and the county if he has none, and section 4502 providing for support by the county in which the pauper may "be," but not as between counties making any provision as to which county should bear the charge, it is the duty of the county where the person becomes a pauper to bear it; and in the case of insane paupers the provision of Comp. L. 1897, §§ 1915-1921, that the cost of support at public asylums shall be borne by that county where the insane has a "legal settlement" means that a year's settlement is required, that being the only meaning ascribable to the legislature.—Superintendents of Poor of Jackson County v. Superintendents of Poor of Hillsdale County, 124 Mich. 17.

¶ 18. A person who became indigent and insane in a county after a residence less than one year, was properly adjudged to have her legal settlement in the county of her prior residence, although the proceedings were had under Comp. L. 1897, § 1915, which fails to specify the time required to effect a legal settlement; as under Comp. L. 1897, § 4556, the legislature has determined that in cases of indigent insane persons a legal settlement may be had in a county when a person, otherwise competent, has maintained himself for one year after such entry; and this statute although independent of the present case, is to be regarded as an intention to fix the time and circumstances under which legal settlement may be acquired by an indigent insane person within any county.—In re Woodcock, 123 Mich. 369.

¶ 19. Where, during an investigation by a probate judge of an application for the admission of an indigent insane person to the insane asylum, it appears that such person has not acquired a legal settlement in his county, he is not ousted of jurisdiction, nor can he refuse for that reason to make the desired order of admission; and he should order the expense to be paid by his county in the first instance, leaving the question of residence and of the county finally liable for such support to be determined as provided by How. St. § 1930c4.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 20. The provision of Pub. Acts 1887, No. 62, amending Pub. Acts 1885, No. 135, § 25, which permitted "any person" found to be insane and indigent, and who had not gained a settlement "in any county of the state," to be committed to an asylum and supported at the expense of the state, was repealed by Pub. Acts 1897, No. 44, amending section 23 of the Act of 1885, and providing for the commitment as a state charge of any indigent insane person who has no legal settlement in any county of the state, if such person "is a citizen of the state."—Porter v. Edwards, 114 Mich. 640.

¶ 21. The certificate of a probate judge, made pursuant to Comp. L. 1871, § 1934, after the investigation provided for by said section, that satisfactory proof has been adduced showing that the person therein named is insane, and that his estate is insufficient to support him and his family, or, if he has no family, himself, under the visitation of insanity, is all that is required to admit said person into the insane asylum, to be supported at the expense of the county to which he belongs, etc.; and the officers of the asylum are bound to act upon such certificate, which is an original document, and is not invalidated by the failure of the probate judge to enter the proper order in the journal of the probate court, as required by said section.—State v. Dunbar's Estate, 99 Mich. 99.

¶ 22. A county was not chargeable under R. S. 1846, chap. 14, §§ 3, 29, to an attorney who, at the request of the court, defended one charged with crime who was poor and unable to employ counsel.—Bacon v. Wayne, 1 Mich. 461.

§ 8. ——Liability of state for support.

¶ 23. The return of an insane person to asylum within one year is necessary to entitle a patient to be received at the expense of the state, and if returned after the expiration of a year such person becomes a charge upon the county, as How. St. § 1930c8 requires an unrecovered insane patient removed from an asylum to be returned within one year in order to be received at the expense of the state.—Lockton v. Edwards, 118 Mich. 419.

§ 9. Liability of person bringing in or transporting pauper.

Intent to make county liable by transporting pauper, see also ante ¶ 15.

Liability for support by reason of relationship to poor person, see post §§ 10, 11.
Crime of transporting pauper into county, see Crimes § 118.

¶ 24. It is no justification for bringing a pauper into the state and county to say that it was done by direction of a court of the state from which the pauper was brought.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

¶ 25. One who brings a pauper from another state into a county of this state with intent to charge such county with her support, and who thus far supports her, is not, until he has been convicted under How. St. § 1776, liable in an action for her prospective support, though he fails to indemnify the county therefor.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

¶ 26. An affidavit to recover a penalty for bringing a pauper from another state into a county in this state, with intent to make such pauper a charge to said county, must, to give the court jurisdiction, state the facts positively or give the circumstances upon which affiant has good reasons to believe they exist.—Luton v. Newaygo Circuit Judge, 70 Mich. 152.

¶ 27. A suit to recover for the support of a pauper illegally removed from another state into a county in Michigan is properly brought in the name of the superintendents of the poor of the county.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

¶ 28. Unless the indigent condition of a person brought into this state is admitted, an adjudication of the fact that this person is a pauper must precede suit for her support.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

¶ 29. The county superintendents of the poor are the proper parties to sue for a pauper's support.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

§ 10. Liability of relatives.

Statutory provisions respecting support of the poor by their relatives, see Comp. L. 1915, chap. 97.

¶ 30. Relatives of indigent patients who previous to passage of Act No. 101, Pub. Acts 1909, § 3768 et seq., How. St., 2nd Ed., were supported at the expense of the state in state hospitals, are thereafter liable for the future maintenance of such patients.—In re Clark's Appeal, 186 Mich. 300.

¶ 31. The fact that a person has been maintained without compensation by the state in a state hospital does not confer a vested right on his relatives to have such free support continue indefinitely.—In re Clark's Appeal, 186 Mich. 300.

¶ 32. Act No. 27, Pub. Acts 1913, relative to inmates of the Home for Feeble-Minded and Epileptics is not a legislative construction of Act No. 101, Pub. Acts 1909, § 3768 et seq., How. St., 2nd Ed., requiring the relatives of indigent patients to pay for their support in state hospitals.—In re Clark's Appeal, 186 Mich. 300.

¶ 33. A father may be compelled to support his adult children if they become a public charge.—Stilson v. Gibbs, 53 Mich. 280.

¶ 34. To make their father liable to support adult children must be "poor persons" within the meaning of How. St., § 1741.—Clinton v. Laning, 61 Mich. 355.

¶ 35. Under How. St., § 1741, a daughter is legally liable for the support of her indigent mother unable to support herself, and the mother's brother is not so liable and it was not error for the court to so instruct the jury in a case where a married daughter had sued her uncle for money expended in her mother's care and support.—Howe v. Hyde, 88 Mich. 91.

¶ 36. There is nothing in the statute relating to the support of poor persons by their relatives requiring a person to support his brothers or sisters.—Richardson v. Detroit & M. Ry. Co., 176 Mich. 413.

§ 11. ——Procedure to enforce support or charge relatives.

Reviewableness on error of proceedings to compel support of parent, see Appeal § 20, ¶ 82.
Bastardy proceedings to enforce support of bastards, see Bastards § 4.
Statutory provisions, see Comp. L. 1915, § 5191 et seq.

¶ 37. The proceeding, under Comp. L. 1871, chap. 49, How. St., chap. 41, to compel the support of poor persons by their relatives, are summary in character, and are not according to the course of the common law.—Smith v. Lapeer County Superintendents of Poor, 34 Mich. 58.

¶ 38. Notice must be given to the mother of an insane child of proceedings by the superintendents of the poor to charge her with its support.—North v. Joslin, 59 Mich. 624.

¶ 39. The notice required by How. St. § 1742 to be given to the relatives of an insane child is essential to give the circuit court jurisdiction of proceedings by superintendents of the poor to charge such relatives with his support.—North v. Joslin, 59 Mich. 624.

¶ 40. In suing individuals to reimburse the county for money paid to an asylum for care of an indigent insane person under How. St. § 1748 and Laws 1885, Act No. 135, § 28, it is sufficient to declare on the money counts in the name of the superintendents of the poor.—Superintendents of Poor of Washtenaw County v. Rabbitt, 99 Mich. 60.

¶ 41. Pub. Acts 1903, No. 217, § 20, allowing the probate court to make an order requiring relatives legally liable to pay a reasonable sum for the support of an indigent committed to an insane asylum does not require that the probate judge make an order for a specific amount. An order that a father contribute to the support of his indigent daughter "not to exceed the sum of $50.00" quarterly, is therefore a valid one.—In Re Beers, 148 Mich. 300.

¶ 42. In order to charge a parent it need not affirmatively appear from the findings of the trial judge that the rate of charges for the support of the patient was fixed by the trustees of the several insane asylums in joint session, as required by Laws 1885, Act No. 135, §§ 28, 29, as the treasurer of the county is authorized to pay to the treasurer of the asylum where such support is furnished the amount of such charges on the order of the steward, which is, to him at least, prima facie evidence of its correctness, and the county then has right of recourse on individuals who are liable.—Superintendents of Poor of Washtenaw County v. Rabbitt, 99 Mich. 60.

¶ 43. An order in proceedings under How. St., chap. 41, requiring sons to support their aged and infirm father, was held, on certiorari, to be warranted by evidence.—Superintendents of Poor of Clinton County v. Jury, 80 Mich. 327.

¶ 44. The order for support under Comp. L. 1871, chap. 49, How. St. § 1743, in such proceedings is not a judgment, and cannot be reviewed on writ of error. It is to be enforced by attachment.—Smith v. Lapeer County Superintendents of Poor, 34 Mich. 58.

§ 12. Insane paupers.

Liability of public and of relatives for support, see ante §§ 7-10.

Procedure to enforce liability of relatives, see ante § 11.

Suit by superintendent of poor to recover support of insane person furnished by county upon such person becoming possessed of property sufficient to reimburse county, see Insane Persons ¶ 140.

Limitation of action by state for reimbursement from estate of indigent insane person, see Limitations ¶ 108.

Support and custody of insane persons in general, see Insane Persons, II.

¶ 45. A fund in the hands of the guardian of an insane person, arising from the payment to the guardian of a legacy bequeathed to the ward under a will which directs that it shall be received by the legatee free and clear from his debts, contracts, anticipations, and alienations, and of all liability for or by reason of the same, and from all levies, attachments, and executions, may be subjected to the payment of a claim by the state against the estate of the ward for expenses thereafter incurred in the care, support, or maintenance of the ward in the asylum as an indigent insane person.—State v. Dunbar's Estate, 99 Mich. 99.

§ 13. Poor officers, and their powers, rights and liabilities.

Authority to contract for support to be given outside county of settlement, see ante ¶ 9.

Authority to sue for penalty for bringing poor into county, see ante § 9.

Name in which to sue for penalty, see ante ¶ 27.

Power of superintendent to make criminal complaint for wife abandonment, see Indictment § 8.

Authority of poor director to bind city for employment of physician, see Municipal Corporations ¶ 819.

General powers, duties, and authority, see Comp. L. 1915, chap. 97 et seq.

Name in which actions by or against superintendent of the poor shall run, see Jud. Act, chap. XII, § 9; Comp. L. 1915, § 12360.

¶ 46. The Board of Poor Commissioners of the City of Detroit is a local, and not a state, agency.—Pryzbylowski v. Detroit Board of Poor Commissioners, 188 Mich. 270.

¶ 47. The Board of Poor Commissioners of the City of Detroit is subject to the Civil Service Amendment to the charter of the City of Detroit in the choice of, and discharge of, its subordinates.—Pryzbylowski v. Detroit Board of Poor Commissioners, 188 Mich. 270.

¶ 48. Township directors of the poor cannot incur liability on behalf of their townships by employing physicians to perform surgical operations upon paupers.—Barber v. City of Saginaw, 34 Mich. 52.

¶ 49. When application is made by a pauper to a county superintendent of the poor under C. L. 1857, § 1439 (see How. St. § 1762), the superintendent has full power to provide such temporary relief as he may deem proper, without any of the restrictions or qualifications imposed upon directors of the poor on similar applications by sections 1443 and 1444. And in granting temporary relief, and in determining who are proper subjects for temporary and permanent relief, a single member possesses the whole power of the board.—Hewitt v. Macomb County Superintendents of Poor, 5 Mich. 166.

¶ 50. Under Comp. L. 1871, § 1818, two of the three county superintendents of the poor possess the power of the board whenever they unite in action; it is within their power, without an authorization from the board at a formal meeting, to contract for the purchase of a moving and reaping machine for use on the county farm.—Osborne v. Macomb Superintendents of Poor, 26 Mich. 66.

¶ 51. Under Comp. L. 1897, § 2336, the supervisor is the agent of the township for the transaction of all legal business, and it is his duty to determine whether a boy injured by a gun shot is such a poor person as to bring the action within the law provided for the support of the poor by the township. —Belknap v. Township of Benton, 169 Mich. 58.

¶ 52. In their statutory capacity as owners and managers of farm property superintendents of the poor are liable for injuries to adjoining owners from their negligent management.—Rowland v. Kalamazoo Poor Superintendents, 49 Mich. 553.

¶ 53. A declaration against superintendents of the poor for injuries from their negligence in managing farms which they are empowered by statute to keep up, sustained. —Rowland v. Kalamazoo Poor Superintendents, 49 Mich. 553.

POPULATION to POSSESSION.

Cross-References.

Population—
- As basis for class legislation, see Constitutional Law § 215.
- Subjects of judicial notice, see Evidence, I.

Portage Ship Canal—
- See Canals; Navigable Waters, III.
- Land grants in aid of canal, see Public Lands, VI.

Portion of Child—
- In the sense of advancement, see Descent § 27; Estates of Decedents § 365; Wills, VI.

Positive Law—
- Force of rules of court, see Courts § 16.
- Force of municipal ordinances, see Municipal Corporations § 49.

Positiveness in Pleading—
- See Pleading § 4; Equity § 77 et seq.

Posse Comitatus—
- Power of officer to invoke, see Arrest, V.
- Liability of persons called to assist for false imprisonment of person arrested by officer's command, see False Imprisonment § 21.

Possession—
- Owing to the great variety of legal subjects in which possession is an element no detailed list of references would be feasible or desirable. See topic treating of the subject-matter possessed or of the principal thing to which possession is an incident.
- As an element entering into title, ownership, enjoyment, or boundaries of real property, see Adverse Possession; Boundaries; Easements; Landlord and Tenant; Life Estates; Tenants in Common; Vendors and Purchasers.
- As an element in personal property rights and titles and transfers thereof, see Sales; Bailments; Pledges; Chattel Mortgages; Liens.
- Injuries to possession of real or personal property, see Conversion; Trespass.
- Remedies for injury to possession, see Conversion; Trespass; Covenants for Title; Landlord and Tenant, V; Forcible Entry.
- Remedies for recovery of possession, see Ejectment; Replevin; Forcible Entry.
- As badge or indicium of ownership, claim, or incumbrance, or of fraud therein, see Notice and Record of Title; Chattel Mortgages; Sales, XI; Fraudulent Conveyances; Chattel Mortgages, I; Evidence §§ 56, 103; and see also topics treating of remedies involving possession.
- As badge of authority to bind owner by declarations, see Evidence § 418.
- Rights of receiver, trustee, or representative, see Estates of Decedents, V, B; Receivers, IV; Trusts, VI.
- Taking possession to constitute levy, see Attachment § 48; Executions § 36.
- Writ of possession, see Ejectment § 59; Forcible Entry, III.

POSTAL LAW.

TREATS of the law relating to the post-office department, mails, and letters.

§ 1. In general.

Construction of agreement giving right to open business letters, see Contracts § 214, ¶ 888.

Validity of contracts to obtain location of post office or appointment to office, see Contracts §§ 53, 59.

Jurisdiction of postal crimes, see Indictment ¶ 493.

Presumption as to receipt of letters duly mailed, see Evidence § 35.

Admissibility of letters as evidence, see Evidence, IV, V, VII, VIII; Indictment, VIII, B.

Liability of carrier for act of mail agent in throwing off sacks at stations, see Carriers ¶ 523.
Sufficiency of service of notices by mail and proof of such service, see Notices §§ 3, 4, 8.

Liability of carrier for injuries to government postal employees, see note, 14 N. C. C. A. 197-222.

POST DATING to POWER PLANTS.

Cross-references.

Post Dating—
See Execution of instruments § 5; Negotiable Instruments.
Posthumous Heirs—
Vesting of title in intestacy, see Descent § 21.
Rights under wills, see Wills, VI, VII.
Posting Notices—
See Notices; Process, II; and see also specific topics such as Drains, II.
Post Mortem—
Observed facts on autopsy as evidence of bodily conditions, see Evidence § 100.
Postnuptial Settlements—
Dealings between husband and wife, see Husband and Wife, II.
Post Obit Notes and Agreements—
See Negotiable Instruments.
Limitations on agreements payable at death of person, see Limitations § 56.
As lacking consideration, see Contracts § 135.
Postponement of Trial—
See Continuances, Indictment, VI.
Post Testamentary Marriage and Children—
See Wills.
Pounds—
See Animals § 4 et seq.
Powers of municipalities to establish, see Municipal Corporations § 94.
Poverty—
As excusing laches, see Equity § 50.
As element in diligence in seeking rehearing, see Appeal § 545.
As affecting damages, see Damages, V, XI, B.
Relief and support of poor persons, see Poor Persons.
Power Plants—
As fixtures, see Fixtures § 9.
Rights in waters, see Waters, IV.
Grants and contracts for power, see Waters, IV.

POWERS.

TREATS of the right in one person to create estates in lands belonging to another (Comp. L. 1915, chap. 222), excluding mere powers of attorney amounting only to an authority to act in the name of the principal (see Agency; Frauds, Statute of) and trusts to manage and dispose of lands (see Trusts). The interpretation of power and trust clauses in wills is treated in Wills, VI.

§ 1. In general.
Construction of wills and trusts respecting powers, see Wills, VI; Trusts, II.
Sale under power in chattel mortgage, see Chattel Mortgages § 126 et seq.
Bare power of sale to secure debt as distinguished from chattel mortgage, see Chattel Mortgages § 2, ¶ 6.
Agreement for power of sale to pay debts as distinguished from chattel mortgage, see Chattel Mortgages § 2.
Execution sale as the exercise of a power by sheriff, see Executions ¶ 183.
Foreclosure sale under power in mortgages, see Foreclosure, II.
Powers of officers and agents, see Officers, VI; Agency, II; Corporations, XVII.

¶ 1. Where the donee of a power to be executed by conveyance to another attaches unauthorized conditions, such conditions are void and the deed good. But only the grantee and those in privity with him are entitled to question the act.—Ready v. Kearsley, 14 Mich. 215.

¶ 2. On a bill by executors to have the court construe a clause in the will leaving a fund to a city for the erection of a fountain, held, that a power may be granted with a devise or bequest to others than the beneficiaries, and such power conferred upon the same persons who are appointed executors, the authority to exercise or execute the power being derived from the will.—Hosmer v. City of Detroit, 175 Mich. 267.

¶ 3. A power may be created by will.—Battelle v. Parks, 2 Mich. 531.

PRACTICAL CONSTRUCTION to PRIORITIES AMONG CREDITORS.

Cross-References.

Practical Construction—
See Constitutional Law, I; Contracts, VI, A; Statutes, V; Wills, VI, A.
Practice and Procedure—
The topic "Practice" contained in the former editions of this digest embraced so many and such bulky subjects that it was abandoned and the matter was distributed for treatment into a number of distinct topics, to wit, Appearance; Calendar; Continuances; Discontinuance;

Dismissal and Nonsuit; Directing Verdict; Motions and Orders; New Trial; Instructions; Jury; Trial; Argument of Counsel; Verdicts and Findings; Judgments.
Court rules in general, see Courts, III.
Equity practice, see Equity.
Criminal pleading and trials, see Indictment.
Justice court practice, see Justices of the Peace.
Superior court and other municipal court practice, see Municipal Courts.
Pleading, see Generally Pleading; Equity, VII, and see also portions of specific topics devoted to "pleading."
Rules of evidence, see Evidence; Indictment, VIII.
Examination and privileges of witnesses, see Examination of Witnesses.
Appellate and revisory procedure, see Appeal; Certiorari.
On writs and process, see Attachment; Civil Arrest; Executions; Process.
In addition to the foregoing the practice in particular actions and proceedings or in relation to particular causes of action is treated in specific topics devoted to such actions and causes of action, e. g., Death by Wrongful Act; Contracts, X; Highways, XII, XIII; Negligence, V; Trespass, II; Conversion, II.

Præcipe—
See Process § 8.

Prayer—
Necessity and sufficiency of prayers in bills, see Equity § 90 et seq.
In bill to enforce mechanics' liens, see Mechanics' Liens § 46.

Precatory Words—
As creative of trust, see Wills, VI.

Precautions—
Element of care and omission as negligence, see Negligence, and see specific topics referred to in Negligence.

Precedent and Subsequent Conditions—
See Contracts, VI; Deeds, III; Wills, VI; Statutes, V.

Precedents—
General doctrine of precedent as authority and rule of stare decisis, see Courts, IV.

Preceding Estates—
See Life Estates, Remainders, and Reversions.

Predisposing Conditions—
As proximate causes, see Negligence, III.
As affecting damages enhanced thereby, see Damages.

Pre-emptions—
See Public Lands.

Pre-existing Conditions—
Damages for personal injuries aggravated by pre-existing conditions, see Damages § 140.

Pre-existing Debts—
As consideration or value, see Contracts § 123; Fraudulent Conveyances, I, C; Negotiable Instruments § 78; Notice and Record of Title § 34.

Pre-existing Law—
As factor in statutory construction, see Statutes, V.

Preferences—
In bankruptcy or assignment for creditors, see Bankruptcy §§ 8, 9; Assignments for Creditors §§ 9-12.
Of creditors of corporations, see Corporations § 221.
As fraud warranting attachment, see Attachment § 8.

Preferred Claims—
Against decedents' estates, see Estates of Decedents § 213.
Against corporations' estates, see Corporations § 227.
Against insolvents' estates, see Assignments for Creditors § 23; Bankruptcy.

Prejudice—
Disqualifying judge or juror, see Judges, III; Jury, III.
Ground for new trial, see New Trial § 8.
Affecting qualifications of arbitrators, see Arbitration § 8.
Affecting credibility of witness, see Witnesses, VI.

Prejudicial Error—
See Harmless Error; Indictment, XV.

Preliminary Examination—
On information for crime, see Arrest, III, VII.
On information or complaint for bastardy, see Bastards § 6.

Preliminary Injunctions—
See Injunctions, IV.

Preliminary Proofs—
In the sense of foundation for other evidence, see Evidence § 76.
Order of introduction of preliminary proofs or foundation, see Trial, V, B; Indictment, IX, B.

Premature Actions—
Time, stage or condition of cause of action to make it suable, see specific topics treating of the various causes, e. g., Highways § 265 et seq.; Insurance § 265 et seq.
Accrual and maturity of cause to set limitations in motion, see Limitations, IV.
Proof of cause of action matured after commencement of action as variance, see Pleading §§ 164, 167.
Ground for involuntary dismissal of action, see Discontinuance § 49.

Premeditation—
Element in murder, see Homicide § 2.

Premiums—
On building association loans, see Building Associations § 11.
For insurance, see Insurance, VI.

Prepayment—
Of damages in exercise of eminent domain, see Eminent Domain § 36.
For insurance, see Insurance § 85.
Of fees of officers for official service, see Sheriffs, III; Costs § 145.
Of jury and witness fees, see Jury § 12; Witnesses, VII.
Preponderence—
Sufficiency of evidence, see Evidence, X; Indictment § 301.
Prerogative writs—
See Certiorari; Mandamus; Appeal and Error; Prohibition; Quo Warranto; Injunctions.
Legislative power to affect, see constitutional Law § 55.
Prescription—
Of easements, see Easements; Highways, II; Waters.
As legalizing nuisance, see Nuisances § 11.
Presence—
At trials, see Trial, II; Indictment § 328.
At execution of will, see Wills, IV, B.
Present Worth—
Evidence as to proper computation, see Damages § 331.
Manner of computing damages for death, see Death by Wrongful Act § 38.
Presentation of Claims—
See Estates of Decedents, VI, C; Corporations § 223; Assignments for Creditors § 24; Bankruptcy § 11; Guardianship § 35; Receivers, IV; Counties § 46; Municipal Corporations § 148 et seq.; Townships, VI; Schools, IV; Highways § 266 et seq.
Presentment and Demand—
For payment of bill or note, see Negotiable Instruments, VIII.
Presidential Electors—
Constitutionality of districting law, see Constitutional Law, V, X, XII.
Elections in general, see Elections.
Voting districts, see Elections § 7.
Reviewableness of state decision on law by United States Supreme Court, see Courts § 91.
President of Corporation—
See Corporations, XVII.
Press—
Constitutional liberty, see Constitutional Law § 186.
Libelous and privileged publications, see Libel.
Presumptions—
In general, see Evidence, II; Indictment, VIII, A.
Specific presumptions, see above and see specific topics.
Arising from record on appeal or error, see Appeal, XII, C.
Attendant on judgments or in support of jurisdiction, see Judgments, VII; Appeal, XII, C; Courts § 80.
Rule against pleading facts presumed, see Pleading § 14.
Pretenses—
Crime of obtaining money or property by false pretenses, see Crimes, II.
Pretermitted Heirs—
Right to inherit regardless of will, see Wills, I, VII.
Construction of Will, see Wills, VI.
Prevailing Party—
Right to costs determinable by event, see Costs, II.
Preventing Performance—
As actionable breach of contract, see Contracts § 223; Sales; Building Contracts, II.
Prevention of Clouds on Title—
Ground for injunction, see Injunctions, II, E.
Previous Conviction or Acquittal—
See Crimes, I, D.
Previous Testimony—
As evidence, see Evidence § 337 et seq.; Indictment §§ 222, 236, 237.
Price—
Of goods sold, see Sales.
Agreements fixing prices, see Combinations; Contracts § 88.
As evidence of value, see Values.
Prima Facie Case—
Rule as to directing verdicts, see Directing Verdict.
General rules as to sufficiency of evidence, see Evidence, X.
Sufficiency of evidence as to particular causes and issues, see specific topics treating of them.
Primary Election Law—
See generally Elections.
Validity of the law, see Constitutional Law § 254.
Primary Evidence—
See Evidence, IV; Indictment § 184 et seq.
Primary Obligors—
See Negotiable Instruments; Guaranty; Suretyship.
Primary Wrongdoer—
Liability to indemnify technical tortfeasor, see Indemnity, II, B; Highways §§ 263, 264.
Principal and Agent—
See Agency.
Principal and Income—
See Life Estates § 28; Wills, VI; Trusts.
Principal and Surety—
See Suretyship.
Principals—
In crime, see Crimes, I, B.
Printing—
Of records and briefs in supreme court, see Appeal §§ 174, 231; Indictment § 598.
Costs on appeal for printing record and briefs, see Costs §§ 116-118.
Rule for construction of written and printed parts of contracts, see Contracts § 157.
Publication of summons for substituted service, see Process, II, C.
What constitutes legal newspaper, see Newspapers.

Prior; Priorities—
See generally topic treating of that which is described as prior or as having priority. See also the following:
Jurisdiction of courts, see Courts § 72 et seq.
Between creditors and liens, see Liens § 11; Mortgages, V; Chattel Mortgages, III; Pledges § 7; Attachment, VIII; Executions, V; Mechanics' Liens, VI.
Marshalling assets to work out priority, see Marshalling Assets.
In distribution under Bankruptcy Act, see Bankruptcy § 12.
By creditors' bill, see Creditors' Suits §§ 31, 32.
Between lis pendens and other claims, see Lis Pendens § 3.

PRISONS AND JAILS.

TREATS of prisons and jails as institutions and of their management and discipline, excluding the status and rights of convicts (see Convicts) and the pardon or liberation of imprisoned persons (see Pardons; Habeas Corpus) and the arrest, prosecution, and sentence of persons to imprisonment (see Arrest; Indictment). Matters peculiar to reformatory institutions will be treated in Reformatories.

Analysis.

§ 1. In general; regulation and control.
§ 2. Confinement and discipline of prisoners.
§ 3. Labor and instruction of prisoners.
§ 4. Keeping, protection and sustenance of prisoners.
§ 5. Warden, jailer, or agent.
§ 6. Transfer of prisoners to other prisons.

For the statutes relative to prisons and jails, see the indices to the published statutes, especially Comp. L. 1915, chap. 59 et seq., being Part Three, entitled "Penal and Reform Institutions."

§ 1. In general; regulation and control.

Legislative power over prisons, see also Constitutional Law § 65.
Places for imprisonment for crimes, see Crimes, §§ 28, 29.
Place of commitment in bastardy proceedings, see Bastards §§ 13, 14.
Powers of city to designate prison for confinement of offenders, see Municipal Corporations § 98.
Description of place of confinement in record of sentence, see Indictment § 500.
Requisites of indictment for crime by convict in prison, see Indictment § 34.
Cost of prosecuting convict for crime in prison as state or county charge, see State of Michigan.
Jail and appurtenances thereto within crime of making or aiding escape, see Crimes § 75.
Detroit House of Correction as place where "food or drink is made, stored, sold, or offered for sale," see also Food ¶ 4.
Pardons and paroles and procedure to grant same, see Pardons.
Paroled prisoner as remaining constructively in custody of prison authorities, see Pardons ¶ 11.
Imprisonment of person as suspending running of limitations, see Limitations § 40.
Duty of county to provide jail and submission of plans for approval, see Comp. L. 1915, § 2251.
Statutes regulating county jails and management of them, see Comp. L. 1915, chap. 71.

¶ 1. Laws 1893, Act No. 118, entitled "An act to revise and consolidate the laws relative to the state prison, to the state house of correction and branch of the state prison in the Upper Peninsula, and to the house of correction and reformatory at Ionia, and the government and discipline thereof, and to repeal all acts inconsistent therewith," covers the entire management and control of and discipline in said penal institutions, and supersedes said laws, notwithstanding some of their provisions do not contravene those of the new act.—Attorney-General v. Parsell, 100 Mich. 170.

¶ 2. Although the prison at Ionia is called a house of correction and reformatory, it is no less than a state prison. Persons convicted of felony are sentenced to and confined there.—People v. Gobles, 67 Mich. 475.

¶ 3. The provisions of § 2156, Comp. L. 1897, How. St., 2nd Ed., § 15462, that the Detroit House of Correction is subject to periodical inspection in the discretion of the state authorities, includes inspection by representatives of the State Dairy and Food Commissioner.—People v. Jacobs, 184 Mich. 77 (equally divided court).

¶ 4. While the legislature has required the city of Detroit to pay the expenses of the Detroit House of Correction to the extent that they shall be found to exceed its earnings, the management and appropriations of said institution are not within the control of the common council, but are confided to officers provided for by the law, except as the assent and concurrence of the council are necessary to extraordinary appropriations.—City of Detroit v. Board of Water Com'rs of Detroit, 108 Mich. 494.

¶ 5. The board of water commissioners of Detroit is not obliged to furnish water gratuitously to the Detroit House of Correction as to a city public institution. It is not such.—City of Detroit v. Board of Water Com'rs of Detroit, 108 Mich. 494.

¶ 6. The city of Detroit is not custodian of the house of correction or guardian of the prisoners, nor is it liable for the officers' treatment of the convicts.—Detroit v. Laughna, 34 Mich. 402.

§ 2. Confinement and discipline of prisoners.

Transfer to other prisons, see post § 6.

Sentence and judgment and warrant of commitment, see Indictment, XI, XII.

Sentence of prisoner for crime in prison to commence at end of present term, see Indictment ¶ 2359.

Mandamus to regulate prison labor and discipline, see Mandamus § 105.

¶ 7. The restraint of one convicted of crime is permitted only where there is an order, warrant or judgment of a court or magistrate, commanding it.—In re Forscutt, 167 Mich. 438.

¶ 8. Witnesses who are committed in default of bail for their appearance to testify on behalf of the people in a criminal case must be regarded as "prisoners held upon civil process," within the meaning of How. St. § 8941, which provides that on no pretense whatever shall prisoners held on civil and criminal process be put or kept in the same room.—In re Lewellen, 104 Mich. 318.

§ 3. Labor and instruction of prisoners.

Provision as to teaching trade to convicts, see Constitutional Law § 8, ¶ 25, § 9, ¶ 34.

¶ 9. Where the statute required the agent of the state prison to give notice in a newspaper for sealed proposals for letting the convicts, and the agent, without giving such notice, hired them out for a term of years, the hiring was held void, the mode of letting prescribed by the statute being a limitation on the power itself, and not merely directory to the agent.—State Prison Agent v. Lathrop, 1 Mich. 438.

¶ 10. A contract made by the agent of the state prison for letting out the services of convicts was held void because of the omission to publish notice as required by the statute.—State Prison Agent v. Lathrop, 1 Mich. 438.

¶ 11. Where the constitution and statutes provide that "no mechanical trade shall hereafter be taught to convicts in the state prison, except the making of those articles of which the chief supply for the consumption of the country is imported from other states or countries," it is for the agent of the prison and not for the courts to determine what trades are within the spirit of such provision.—People ex rel. Russell v. State Prison Inspectors, 4 Mich. 187.

¶ 12. The provision of Pub. Acts 1893, No. 118, § 34, that the prison boards shall meet jointly once in six months "to determine what lines of productive labor shall be pursued in each prison, etc.," does not operate as a condition precedent to the execution of a contract for prison labor by the warden of a prison with the approval of its board of control where the joint board has taken no determinative action; since in view of the policy evinced by other parts of the prison laws it was the intention to keep inmates employed.—Wallerstein v. Board of Control, 116 Mich. 365.

¶ 13. The fact that brooms made under a contract for the manufacture of brooms in the state prison are sold outside of the state of Michigan only, is immaterial, in an action to enjoin the performance of such contract as being in violation of Const. art. 18, § 3, prohibiting manufacture in prisons of articles chiefly made within the state for consumption therein.—Manthey v. Vincent, 145 Mich. 327.

¶ 14. Const. art. 18, § 3, of the Constitution, prohibiting the manufacture in the state prison of those articles, of which the chief supply for home consumption is derived from home manufactories, applies in all cases where convicts cannot manufacture such articles without being taught the trade, practically or theoretically.—Manthey v. Vincent, 145 Mich. 327.

¶ 15. Const. art. 18, § 3, prohibiting the teaching of a "mechanical trade" in prison of the manufacture of such articles "of which the chief supply for home consumption" is derived from home manufactories; will sustain an action to enjoin the performance of a contract for the manufacture of brooms by state convicts as being in violation of such provision of the constitution, although as such contract is being performed, the work is divided into 13 branches, and each convict learns to do the work in one, and only one, of these branches, and does not learn to make a complete broom.—Manthey v. Vincent, 145 Mich. 327.

§ 4. Keeping, protection and sustenance of prisoners.

Transfer to other prisons, see post § 6.

Nonliability of city for mistreatment, see ante ¶ 6.
Nonliability of county to prisoner made sick by unhealthy jail, see Counties § 36.
Warrant to warden for arrest of convict for crime within prison, see Arrest § 18.
Discharge of accused on affirming sentence for a time elapsed pending review, see Indictment § 639.
Power of county board to fix compensation for care of prisoners, see also Counties ¶ 178.
Expense of keeping prisoners as county charge, see Counties § 35.
Validity of contract by city to board and lodge witness convict detained under suspended sentence to be witness in another case, see also Municipal Corporations ¶ 475.
Compensation of sheriff for keeping and custody of prisoners, see Sheriffs, III.

¶ 16. A valid contract made by the board of inspectors of the state house of correction for the keeping of female prisoners in the Detroit House of Correction, was not abrogated by Pub. Acts 1893, No. 118, which, while superseding all prior acts relating to the management of the penal institutions of the state, expressly saved all existing rights and penalties.—Rich v. Chamberlain, 107 Mich. 381.

Liability for injury to convicts, see note, 9 N. C. C. A. 133-145.
Liability for injury to sick or intoxicated prisoners, see note 8 N. C. C. A. 872-876.

§ 5. Warden, jailer, or agent.

As city or state officers, see also ante § 1.
City or state control of house of correction, see also ante § 1.
Officers of Detroit House of Correction as state or municipal officers, see also Municipal Corporations ¶ 546.
Nonresponsibility of municipality for acts of prison officers, see Municipal Corporations ¶ 840.
Warrant to warden for arrest of convict for crime within prison, see Arrest § 18.
Validity of agreement with warden for purchase of article supposed to have been stolen by convict, see Contracts ¶ 218.
Bribery of warden, see Crimes ¶ 218.
Action against warden or prison agent as suit against the state, see State of Michigan.

¶ 17. Comp. L. of 1897, § 2091, empowering the warden of a prison to sue and be sued, is repealed by the amendment to said section in Act No. 219, Sess. Laws 1911.—McDowell v. Warden of Michigan Reformatory at Ionia, 169 Mich. 332.

¶ 18. The statute expressly vests all control and use of state prison moneys in the agent, and he cannot be relieved from his responsibility, nor can any of his statutory power be transferred to the clerk, and if the agent allows the clerk to receive and pay out prison funds in his absence it is as the agent's own servant and not officially as clerk.—Hulin v. People, 31 Mich. 323.

¶ 19. A deputy warden of a prison may, in the absence of the warden, issue a warrant for retaking and returning a paroled convict to the prison for a breach of his parole as provided for in Pub. Acts 1905, No. 184 (the indeterminate sentence law).—In re Fox, 147 Mich. 189.

¶ 20. See as to meetings of the board of inspectors of the state prison; as to the record of the rules and regulations adopted by said board, and the verification of copies thereof; as to the official liability and duties of the clerk of said prison; as to the duties and powers of the agent of the prison, and as to actions on said clerk's official bond.—Hulin v. People, 31 Mich. 323.

§ 6. Transfer of prisoners to other prisons.

¶ 21. A sentence to imprisonment in a penal institution is subject to the provisions of law then in force to commute it to confinement in a reformatory.—Rich v. Chamberlain, 107 Mich. 381.

¶ 22. Under How. St., § 9865, providing that, whenever the sentence of any female confined in the state prison shall, by the governor or other competent authority, be "commuted to confinement for any period in the Detroit house of correction," the agent of the prison shall at once transmit such person to the superintendent of said house of correction, who shall keep her therein until the expiration of her sentence "as commuted," the governor has power to order that a woman sentenced to imprisonment in the state prison for life be transferred to the house of correction, without shortening the term of imprisonment.—Rich v. Chamberlain, 107 Mich. 381.

PRIVACY to PROBATE.

Cross-References.

Privacy—
- Actionable libel or slander of person, see Libel.
- Malicious prosecutions, see Malicious Prosecution.
- Introduction of improper person into sick room by physician, see Medicine § 9.
- Tortious arrest, see False Imprisonment.
- Pictures of accused persons as criminal records, see Records.

Private Banks—
- See Banking.

Private Carriers—
- See Carriers § 15.

Private Corporations—
- See Corporations.

Private Drains—
- See Drains, I.

Private Nuisances—
See Nuisances.
Private Property—
See generally Property, and cross-references there.
Taking for public use, see Eminent Domain; Highways II, B.
Private Prosecutors—
See Attorneys, III.
Private Roads—
See Highways, XV; Easements.
Private Ways—
See Easements.
Private Writings and Documents—
As evidence, see Evidence, VIII, A.
Privation—
As constituting ground for divorce, see Divorce, II.
Privilege—
From arrest for crime, see Arrest § 5.
From capias or civil arrest, see Civil Arrest § 2.
Of party or witness while in attendance on court, see Parties § 18; Witnesses, I.
From service of process, see Process § 23.
Of prisoner extradited for one offense against detention on another, see Extradition § 4.
Privilege of Witnesses—
See Examination of Witnesses, IV; Witnesses, I.
Impropriety of comment in argument on claim of privilege, see Indictment § 385; Argument of Counsel § 16.
Privileged Communications—
In law of libel and slander, see Libel, III.
Communications to priests, physicians, or attorneys, or between husband and wife, privileged against disclosure as witness, see Witnesses, V.
Privileged Questions—
To witness in general, see Examination of Witnesses § 108.
Privilege against self-crimination, see Constitutional Law § 201; Examination of Witnesses § 109.
Privileges and Immunities of Citizens—
See Constitutional Law, X.
Privity—
Of contract, see Contracts, II.
To bind person by judgment against predecessor, coparty, or representative, see Former Adjudication, V.
Estoppel of privies to parties estopped, see Estoppel §§ 13, 52.
Of declarant to bind represented party by admissions, see Evidence §§ 401-439.
Mechanics' liens as requiring privity of owner, see Mechanics' Liens, IV.
Prize Fighting—
As crime, see Crimes, II; Indictment.
Prize Schemes—
As crimes, see Crimes § 103.
Probable Cause—
For arrest or commitment for trial, see Arrest.
Element in actionable tortious arrest and prosecution, see False Imprisonment § 5 et seq.; Malicious Prosecution § 7 et seq.
Probate—
Of wills, see Wills, V.

PROBATE COURTS.

TREATS of the probate courts and the general law of procedure therein, excluding the particular law of procedure to the specific topics, Estates of Decedents; Guardianship; Wills; Adoption; Insane Persons, I; Eminent Domain; Drains, II. The general law of courts and jurisdiction is treated in Courts.

Analysis.

I. The court, officers and jurisdiction.
§ 1. In general; the court and its officers.
§ 2. Nature and extent of jurisdiction.
§ 3. ——Incidental jurisdiction over right or title to property.

II. Procedure and process.
§ 4. In general.
§ 5. Citation and notice; service and proof of service.
§ 6. Pleading and practice.
§ 7. Hearings, taking testimony and examining witnesses.

III. Decrees and orders.
A. In General.
§ 8. Rendition, requisites, and sufficiency.
§ 9. Operation and effect of orders and decrees.

§ 10. ——Causes, claims and defenses barred, merged, or concluded.
§ 11. ——Persons concluded or entitled to assert conclusiveness.
§ 12. Collateral attack and presumption of validity.
§ 13. Evidentiary effect of adjudication or record.
§ 14. Vacation of order or decree and granting of rehearing.
§ 15. Equitable proceedings to open or set aside probate decree.

B. APPEALS AND REVIEW.

§ 16. In general; appellate jurisdiction.
§ 17. Appealable orders and decisions.
§ 18. ——Completion and entry of decree.
§ 19. ——Parts and items of decrees.
§ 20. ——Report or decision of claims commissioners.
§ 21. Persons entitled to appeal.
§ 22. ——Waiver or estoppel of right.
§ 23. Application and order for leave to appeal.
§ 24. Leave to appeal after time.
§ 25. ——Petition and showing.
§ 26. Notice of appeal.
§ 27. ——Persons to be notified and mode of service.
§ 28. Necessary and proper parties to appeal.
§ 29. Necessity, requisites, and sufficiency of appeal bond.
§ 30. ——On appeal from claims commissioners' report.
§ 31. Time for filing record and effect of delay.
§ 32. Control over and conduct of appeal.
§ 33. Abandonment or discontinuance of appeal.
§ 34. Objections to appeal and motions to dismiss.
§ 35. Procedure and practice on appeal in general.
§ 36. Pleadings and framing of issues on appeal.
§ 37. Amendments on appeal.
§ 38. Trial of issues of fact.
§ 39. ——Submission of issues to jury.
§ 40. Scope of issues on appeal.
§ 41. ——Issues not raised or waived in probate court.
§ 42. ——Errors and objections not specified in petition and notice of appeal.
§ 43. ——Matters extraneous to order appealed from.
§ 44. Construction and conclusiveness of record and intendments thereon.
§ 45. Judgment on appeal and scope of relief.
§ 46. ——Final judgment or remand to probate court.
§ 47. ——Rendition of judgment against sureties' bonds.
§ 48. Costs on appeal.
§ 49. Operation and effect of appellate judgment.
§ 50. Proceedings after judgment on appeal.
§ 51. Certiorari to review probate proceedings.

I. THE COURT, OFFICERS AND JURISDICTION.

§ 1. In general; the court and its officers.

Nature and extent of jurisdiction, see post §§ 2, 3.

Disqualification of probate judge by bias or interest, see Judges §§ 10, 11.

Disability of judge to take interest under his own proceedings, see Judges § 4, ¶ 9.

Competency of probate judge who is legatee to make orders preliminary to probate, see Judges ¶ 24.

Presumption that substitute for probate judge was properly acting, see also Judges ¶ 45.

Vacancy appointment of judge, see Judges ¶¶ 3, 4.
Functions of probate judge in condemnation proceedings, see Eminent Domain § 89.
Validity of laws for filling of vacancies or interims, see Constitutional Law § 266.
Election for office of probate judge, when held, see Elections ¶ 1.
Election to fill vacancy, see Elections § 2.
Sufficiency of notice of special election, see Elections ¶ 11.
Constitutional provisions, see Const. art. VII, §§ 13, 14.
Powers vested under constitution, see Const. art. VII, § 1.
Place of office, see Const. art. VIII, § 4.
Election and term of probate judge, see Const. art. VII, § 14.
Powers of probate judge, see Jud. Act., chap. LI, § 2; Comp. L. 1915, § 13765.
When circuit judge may act as judge of probate court, see Jud. Act, chap. III, § 11 et seq.; Comp. L. 1915, § 12239 et seq.

¶ 1. Parties with whose consent and concurrence a circuit judge has acted as judge of the probate court cannot, in a collateral proceeding, question his right to act.—Landon v. Comet, 62 Mich. 80.

¶ 2. Where a circuit judge has acted as judge of probate over an objection that there was no order authorizing it and that the probate judge was not incapacitated, it will be presumed, in the absence of any showing to the contrary, that the necessary jurisdictional facts existed and were found authorizing him to do so.—Landon v. Comet, 62 Mich. 80.

§ 2. Nature and extent of jurisdiction.

Incidental jurisdiction over right or title to property, see post § 3.
Jurisdiction of circuit court on appeal, see post § 16.
Effect of appeal where probate court has no jurisdiction, see post ¶ 64.
For jurisdiction with reference to particular topics, see the topic in question, i. e., Adoption; Eminent Domain; Estates of Decedents; Drains; Guardianship; Incompetents; Insane Persons; Wills, V.
Jurisdiction of probate court in trust accounting, see Trusts, XI.
Relative jurisdiction of chancery and probate courts, see also Equity § 26.
Jurisdiction of probate court over claims against estates, see Estates of Decedents § 179.
Jurisdiction concurrent with chancery over testamentary trusts, see Equity ¶ 94.
Jurisdiction in condemnation proceedings, see Eminent Domain § 57, ¶¶ 174, 177.
Estoppel on appeal to object to jurisdiction of probate court, see also Courts ¶ 298.
Jurisdiction of circuit court in exercise of supervisory control, see Courts § 55.
Legislative power to change or confer jurisdiction of procedure, see Constitutional Law § 56.
Power and jurisdiction to punish for contempt, see Contempt § 19.
Power to cause taking of depositions, see Depositions § 1.
Jurisdiction and discretion of probate court in determination of compensation of representative, see Estates of Decedents § 291.
Jurisdiction of probate court for construction of will incidental to distribution, see Estates of Decedents ¶¶ 1180-1182.
Approval of justice's sentence to reformatory, see Indictment § 658.
Necessity and propriety of probate of will, see Wills, V, A.
Jurisdiction of probate court to determine whether mutual wills constitute contract, see Wills, V, B.
Jurisdiction as defined in constitution, see Const. art. VII, § 13.
Original jurisdiction over incompetents and delinquents, see Const. art. VII, § 13.
Statutory provisions as to jurisdiction of probate court, see Jud. Act, chap. LI, § 1 et seq.; Comp. L. 1915, § 13764 et seq.
When dower may be assigned by probate court, see Jud. Act, chap. LVII, § 30; Comp. L, 1915, § 13942.

¶ 3. The probate court is a constitutional court and has conferred upon it by the legislature general probate jurisdiction.—Michigan Trust Co. v. McNamara, 167 Mich. 406; In re McNamara's Estate, Id.

¶ 4. The probate court derives none of its jurisdiction or powers from the common law, but must find the warrant for all its doings in the statute.—Grady v. Hughes, 64 Mich. 540.

¶ 5. The probate court is one of general jurisdiction in testamentary and other probate matters, and where no fatal defect appears on the face of its proceedings, they are not void.—Church v. Holcomb, 45 Mich. 29; Alexander v. Rice, 52 Mich. 451; Morford v. Dieffenbacker, 54 Mich. 593; and see Palmer v. Oakley, 2 D. 433.

¶ 6. Probate courts are not courts of inferior jurisdiction but have general jurisdiction in testamentary and other probate matters.—Schlee v. Darrow's Estate, 65 Mich. 362; Fingleton v. Kent Circuit Judge, 116 Mich. 211; Reason v. Jones, 119 Mich. 673.

¶ 7. Probate courts, though courts of record (see Const. art. VI, § 15; also Drake v. Kinsell, 38 Mich. 232; Ellsworth v. Hall, 48 Mich. 407), are not "courts of law," according to the use of the term as found in the statute allowing writs of error to judgments of "courts of law and of record." They derive their origin and jurisdiction from a source distinct from the common law, and exercise no functions peculiar to that system.—Holbrook v. Cook, 5 Mich. 225.

¶ 8. Probate courts are not courts of law strictly speaking, but are courts of limited statutory jurisdiction, established primarily to administer the estates of deceased persons and care for the persons and property of those under disability and liable to wardship.—Rodgers v. Huntley, 166 Mich. 129.

¶ 9. Though the probate court is one of general jurisdiction, it cannot take cognizance of particular cases until in some legal manner the parties are before it.—Gillett v. Needham, 37 Mich. 143.

¶ 10. While the probate court has general jurisdiction for certain purposes, yet its authority to act is created and limited by statute, and all proceedings taken in said court must conform to the statute in order to be of validity.—Hewitt v. Durant, 78 Mich. 186.

¶ 11. A mere complexity of accounts does not oust the probate court of jurisdiction so as to permit the filing of a bill for an accounting therefor in the chancery court.—Brooks v. Hargrave, 179 Mich. 136.

§ 3. ——Incidental jurisdiction over right or title to property.

¶ 12. The probate court is not a proper place to try title to real or personal property, either against an administrator claiming the same in his own right or a stranger to the estate.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 13. Probate courts cannot divest or decide on rights of property vested under proceedings valid on their face.—Besançon v. Brownson, 39 Mich. 388.

¶ 14. Probate courts, though courts of record and having large and important powers, are inferior courts, subject to the review of the circuit courts, and not designed or adapted to the exercise of the ordinary judicial power in dealing with litigated questions affecting persons not subject to the exercise of perogative jurisdiction and entirely sui juris; therefore such a court cannot constitutionally make an order based on How. St., § 3340, permitting a railroad company to continue possession of premises pending condemnation proceedings.—Detroit, L. & N. R. Co. v. Livingston County Probate Judge, 63 Mich. 676.

II. PROCEDURE AND PROCESS.

§ 4. In general.

Citation and notice; service and proof of service, see post § 5.

Pleading and practice, see post § 6.

Hearing, taking testimony and examining witnesses, see post § 7.

Decrees and orders generally, see post III, A.

Procedure on probate of wills, see Wills, V, B.

Procurement of guardianship to defraud ward, see also Fraud ¶¶ 579, 580.

Habeas corpus to review commitment order, see Habeas Corpus § 5.

Adoption proceedings, see Adoption.

Removableness of probate proceedings on claims to federal courts, see Removal of Causes §§ 1, 2.

Due process in contempt proceedings before court, see also Constitutional Law § 142.

Condemnation proceedings to lay out drains, see Drains, II, A.

Jurisdictional facts and showing in proceeding to assign dower, see Dower § 41.

As courts of record, see Const. art. VII, § 17.

Appearance of attorney, see Prob. Ct. Rule 2.

Withdrawal of files and records, see Prob. Ct. Rule 16.

Continuances and adjournments, see Prob. Ct. Rule 15.

¶ 15. Probate court proceedings are of a summary character, and are not in the strict sense either suits or actions.—Allison v. Smith, 16 Mich. 405.

¶ 16. The probate court is always open for ordinary routine business, but there must be regular terms for contested matters, and proceedings in which a party has a right to be heard cannot be brought up at other times except on notice; and hence a probate order confirming the report of commissioners upon the condemnation of land for a crossing of railways is invalid if made out of term without notice to the respondent.—Michigan Cent. R. Co. v. Tuscola Probate Judge, 48 Mich. 638.

¶ 17. Probate courts are courts of record, and may properly enter upon their records all petitions for license to sell land (Comp. L. 1871, § 5193).—Ellsworth v. Hall, 48 Mich. 407.

§ 5. Citation and notice; service and proof of service.

Proof of service or posting or publication of notices other than process, see Notices § 8.

Manner of proof of service of notice of motion for leave to appeal, see Motions and Orders ¶ 15.

Power to perform marriage ceremony, see Marriage ¶ 4.

Manner of preparation of papers and filing thereof, see Prob. Ct. Rule 1.

Notice of hearing on petition for widow's allowance, see Prob. Ct. Rule 9.

Form and service of citation, see Prob. Ct. Rule 13.

Persons entitled to make service of papers and proof of service, see Prob. Ct. Rule 14.

¶ 18. Want of venue to an affidavit of service of notice to the parties concerned in partition proceedings in the probate court is not a fatal defect if the venue is indorsed on the notice and the affidavit is properly entitled and sworn to.—Persinger v. Jubb, 52 Mich. 304.

§ 6. Pleading and practice.

Hearing, taking testimony and examining witnesses, see post § 7.

Notice of appeal, see post § 26.

Decrees and orders generally, see post III, A.

General law of pleading, see Pleading.

Proceedings for admission of indigent insane to asylum, see Poor Persons ¶ 19.

Sufficiency of application for accounting by representative to support order thereon by probate court, see Estates of Decedents ¶ 1083.

Citations and notices in drain proceedings, see Drains, II, A.

Whether probate court entitled to fees for certified copies of record returned to circuit court on certiorari in drain proceedings, see Drains § 47, ¶ 148.

Statutory proceedings for assignment of dower, see Dower §§ 40, 41.

Manner of preparation of petitions and other papers and filing thereof, see Prob. Ct. Rule 1.

Form and verification of petitions to court, see Prob. Ct. Rule 3.

Petition for probate of will or administration, see Prob. Ct. Rule 4.

Petition for appointment of guardian, see Prob. Ct. Rule 5.

Petitions for assignment of dower, see Prob. Ct. Rule 10.

Settlement of administration and guardianship accounts, see Prob. Ct. Rule 11.

¶ 19. A petition for the appointment of a guardian for an incompetent person cannot give jurisdiction unless it uses the words of the statute or uses language and states facts fully equivalent.—Storick's Case, 64 Mich. 685.

¶ 20. A proceeding to remove an administrator, nugatory because the petition was insufficient, falls with the petition, and the notice given of it is not imparted to an amended petition improperly allowed on the hearing of objections to the original proceedings; since a void proceeding cannot gain validity by adjournment.—White v. Spaulding, 50 Mich. 22.

¶ 21. It is not contemplated that the practice of raising pure questions of law by demurrer shall be followed in the probate courts, and in most cases such practice would be objectionable.—Turner v. Burr, 141 Mich. 106.

§ 7. Hearings, taking testimony and examining witnesses.

Decrees and orders generally, see post III, A.

Best and secondary evidence of matters of probate record, see Evidence, IV.

Judicial notice by probate court of its own records, see Evidence, § 19.

¶ 22. A person cited before the probate court for examination as to his possession of effects of a decedent's estate is to be examined not orally, but upon written interrogatories and answers.—Palmer v. Jackson Circuit Judge, 90 Mich. 1.

¶ 23. The commissioners on claims may be compelled by mandamus to return evidence into the probate court where the law requires it.—Buchoz v. Pray, 37 Mich. 512.

III. DECREES AND ORDERS.

A. IN GENERAL.

§ 8. Rendition, requisites, and sufficiency.

Operation and effect of orders and decrees, see post §§ 9-11.

Collateral attack and presumption of validity, see post § 12.

Evidentiary effect of adjudication or record, see post § 13.

Vacation of order or decree and granting or rehearing, see post § 14.

Equitable proceedings to open or set aside probate decree, see post § 15.

Appeal from decrees and orders, see post III, B.

Judgment and decree in eminent domain, see Eminent Domain § 115.

Order for admission of indigent insane to asylum, see Poor Persons ¶ 21.

Sufficiency of order for support of indigent insane by relative, see Poor Persons ¶ 41.

Order of probate court in drain proceedings, see Drains § 34.

Order appointing representative, see Estates of Decedents § 31.

Order for removal of representative, see Estates of Decedents § 45.

Order for widow's allowance, see Estates of Decedents § 114.

Decision on claims against estates, see Estates of Decedents, VI, C.

Order for sale in administration of estate, see Estates of Decedents, VII, A, 3.

Accounting decree in administration of estate, see Estates of Decedents, XII, D.

Order for discharge of representative, see Estates of Decedents, XIV.

Order of guardianship appointment, see Guardianship § 16.

Conclusiveness of adjudication of insanity, see Insane Persons § 18.

Right of appeal and mode of review of order adjudicating respecting insanity, see Insane Persons § 19.

Form of order or decree and filing or enrollment, see Prob. Ct. Rule 17.

§ 9. Operation and effect of orders and decrees.

Clauses, claims and defenses barred, merged or concluded, see post § 10.

Persons concluded or entitled to assert conclusiveness, see post § 11.

Appeal from decrees and orders, see post III, B.

Necessity that decisions on claims be final and on merits to operate as res adjudicata, see Former Adjudication ¶ 83.

Conclusiveness of consent decree to settlement on agreed balance of accounts, see also Former Adjudication ¶ 125.
Effect and conclusiveness of foreign decrees in probate, see Foreign Judgments, II.
Effect of foreign judgment encroaching on exclusive probate jurisdiction, see Foreign Judgments § 9.
Conclusiveness of decree of probate court for final account of representative, see Estates of Decedents ¶ 1115.
Conclusiveness and effect of judgments of the circuit rendered on appeal from probate, see Former Adjudication.

¶ 24. Decrees and orders of the probate court made in the exercise of jurisdiction are as final and conclusive as those of any other court.—Burgess v. Stribling, 134 Mich. 33.

¶ 25. After the probate court has put into the form of a decree its final adjudication upon the merits, it cannot review or set aside such decree.—Grady v. Hughes, 64 Mich. 540; Holden v. Lathrop, 65 Mich. 652.

¶ 26. Probate courts have general jurisdiction in testamentary and other probate matters, and their action therein is not void where no fatal defect appears on the face of the proceedings; it may be reversible on appeal, but must stand if an appeal is not taken.—Church v. Holcomb, 45 Mich. 29.

¶ 27. No administration of an estate is extraterritorial, and no foreign proof can be enforced without reallowance; a foreign judgment may have great force or even be conclusive as evidence, but it cannot be enforced as a judgment outside of the jurisdiction in which it is given without being established in new legal proceedings.—Dickinson v. Seaver, 44 Mich. 624.

¶ 27a. A person appointed trustee under a will on his own petition is charged with knowledge of orders made by the probate court in the proceedings.—Gibney v. Allen, 156 Mich. 301.

¶ 27b. A decree for contribution by devisees and legatees in payment of debts and other liabilities of the estate, under How. St. § 5820, is no more than a personal judgment, enforceable by execution.—Frost v. Atwood, 73 Mich. 67.

§ 10. ——Causes, claims and defenses barred, merged, or concluded.

Persons concluded or entitled to assert conclusiveness, see post § 11.

¶ 28. The report of the commissioners on claims against an estate showed that a certain mortgage note was presented and disallowed. No appeal was taken from this report. Foreclosure proceedings were subsequently instituted. Complainant's solicitor testified that the claim was never passed upon by the commissioners, but was withdrawn by him from their consideration. The commissioners testified that the claim was presented and disallowed, giving the reasons for their action, and were corroborated by other witnesses. Held, that the defense that the matter was res judicata was fairly established.—Finley v. Dubay, 112 Mich. 334.

¶ 29. A decree of the probate court granting a petition for the appointment of a guardian for an incompetent woman, determining that she is married and making an order in conformity with Comp. L. 1897, 8736, which sets out the powers and duties of guardians for married women, is res adjudicata upon the question of the validity of her marriage in a hearing on a petition by her husband for appointment as administrator in which the same persons are parties.—Burgess v. Stribling, 134 Mich. 33.

¶ 30. A person who was adjudged insane in the probate court and who thereafter on his application was discharged under Comp. L. 1897, § 8724, providing for the discharge of an insane person when it shall appear to the probate judge on application of the ward that guardianship is no longer necessary; was by such discharge estopped to proceed in equity to have the probate proceedings declared void for fraud and jurisdictional defects.—Cornett v. Cornett, 122 Mich. 685.

¶ 31. An order of the probate court granting leave to sue a guardian's bond is not res judicata of the sureties' liability.—Perkins v. Cheney, 114 Mich. 567.

¶ 32. The validity of a will under which plaintiff in ejectment claims, and which was admitted to probate though contested by defendant, cannot be questioned by the latter in such action of ejectment.—Johnson v. Johnson, 70 Mich. 65.

¶ 33. Refusal of the probate court to appoint an administrator on the ground that the estate has been settled by an agreement of the heirs is not res adjudicata as to the validity of such agreement, as the court could not decree specific performance of the agreement if valid, or cancel it if invalid.—Shurte v. Fletcher, 111 Mich. 84.

¶ 34. An heir filed a petition in the probate court against the administratrix, alleging that certain real and personal property belonging to the estate was wrongfully omitted from the inventory. Upon dismissal of his petition without prejudice, on the ground that a question of title was involved, the heir filed a second petition under sections 9355-9357, Comp. Laws 1897, praying for a discovery as to the same and other property. Held, that failure to appeal from the dismissal of the first petition does not render the questions involved in the second one res judicata.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 35. A determination of the probate court that for the purpose of computing the amount of an inheritance tax, the value of certain indebtedness must be fixed from time to time, as payments to the executors were made, is not an adjudication that the executors have no such property in the possible future payments by the debtors as to make them taxable as credits.—City of Port Huron v. Wright, 150 Mich. 279.

¶ 36. The wife of a testator was a legatee and the executrix under the will. She filed her final account, submitting therewith a list of the assets remaining in the estate, but making no statement as to property disposed of by her. The probate court approved the account. In a subsequent proceeding to interpret the will in order to determine whether the wife held the estate for life or in fee, held, the order of the probate court approving the final account did not render the question res adjudicata.—Farlin v. Sanborn, 161 Mich. 615.

¶ 37. The determination of the probate court in an application for a widow's allowance, that the claimant was the widow of the decedent, was conclusive only as far as it related to the allowance made to her, pending litigation, and was not res adjudicata as to her right as widow to the distributive share of the estate to which the widow was entitled.—Bordwell v. Saginaw Circuit Judge, 119 Mich. 421.

¶ 38. The right of a widow to the rents and profits of land devised to her for life is determined by her final account as administratrix, from the allowance of which no appeal has been taken, so as to be res adjudicata in a suit to set aside a foreclosure sale to her on the ground that the rents and profits of the land were to be applied to the mortgage.—Lawrence v. Hathaway, 128 Mich. 119.

¶ 39. Concessions by a legatee in order to obtain the probate of a will which other legatees are contesting on the grounds of incompetency and undue influence do not establish that the attack is in either respect well grounded, but, on the contrary, the probate of the will settles in the negative the question of the existence of the grounds on which it was attacked.—Wilkins v. Hukill, 115 Mich. 594.

¶ 40. Where a probate court, holding that an executor had a right to pay a mortgage out of a legacy, dismisses the legatee's petition to compel the executor to pay such legacy to him, such dismissal determines the construction of the will, and the question becomes res judicata unless an appeal is taken. —Byrne v. Hume, 84 Mich. 185, adhered to on rehearing 86 Mich. 546.

¶ 40a. Denial, on the ground of undue influence, of probate to a will containing a clause revoking a former will is res adjudicata upon the question of revocation.—Lyon v. Dada, 127 Mich. 395.

¶ 40b. Settlement of an executor's accounts from time to time in the probate court and an order given for the payment of a mortgage out of a legacy and the legatee's assent thereto do not estop the legatee from setting up her claim to the legacy where ample funds remain to pay it and it was not chargeable.—Byrne v. Hume, 84 Mich. 185.

§ 11. ——Persons concluded or entitled to assert conclusiveness.

Causes or claims barred, merged or concluded, see ante § 10.

Decision of commissioner on claims, conclusiveness upon persons who were not parties or privies, see Former Adjudication § 61.

Decree respecting widow's allowance on claim by first wife as conclusion on second wife not made party, see also Former Adjudication ¶ 338.

Judgment or decree as res adjudicata between representatives, heirs and legatees, see Former Adjudication § 76.

Persons bound by foreign administration proceedings, see Foreign Judgments § 10.

¶ 41. One who is not a party or privy to the judgment of a probate court allowing claims of creditor, is not concluded by the decision.—Seymour v. Wallace, 121 Mich. 402.

¶ 42. While a probate decree allowing a claim on an insane decedent's bond might conclude the estate from questioning the bond, it cannot estop the widow from resisting a proceeding in aid of an execution thereon by a bill to set aside, for the grantor's insanity, a prior deed made to her by her husband.—Davis Sewing Machine Co. v. Barnard, 43 Mich. 379.

¶ 43. A surety on a guardian's bond does not conclusively admit his liability on the bond by voluntarily becoming a party to the proceedings upon an accounting to determine the amount due from the guardian to his ward, or thereby become a party to the decree settling the account.—Perkins v. Cheney, 114 Mich. 567.

¶ 44. An order of the probate court dividing an estate in accordance with an agreement is not, after a lapse of more than 20 years, open to the objection that it does not appear from the record that all the parties interested in the estate were parties to the agreement, since the order necessarily involved a determination that all the necessary parties were before the court.—Lasley v. Preston, 132 Mich. 208.

¶ 45. An order of the probate court, reciting that the administrator has presented his final account "with the consent to its allowance indorsed thereon by all persons in-

terested therein" and decreeing that it be allowed as stated, does not amount to an adjudication that one of the persons whose receipt was included and who indorsed consent thereon was in fact a person entitled to any share in the estate; and the administrator is not bound thereby to one claiming through such receiptor.—In re Doyle's Estate, 147 Mich. 544.

¶ 46. Where it is agreed between the mortgagor and the mortgagee that the mortgagee is to board with the mortgagor and allow the value of such services to be applied upon the mortgage debt, and subsequently the mortgage is assigned after maturity, the allowance of the claim of the mortgagor against the estate of the mortgagee is not binding upon the assignee of the mortgage who is not made a party to the proceedings.—Wright v. Hubbard, 126 Mich. 239.

§ 12. Collateral attack and presumption of validity.

See also ante ¶ 32.
Appeals from decrees and orders, see post III, B.
Presumption of validity where no defect on face of proceedings, see also ante ¶ 5.
Appealable orders and decisions, see post §§ 17-20.
Collateral attack on decrees in condemnation proceedings, see Eminent Domain § 147.
Collateral attack on letters of administration, see Estates of Decedents § 32.
Collateral attack on order for mortgage of property of estate of decedent, see Estates of Decedents § 256.
Collateral attack and impeachment of order of sale in estates of decedents, see Estates of Decedents § 244.
Collateral attack and impeachment of representatives accounting decree, see Estates of Decedents § 354.
Collateral attack on partition decree of probate court, see Estates of Decedents § 396.
Collateral attack on adjudication of insanity, see Insane Persons § 18.
Presumptions in support of decrees and orders, see also Judgments § 115.
Presumption of validity of decree or order, see Jud. Act, chap. LI, § 5; Comp. L. 1915, § 13768.

¶ 47. In the absence of evidence to the contrary the regularity of the orders and proceedings of probate courts will be presumed.—Reason v. Jones, 119 Mich. 673.

¶ 48. The sufficiency of the testimony adduced in a probate court, and of which no record is kept, to sustain the order or decree made, will not be determined by other courts, except on appeal.—Egan v. Grece, 79 Mich. 629.

¶ 49. Orders of the probate courts cannot be attacked collaterally upon any assumption that evidence was wanting to support jurisdictional allegations; their action, when properly invoked, is presumed to be rightful.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 50. Where a claim against an estate is allowed, upon an appeal from commissioners, by a court which has jurisdiction, and no fraud is proved against the adjudication, the allowance is conclusive as against any collateral attempt to impeach it.—O'Connor v. Boylan, 49 Mich. 209.

¶ 51. An adjudication of the probate court that a will is void, and disallowing it, cannot be collaterally attacked by the persons who procured such adjudication.—Holland v. Holland, 121 Mich. 109.

¶ 52. The action of the probate court in appointing an administrator is not open to collateral attack, but should be appealed from if not satisfactory.—Johnson v. Johnson's Estate, 66 Mich. 525.

¶ 53. Where an order of the probate court dividing an estate was based upon an agreement, it will be presumed, after a lapse of more than 20 years, that the agreement was properly signed by the necessary parties.—Lasley v. Preston, 132 Mich. 208.

§ 13. Evidentiary effect of adjudication or record.

Public records as evidence generally, see Evidence, VIII, C.

¶ 54. A probate order adjudging a man incompetent to manage his property and appointing a guardian for him is admissible on the question of his testamentary capacity at the time, as bearing on his condition.—Rice v. Rice, 50 Mich. 448.

¶ 55. Though insanity was in issue in the proceeding before a probate court to determine one's competency to manage his affairs a recital in the order that he was insane and for that reason incompetent, is superfluous and is not involved in the main issue; hence it is not evidence of testamentary incapacity.—Rice v. Rice, 53 Mich. 432.

¶ 56. A record made in 1847 by the probate court of a decree made by the same court in 1837, admitting a will to probate, was proper, and such record is admissible evidence of the decree.—Ives v. Kimball, 1 Mich. 308.

¶ 57. The record of the proceedings in probate court in the settlement of an estate are not inadmissible in evidence because there were entered copies, certified by the probate judge as correct copies, of powers of attorney and releases not authorized by law to be recorded in the office of the probate court, since such instruments were merely evidence and the record would have been conclusive without any entry thereof.—Lasley v. Preston, 132 Mich. 208.

§ 14. Vacation of order or decrees and granting of rehearing.

Appeal from decrees and orders, see post III, B.

Equitable proceedings to open or set aside probate proceedings, see post § 15.

Revocation or review of probate of will, see Wills, V, C.

Power to revoke order of adoption, see Adoption ¶ 8.

¶ 58. The probate court is a tribunal of limited jurisdiction, and the judge thereof has no power to set aside his own adjudications and grant rehearings.—Hitchcock v. Genesee Probate Judge, 99 Mich. 128.

§ 15. Equitable proceedings to open or set aside probate decree.

Appeals from decrees and orders, see post III, B.

Equitable jurisdiction generally, see Equity, III.

Revocation or review of probate of will, see Wills, V, C.

Bills to establish or annul probate of will, see Wills V, D.

Fraud or collusion as ground for equitable relief from probate judgment, see also Judgments § 77.

Equitable relief against partition decree in probate, see also Judgments ¶ 207.

¶ 59. Equity has jurisdiction of a suit brought to set aside administration orders of a probate court made in administration proceedings on the ground that they were obtained by fraudulent suppression of a will, although the court should perhaps, defer a final decree until the question of fraudulent suppression upon which it depends shall have been tried out in the probate court, on the application to admit it to probate.—Ewing v. Lamphere, 147 Mich. 659.

¶ 60. Fraud is not essential to a bill brought by the wards to set aside a void order of probate allowing fees to an attorney as agreed upon with the guardian.—Lothrop v. Duffield, 134 Mich. 485.

¶ 61. Equity has jurisdiction to declare null and void an order of probate court allowing remuneration direct to an attorney on his petition against an infant's estate and to restrain his enforcement of the claim.—Lothrop v. Duffield, 134 Mich. 485.

¶ 61a. How. St., § 5820, does not provide for proceedings at law or in equity as supplementary to the probate decree therein provided for, but as elective remedies, which always existed independently, and were left untouched. Such proceedings, if at law, must be against the parties liable to contribution severally, but if in equity may be against them jointly.—Frost v. Atwood, 73 Mich. 67.

B. APPEALS AND REVIEW.

§ 16. In general; appellate jurisdiction.

See also post ¶ 243.

Appealable orders and decisions, see post §§ 17-20.

Persons entitled to appeal, see post §§ 21, 22.

Application and order for leave to appeal, see post § 23.

Leave to appeal after time, see post §§ 24, 25.

Notice of appeal, see post §§ 26, 27.

Necessary and proper parties to appeal, see post § 28.

Necessity, requisites and sufficiency of appeal bond, see post §§ 29, 30.

Time for filing record and effect of delay, see post § 31.

Authority, conduct and control of appeal, see post § 32.

Abandonment or discontinuance of appeal, see post § 33.

Objection to appeal and motions to dismiss, see post § 34.

Procedure and practice on appeal in general, see post § 35.

Pleadings and framing of issues on appeal, see post § 36.

Amendment on appeal, see post § 37.

Trial of issues of fact, see post §§ 38, 39.

Scope of issues on appeal, see post §§ 40-43.

Construction and conclusiveness of record and intendments thereon, see post § 44.

Judgment on appeal and scope of relief, see post §§ 45-47.

Costs on appeal, see post § 48.

Operation and effect of appellate judgment, see post § 49.

Proceedings after judgment on appeal, see post § 50.

Certiorari to review probate proceedings, see post § 51.

Equitable proceedings to open or set aside probate proceedings, see ante § 15.

Vacation of order or decree and granting of rehearing, see ante § 14.

When circuit court judge may act as probate judge, see ante ¶ 2.

Jurisdiction of probate court, see ante § 2.

Loss of judisdiction by stipulation or waiver, see also post ¶ 230.

Loss of jurisdiction by stipulation for settlement, see post ¶ 204.

Collateral attack and presumption of validity as to decree, see ante § 12.

Probate court and its jurisdiction generally, see ante I.

Mandamus to correct action of circuit court on appeal or certiorari from probate court, see Mandamus § 68.

Mandamus to correct decision of probate court, see Mandamus §§ 64, 65.

Jurisdiction to issue mandamus to probate court, see Mandamus § 123.

Grant of mandamus to quash appeal with leave to apply for certiorari, see Mandamus ¶ 1000.

Statutory provisions for appeal from probate court, see Jud. Act, chap. LXV, § 1 et seq; Comp. L. 1915, § 14145 et seq.

Appellate jurisdiction of circuit court, see Jud. Act, chap. LXV, § 19; Comp. L. 1915, § 14163.

¶ 62. The character of the jurisdiction of the circuit court upon appeals from the probate court explained.—Holbrook v. Cook, 5 Mich. 225.

¶ 63. An appeal from a probate decree unfounded in jurisdiction confers no jurisdiction on the circuit court.—Jaquith v. Benzie Circuit Judge, 142 Mich. 174.

¶ 64. Appeals from commissioners on decedents' estates are governed by Comp. L. 1871, chap. 158, How. St. §§ 5907-5917, and not by chap. 177, How. St. §§ 6779-6790, which relate to appeals from orders and decisions of probate judges.—Buchoz v. Pray, 36 Mich. 429.

¶ 65. The primary authority to review orders and decisions of probate courts is conferred upon the circuit courts under Comp. L. 1897, § 669, re-enacted in Pub. Acts 1911, No. 238, How. 2nd Ed., § 12117.—Seilnacht v. Wayne Probate Judge, 190 Mich. 461.

¶ 65a. Statutes allowing appeals should be liberally construed when possible without extending the letter of the statute.—Snyder v. Washtenaw Circuit Judge, 80 Mich. 511.

§ 17. Appealable orders and decisions.

Completion and entry of decree, see post § 18.
Parts and items of decrees, see post § 19.
Reports or decisions of claims commissioners, see post § 20.
Persons entitled to appeal, see post §§ 21, 22.
Appealability of probate court order for second revival of claims commission, see also Estates of Decedents ¶ 567.
Appealability of orders of probate court in proceedings for determination of heirship, see also Estates of Decedents ¶ 1256.
Statutory provisions as to appealable orders, see Jud. Act, chap. LXV, § 1 et seq; Comp. L. 1915, § 14145.

¶ 66. An appeal may be taken by any person aggrieved from any probate order that affects the merits (How. St. § 6779), unless it is merely interlocutory or subsidiary, or is one appointing a special administrator pending proceedings (section 5851).—Goss v. Stone, 63 Mich. 319.

¶ 67. Where an application to the probate court for discovery of assets is merely incidental, an order sustaining a demurrer to such application is interlocutory and non-appealable.—Mitchell v. Bay Probate Judge, 155 Mich. 550.

¶ 68. An order for the oral examination of a person cited to appear before the probate court for examination touching his possession of effects belonging to the estate of a deceased person, though unauthorized, is not appealable; dismissal of such an appeal may be compelled by mandamus.—Palmer v. Jackson Circuit Judge, 90 Mich. 1.

¶ 69. In a pending controversy over the removal of an executor and his final account an order requiring the executor to produce certain books before the probate court is not in itself appealable under Comp. L. 1897, § 669, providing for appeals from any order, sentence, decree or denial of a judge of probate, as such an order is purely interlocutory and subsidiary.—Erwin v. Ottawa Circuit Judge, 138 Mich. 271.

¶ 70. An allowance to a widow for her support, and the household furniture and personal property mentioned in How. St., § 5847, subd. 2, is not an appealable order.—Bordwell v. Saginaw Circuit Judge, 119 Mich. 421.

¶ 71. There is no right of appeal from an allowance made by the probate court for the support of a widow of a decedent.—In re Koch's Estate, 121 Mich. 667.

¶ 72. Whether a probate order making an allowance for the support of a testator's family pending the settlement of his estate is appealable, quære.—Moore v. Moore, 48 Mich. 271.

¶ 73. Where an administrator is granted permission by the probate court to sell perishable personalty of the estate, no appeal from the order lies, under section 9327, 1897 Comp. Laws.—In re Koenig's Estate, 152 Mich. 432.

¶ 74. Under Comp. Laws 1897, § 669, as amended by Pub. Acts 1911, No. 238, How. 2nd Ed., § 12117, authorizing appeals from the probate court, an order of the probate court authorizing the sale of the interest of an estate of a deceased person in certain real estate for the purpose of preserving the same, on a petition by the executrix who was also a life tenant of such interest, held appealable to the circuit court in the same county.—In re Rodgers' Estate, 192 Mich. 156.

¶ 75. Under Comp. Laws 1897, § 669, providing for appeals from the Probate Court to the Circuit Court, an appeal will lie to the Circuit Court from an order of the Probate Court fixing the amount and directing the payment of an allowance under a will where the amount was left to the discretion of the executors who have refused to fix any amount and to make any payment.—Cole v. Cole's Estate, 125 Mich. 655.

¶ 76. An order denying a legatee's petition that the executor account to her for the legacy is appealable to the circuit court

under How. St., § 6779, regulating probate appeals.—Fingleton v. Kent Circuit Judge, 116 Mich. 211.

¶ 77. An order of the probate judge determining who is entitled to moneys paid into court under How. St., § 3338, as compensation for a decedent's land condemned for railroad purposes, is appealable, as How. St., § 6779, provides for appeals from the probate court in cases "not otherwise provided for."—Defoe v. Bay Circuit Judge, 116 Mich. 567. [Overruled in so far as it intimates that the general statutes governing probate appeals apply to orders made in railroad condemnation proceedings, United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.]

¶ 78. Where a sufficient allowance has been made by the probate court, and has been paid to decedent's widow for the support of minor children pending settlement of the estate, an order of the probate court allowing a claim by an adult sister for sums expended for two of the minors, which sums the widow had refused to pay, is appealable.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 79. A probate order refusing to revive a commission on claims is final and appealable.—Hart v. Shiawassee Circuit Judge, 56 Mich. 592.

¶ 80. A probate judge's order determining prima facie who are the legal heirs of a decedent is not appealable; the statute providing for appeals from the probate court "in all cases not otherwise provided for," is not applicable.—Lorimer v. Wayne Circuit Judge, 116 Mich. 682.

¶ 81. An order of the probate court denying a petition for an accounting by a guardian is appealable under Comp. L. 1897, § 669.—Hopper v. Livingston Probate Judge, 137 Mich. 124.

¶ 82. The appointment of permanent guardian by the probate court is appealable to the circuit court.—Goss v. Stone, 63 Mich. 319.

¶ 83. Where, upon a hearing on an administrator's account, the probate judge had of his own motion appointed a guardian ad litem for minor heirs of an age to be competent to nominate their own guardian, it was held no appeal would lie, the action being merely collateral and interlocutory.—Walker v. Hull, 35 Mich. 488.

¶ 84. Pub. Acts 1895, No. 204, makes no provision for an appeal from an order of the probate court committing a person to the insane asylum; and an appeal could not be taken under the general statute, How. St., § 6779, providing for appeals from probate orders in "cases not otherwise provided for."—Sparrow v. Ingham Circuit Judge, 109 Mich. 272.

¶ 84a. Pub. Acts. 1897 No. 120 (How. St., § 1930a et seq.) providing for an appeal from a determination of insanity is not limited to cases arising under section 21, relating to all other persons alleged to be insane, and may relate to a proceeding under section 23 as to persons in indigent circumstances.—In re Chudek, 118 Mich. 361.

§ 18. ——Completion and entry of decree.

¶ 85. A judgment does not become appealable until it is entered.—Green v. McCutcheon, 40 Mich. 244.

§ 19. ——Parts and items of decrees.

¶ 86. An appeal from a probate judge under Comp. L. 1871, § 5216 (How. St. § 6779), cannot lie from his disallowance of certain items in an account, but must be taken from the order itself, so that the whole matter can be brought up and a rehearing be had upon every item.—Showers' Estate v. Morrill, 41 Mich. 700.

¶ 87. An appeal by an executor from a decree allowing his account, the reason for appeal being stated to be the rejection of a claim for extraordinary services, is a general appeal, not subject to dismissal as taken from a part only of the decree.—Wisner v. Mabley's Estate, 70 Mich. 271.

§ 20. ——Report or decision of claims commissioners.

Bond on appeal from claims commissioners' report, see post § 30.

Appeal from commissioners on claims, see Jud. Act, chap. LXV, § 3 et seq.; Comp. L. 1915, § 14147 et seq.

¶ 88. The disagreement of the two commissioners on claims against an estate is equivalent to a rejection of the claim, and is appealable; and prior to Laws 1883, No. 109 (How. St. § 5891), appeal was the only remedy.—Smith v. Estate of Lloyd, 76 Mich. 619.

¶ 89. An appeal from claim commissioners to the circuit court does not lie in case of contingent claims not asserted or capable of being asserted as absolute.—Buchoz v. Pray, 36 Mich. 429.

¶ 90. A claim for money upon decedent's written agreement can properly be submitted to the commissioners, and the only remedy for disallowance is by appeal.—Patton v. Bostwick, 39 Mich. 218.

§ 21. Persons entitled to appeal.

After time, see post § 24.

Waiver or estoppel of right, see post § 22.

Necessary and proper parties to appeal, see post § 28.

Party entitled to appeal from circuit judgment, see Appeal § 62.
Persons entitled to appeal from report of claims commissioner when representative fails to act, see Jud. Act, chap. LXV, § 5; Comp. L. 1915, § 14149.
Statutory provisions as to persons entitled generally, see Jud. Act, chap. LXV, § 1 et seq; Comp. L. 1915, § 14145 et seq.

¶ 91. No one can appeal from a probate decree allowing an administration account unless he has such interest as may be injuriously affected by the decree so as to render him a party "aggrieved."—Labar v. Nichols, 28 Mich. 310.

¶ 92. Under § 669, Comp. L. 1897, allowing any aggrieved person to appeal from an order of probate, any person may demand the appeal as a matter of right, and it is not for the probate judge to inquire whether he is an aggrieved person or not.—Clifton v. Jackson Probate Judge, 154 Mich. 488.

¶ 93. The next of kin may appeal—if they have made themselves parties to the proceedings—from the decision of the probate court appointing a guardian for a minor, or from the probate of a testamentary provision appointing guardians.—Taff v. Hosmer, 14 Mich. 249.

¶ 94. Under How. St. § 6779, authorizing an appeal to the circuit court to be taken by "any person aggrieved" by any order of a judge of probate, the father of an infant who has no legal interest in such infant's estate cannot appeal from an order authorizing the infant's guardian to lease its land.—In re Cook's Estate, 99 Mich. 63.

¶ 95. An appeal from the allowance by commissioners of claims against an estate is a matter of right to those who are interested, and such person may take it if the administrator declines to.—Crouch v. Wayne Circuit Judges, 52 Mich. 596.

¶ 96. Under a will setting aside a sum of money, the income of which was to be used for the care and ornamentation of the testator's grave, the cemetery association, in which the testator was buried, is a person aggrieved entitled to appeal from an order holding the bequest invalid.—In re More's Estate, 179 Mich. 237.

¶ 97. If the person presenting a foreign probate for allowance is not an executor or other person interested in the will, he is not "aggrieved" by a decision refusing probate, and he cannot appeal therefrom.—Besançon v. Brownson, 39 Mich. 388.

¶ 98. A creditor of the ward cannot appeal from the order of the probate court discharging the guardian to enable him to prosecute a claim previously filed against the ward's estate, or to secure his claim by the guardian's bond.—Lyster's Appeal, 54 Mich. 325.

¶ 99. The executors of an estate are sufficiently aggrieved by the probate court's refusal to entertain a claim belonging to the estate which they represent to be entitled to appeal from such a decision (How. St. § 6779).—Hart v. Shiawassee Circuit Judge, 56 Mich. 592.

¶ 100. Executors under a will which gives them exclusive powers and trusts, and provides for unborn heirs, may appeal from its disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the estate among themselves and oppose the appeal.—Cheever v. Washtenaw Circuit Judge, 45 Mich. 6.

¶ 101. A legatee under a will having an interest in the proceeds of the sale of an interest in real estate belonging to the estate, after the termination of a life estate therein, held a person aggrieved within the meaning of Comp. L. 1897, § 669, as amended by Act 238, Pub. Acts 1911, How. 2nd Ed., § 12117, concerning appeals from orders of the probate court so as to entitle it to take an appeal from an order of that court authorizing the sale of the interest of the estate in such real estate entered on the petition of the executrix of the estate who was also a life tenant of such interest.—In re Rodgers' Estate, 192 Mich. 156.

¶ 102. A residuary legatee under a will probated elsewhere need not have it probated in Michigan to entitle him to appeal from the allowance of an administrator's account by a Michigan court of probate.—In re Mower's Appeal, 48 Mich. 441.

¶ 103. Devisees who have kept their interest in the testator's personalty, but have conveyed away their rights in the real estate, retain sufficient interest to entitle them to appeal from a construction of a will which disposes of both kinds of property.—Rivenett v. Bourquin, 53 Mich. 10.

§ 22. ——Waiver or estoppel of right.
General law of estoppel, see Estoppel.

¶ 104. Persons having claims against an estate and all the heirs except one had a meeting and agreed to a compromise and settlement of the claims. The absent heir was present when the parties appeared before the commissions of claims, heard the agreement read and the claims argued, but made no objection to subsequent allowance of the claims, and as the result of the course pursued one of the claimants was in a less favorable situation in case of a contest. It was claimed that the heir had no knowledge of certain facts against the validity of the claim. Held, he had suffi-

cient knowledge, and the assignee of his interest was equitably estopped from prosecuting an appeal from the allowance of the claims.—Roth v. Rubert, 176 Mich. 484. (Bird, J. dissenting.)

¶ 105. By allowing some person other than the representative to appeal from the allowance by commissioners of claims against an estate, the probate court thereby passes upon the fact of the representative's refusal.—Crouch v. Wayne Circuit Judges, 52 Mich. 596.

§ 23. Application and order for leave to appeal.

Leave to appeal after time, see post § 24.
Petition and showing for leave, see post § 25.

¶ 106. The allowance of an appeal from the probate court does not depend on the probate judge, but is a right fixed by statute; there is, therefore, no occasion to obtain an order from the probate judge allowing an appeal.—Fox v. Wayne Probate Judge, 48 Mich. 643.

¶ 107. An application for an appeal from a disallowance of claim against an estate need not set forth any formal statement of facts, nor need it be verified.—Winter v. Winter, 90 Mich. 197.

¶ 108. An appeal from a decision of commissioners on a claim is allowed by the statute rather than by the probate court; and the so-called "order allowing the appeal" under Comp. L. 1897, § 9390, need not contain any statement that the probate court allowed the appeal, but it suffices if it complies with the statute, and is certified by the probate judge.—Pruden v. Clark, 148 Mich. 163.

¶ 109. Inasmuch as it is the duty of a special administrator to conserve the estate he must defend what he considers unconscionable claims presented. He therefore has the right to appeal from the allowance of a claim against the estate without special authority from the probate court.—In re McNamara's Estate, 148 Mich. 346.

¶ 110. Section 9386, Comp. L. 1897, provides that an appeal from a decision of the commissioners of claims in the probate court must be taken within sixty days after the return of the commissioners' report. A decision was rendered against the claimant by the commissioners, who immediately filed an application for their removal. The commissioners presented their report to the probate judge, who told them they might leave the same with him, but he would not file such report until the application for removal was disposed of. Later the application was denied. Held, that the sixty-day period for appeal began to run when the application was denied, and not when the report was first lodged with the judge.—In re McLaughlin's Estate (Appeal of Hinckley), 160 Mich. 284.

§ 24. Leave to appeal after time.

Petition and showing, see post § 25.
Extension of time for appeal from report of claims commissioners, see Jud. Act, chap. LXV, § 3; Comp. L. 1915, § 14147.
Statutory provision as to appeal after time, see Jud. Act, chap. LXV, § 12 et seq.; Comp. L. 1915, § 14156 et seq.
Rule as to applications for special leave to appeal after time, see 1916 C. C. Rule 47.

¶ 111. The allowance of an appeal under Comp. L. 1897, § 674, is within the sound legal discretion of the circuit judge, and his determination will not be reversed except in a case of clear abuse of discretion.—Small v. Olds, 151 Mich. 111; In re Small's Estate, Id.

¶ 112. Comp. L. 1897, § 674, providing that if a party aggrieved by action of the judge of a probate court shall have omitted to appeal without default on his part, the circuit court may allow appeal on petition, does not authorize the circuit court to grant an appeal where the only showing by the petitioner is that her attorneys never advised her of the excessiveness of the executor's commissions now complained of, nor that she had a right to appeal.—Watson v. Kent Circuit Judge, 125 Mich. 182.

¶ 113. Under sections 674, 675, Comp. L. 1897, providing that after the expiration of the statutory period for appealing from the orders of the probate court, the circuit court may, if justice requires, allow an appeal within one year from the date of the order, an order denying leave to appeal will not be reversed where no excuse is shown for delay in making the application.—In re Bright's Estate, 157 Mich. 220.

¶ 114. There is no abuse of discretion in allowing a delayed appeal from the probate court to the circuit court, where, after the hearing in the probate court, counsel for the appellant promptly gave notice of an appeal to the circuit court, and an appeal bond was filed and approved, and the notice of appeal was served pursuant to the directions of the court, and notice of service filed, but, as the result of some misunderstanding, the appeal was not perfected, and, after a hearing a delayed appeal was allowed.—In re Miner's Estate, 201 Mich. 115.

¶ 115. The denial by the circuit court of an application for an order allowing a dilatory appeal under Comp. L. 1897, § 674 et seq., How. 2nd Ed., § 12122 et seq., from the allowance by the commissioners of a claim against the estate, held not an abuse of the discretion of the trial court where the failure to oppose the claim and take an appeal was due to a misunderstanding between

plaintiff's counsel living in different cities as to which one was to give the matter his personal attention.—Clark v. Berrien Circuit Judge, 194 Mich. 180.

¶ 116. Under Comp. L. 1897, § 674 et seq., How. 2nd Ed., § 12122 et seq., authorizing the circuit court to allow a dilatory appeal where a person has omitted to prosecute his appeal according to law, if the applicant is without default, or if it shall appear that justice requires a revision of the case, although the applicant may have been without default, held that the question whether it appears that justice requires a revision of the case is still within the discretion of the circuit court.—Clark v. Berrien Circuit Court, 194 Mich. 180.

¶ 117. A determination of the circuit court as to the allowance of a dilatory appeal under Comp L. 1897, § 674 et seq., How 2nd Ed., § 12122 et seq., will not be reversed unless there is a clear abuse of discretion.—Clark v. Berrien Circuit Judge, 194 Mich. 180.

¶ 118. Section 669, Comp. L. 1897, allows an appeal from an order of the probate court within sixty days after the order. Sections 674 and 675 provide that if any party, without default, omit to appeal within such period, the circuit court may, if justice requires, permit an appeal within one year after the order complained of. Held, that these provisions do not give one in default a year for the delayed appeal.—In re Bright's Estate, 157 Mich. 220.

¶ 119. An appeal from an order of the probate court should not be allowed where more than 11 months had expired before any effort to appeal was made, and 85 days had passed after the supreme court had decided that appeal was the proper remedy, and no excuse was shown for the delay, since Comp. L. 1897, § 674, providing that appeals may be permitted after time, does not justify the granting of an appeal after such long and unexplained delay.—Hopper v. Livingston Circuit Judge, 139 Mich. 100.

¶ 120. Lack of means is not a sufficient excuse for a delay of three and one-half months in taking an appeal from the final account of an executor, although it is alleged that the executor withheld a portion of the estate due to the petitioner for the purpose of preventing the taking of an appeal, where it is shown that the executor simply delayed paying from the funds until proper receipts should have been executed.—Small v. Olds, 151 Mich. 111; In re Small's Estate, Id.

¶ 121. How. St. § 6784, providing that, if any person aggrieved by any act of the judge of probate, without default on his part, shall have "omitted to claim or prosecute his appeal," the circuit court may allow an appeal if justice requires a revision of the case, allows it to be granted where the failure was through a failure to file the record in the circuit court in the time laid down and is not confined to a failure to "prosecute" in the probate court.—Merriman v. Jackson Circuit Judge, 96 Mich. 603.

¶ 122. One who does all that his attorney's advice requires to perfect an appeal from probate should not, through such attorney's neglect or oversight, lose his right where justice requires and the power to grant it exists under How. St. § 6784.—Merriman v. Jackson Circuit Judge, 96 Mich. 603.

¶ 123. How. St. § 6782, specifying the time within which the record must be filed on appeal from the probate court, providing for a dismissal of the appeal if it be not filed within that time, and further providing that on application within ten days after the thirty days allowed to file it the circuit court shall have power "to reinstate" the appeal when the party was prevented from perfecting it by circumstances not under his control, is not intended to take away the power of the circuit court under section 6784 to allow an appeal in furtherance of justice, where the party entitled has "omitted to claim or prosecute his appeal."—Merriman v. Jackson Circuit Judge, 96 Mich. 603.

§ 25. ——Petition and showing.

¶ 124. Under How. St. § 6784, the petitioner for leave to appeal where an appeal has not been claimed or prosecuted, must show to the satisfaction of the court either by averments in the petition or by evidence on the hearing, that justice requires a revision of the case.—Jerome v. Wayne Circuit Judge, 117 Mich. 19.

¶ 125. Where the only allegation as to the merits in a petition for leave to appeal is that "your petitioners have been advised by their said attorney, after having made to him a full and fair statement of their case, that they have a good defense upon the merits to the application for the allowance of said will, and your petitioners believe such advice to be true," the petition does not show "that justice requires a revision of the case."—Jerome v. Wayne Circuit Judge, 117 Mich. 19.

¶ 126. That the petitioners relied upon their attorney to see that their appeal was filed within the statutory time, and that they were in nowise at fault that the papers were not filed, is a sufficient showing that "without default on his part" (How. St. § 6784) he failed to prosecute his appeal according to law but a further showing that "justice requires a revision" is necessary under the statute.—Jerome v. Wayne Circuit Judge, 117 Mich. 19.

¶ 127. Leave to appeal, after statutory time, from allowance of executor's account is within the jurisdiction of the circuit court on a petition showing that petitioner was not

informed within such time of all assets of estate, and that certain assets whereof he did not learn until afterwards were omitted from said account, is sufficient.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

¶ 128. Leave to appeal from a probate decree is not to be refused upon interested party's denial of facts alleged in petition. —Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

¶ 129. Where the petition is sufficient to call for circuit judge's judgment whether petitioner has been in default, and whether justice requires review, such judgment will not be disturbed on mandamus.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

§ 26. Notice of appeal.

Persons to be notified and mode of service, see post § 27.

Statutory provision as to notice of appeal, see Jud. Act, chap. LXV, § 9; Comp. L. 1915, § 14153.

¶ 130. A notice of appeal need not state facts for appeal.—Winter v. Winter, 90 Mich. 197.

¶ 131. An objection that a notice of appeal from an administrator's final account, given under Comp. L. 1897, § 671, requiring that such notice state the reasons for the appeal, was too general to admit proof as to items not set out in the account, is without merit where neither party applied for the framing of an issue under section 673, and where the administrator failed to move to dismiss the appeal.—Casserly v. Casserly, 123 Mich. 44.

¶ 132. It seems that an appeal from claim commissioners should not be dismissed for failure to give notice of the appeal.—Simpson v. Mansfield, C. & L. M. R. Co., 38 Mich. 626.

§ 27. ——Persons to be notified and mode of service.

¶ 133. A probate judge can direct how service of notice of an appeal from commissioners on an estate shall be served upon a corporation; and may name the officer, agent, etc., on whom it shall be made.—Simpson v. Mansfield, C. & L. M. R. Co., 38 Mich. 626.

¶ 134. Service of notice of appeal from the allowance of probate of a will, by mail is insufficient where the order allowing the appeal required notice to be given "by delivering a certified copy of this order," such order requiring actual personal service upon the parties named.—Hosey v. Ionia Circuit Judge, 120 Mich. 280.

¶ 135. Residuary legatees are entitled to notice of an appeal from an order of the probate court admitting the will of their decedent to probate, under How. St. § 6781, providing that notice shall be given to the adverse party; and where an appeal has been taken without notice to such legatees, it is not error for the circuit court to require that notice be served upon them.—Strang v. Hillsdale Circuit Judge, 108 Mich. 227.

¶ 136. Notice of appeal by a creditor of a decedent's estate from the disallowance of his claim by the commissioners need not, under How. St. § 5910, providing for notice of such appeal "in such manner as the probate judge shall direct," be served on other creditors of the estate, unless the probate judge so directs.—Home Sav. Bank v. Wayne Circuit Judge, 113 Mich. 385.

¶ 137. On appeal from the order of the probate judge if the appellant has complied with How. St. § 6781, which provides that notice shall be given to the adverse party in such manner as the probate judge shall direct, the circuit court has jurisdiction to entertain the appeal, even though notice was not given to all of the adverse parties; the circuit judge having power to require notice to be served upon any other necessary parties.—Defoe v. Bay Circuit Judge, 116 Mich. 567.

§ 28. Necessary and proper parties to appeal.

Persons entitled to appeal, see ante §§ 21, 22.

¶ 138. The fact that alternative legatees of a charitable trust do not appeal from a decision of the probate court directing the disposition of the residue of an estate is immaterial.—In re Brown's Estate, 198 Mich. 544.

§ 29. Necessity, requisites, and sufficiency of appeal bond.

Appeal bonds generally, see Jud. Act, chap. LXV, § 8; Comp. L. 1915, § 14152.

¶ 139. An administrator appealing from an order of the probate court removing him, is not required to give a bond for anything more than the costs which might be awarded to the other party since under Comp. L. 1897, § 670, as amended Pub. Acts 1901, No. 92, governing bonds in such cases, it is not intended that the bond shall furnish security to the estate or to those interested that the estate shall be duly administered and not wasted.—Fleming v. Ottawa Probate Judge, 137 Mich. 139.

¶ 140. Though not conformable precisely to the terms of the statute a bond given by an heir on appeal from an allowance of a claim against an estate conditioned only "for such damages and costs as may be awarded against appellant," was sufficient to confer jurisdiction.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 141. Under Comp. Laws 1897, §§ 669, 670, requiring notice of an appeal from the order of a probate court to be filed within

sixty days, together with a bond, it is not sufficient that the notice and bond are filed within the sixty days, but the bond must be approved also within the time limited.—McNamara v. Kent Probate Judge, 154 Mich. 201.

¶ 142. Where the bond was filed and the appeal allowed on July 22, the fact that by a clerical error the bond was indorsed as approved July 23 does not avoid the appeal.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 143. Where an administrator appeals from an order of the probate removing him, he is presumed to have given an adequate bond to secure the execution of his trust, and the appeal bond should not cover his general duties.—Fleming v. Ottawa Probate Judge, 187 Mich. 139.

¶ 144. On appeal from probate proceedings for settlement of a guardian's account the sureties on the appeal bond cannot be included in the judgment.—Bondie v. Bourassa, 46 Mich. 321.

¶ 145. Where the bond, given by heirs allowed to appeal because of the administrator's unwillingness to do so, ran to the claimant as the adverse party, and the claimant did not move for a better bond, he cannot claim that it should have run to the judge of probate or that it does not contain a proper condition to protect the estate; since it is sufficient to protect him and dismissal is not the proper remedy for failure to provide a bond according to the statute.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 146. A testator left most of his estate in the shape of partnership interests in various businesses. He appointed a son, Edward, as executor, who with another son, Thomas, carried on the various enterprises for many years. After some thirteen years all the legatees joined in a paper authorizing the executor to hypothecate the assets of the estate in securing the debts of himself and Thomas in carrying on the enterprises. A petition against the executor for an accounting was granted in the probate court. Held, that in fixing the appeal bond under Act No. 92, Pub. Acts 1901, the probate court was in error in compelling the executor to give a bond for money claimed by the heirs of Thomas when such money was expended in paying the debts of Thomas.—Stevens v. Ottawa Probate Judge, 156 Mich. 526.

§ 30. ——On appeal from claims commissioners' report.

Appealability of report or decision of claims commissioner, see ante § 20.

¶ 147. No bond is required on an executor's appeal from the commissioners' allowance of claim against the estate.—Winter v. Winter, 90 Mich. 197.

¶ 148. Under Comp. L. 1897, § 9386, providing for appeals by executors or administrators from the report of commissioners to the circuit court upon application in writing filed in the probate court within 60 days after returning such report; and section 9387, providing that in case of an appeal by a claimant he shall within the time aforesaid and before such appeal shall be allowed, give bond to be approved by the judge of probate and filed in the office, and section 9395 providing that when an executor or administrator declines to appeal, any person interested as creditor, heir, etc., may appeal in the same manner as the executor or administrator might have done, provided that the person appealing in such case shall, before the allowance of the appeal, give bond to be approved by the judge of probate; heirs who appealed under section 9395 were required to have their bond approved by the judge of probate before the bond was filed.—Bartlett v. Wayne Circuit Judge, 133 Mich. 604.

¶ 149. The bond required by R. S. 1846, chap. 72, § 21, How. St. § 5908, on an appeal from commissioners on claims, cannot be given by a stranger.—Dickinson's Appeal, 2 Mich. 337.

¶ 150. Where claimant appeals from the decision of the commissioners rejecting his claim, an heir who has assumed the burden of resisting the claim cannot ask that the appeal bond be given to him as the adverse party rather than the administrator.—Daniels v. Stevens, 60 Mich. 219.

¶ 151. Although a judge of probate acts judicially in allowing an appeal from commissioners to audit claims against estates of deceased persons, and in passing upon the sufficiency of the sureties in the appeal bond, yet, until such bond is filed as the statute requires, no foundation is laid for the exercise of judicial discretion, and his acts are void.—Dickinson's Appeal, 2 Mich. 337.

¶ 152. The bond required by How. St. § 5908, to be given to the "adverse party" on an appeal from the disallowance by the commissioners of a claim against a decedent's estate, properly runs to the administrator, and not to other creditors who contest the claim.—Home Sav. Bank v. Wayne Circuit Judge, 113 Mich. 385.

§ 31. Time for filing record and effect of delay.

Statutory provisions as to filing of record, see Jud. Act, chap. LXV, § 10; Comp. L. 1915, § 14154.

Trial de novo in circuit court, see Jud. Act, chap. LXV, § 11; Comp. L. 1915, § 14155.

¶ 153. Under How. St. § 6782, failure of an appellant from a decision of the probate court to file the record in the circuit court within thirty days from taking the appeal

renders such an appeal ineffective, and necessitates dismissal on motion.—Merriman v. Jackson Circuit Judge, 95 Mich. 277.

¶ 154. After claimant's appeal from commissioner's rejection of his claim against estate had been allowed, but before papers had been filed in circuit, claimant had a third commissioner appointed under How. St. § 5891, and upon a rehearing claim was allowed by commissioners, whose action was affirmed by circuit court on appeal by administrator, but was held void by supreme court, whereupon claimant filed the papers necessary to perfect his appeal. Held, that How. St. § 5911, was directory, and that prior to Laws 1887, No. 175 (How. St. § 6782), the circuit court could in its discretion retain the appeal though the papers were filed later than the next term after its allowance.—Durand v. Saginaw Circuit Judge, 76 Mich. 624.

¶ 155. How. St. § 5907, 5908, 5910, together with How. St. § 5911, as amended by Laws 1887, Act No. 175, providing for appeals from the probate to the circuit court, seem to contemplate that the appeal has been made and allowed by the action in the probate court, and require the record to be filed in the circuit court "within thirty days after the appeal is allowed"; if such papers are not filed, "such appeal shall cease to be of effect," indicating that the appeal is considered as having been made perhaps 30 days before.—Snyder v. Washtenaw Circuit Judge, 80 Mich. 511.

¶ 156. An appeal properly claimed, perfected and allowed in the probate court should not be dismissed for a failure to file the record in the circuit court within thirty days, limited by Laws 1887, Act No. 175, if such record is filed before the motion to dismiss is actually heard.—Snyder v. Washtenaw Circuit Judge, 80 Mich. 511.

¶ 157. How. St. § 6782 governing appeals from probate court and providing for filing in the circuit court a certified copy of the record and of the order directing notice to the adverse party together with evidence that notice has been given in accordance with the order, is mandatory and upon failure to comply therewith the circuit judge must dismiss the appeal unless there is an application to reinstate it made within the first 10 days of the term.—Hosey v. Iona Circuit Judge, 120 Mich. 280.

¶ 158. The proviso in Laws 1887, Act No. 175, giving the circuit court power to reinstate an appeal from the commissioners on claims, when the party has been prevented from perfecting the same by circumstances not under his control, shows jurisdiction in the circuit court, although the record may not have been filed.—Snyder v. Washtenaw Circuit Judge, 80 Mich. 511.

¶ 159. The failure to perfect an appeal from the probate court within the thirty days limited by statute (How. St. § 6782), may be waived; so held, where, after the appellees had noticed the case for trial, they moved to dismiss for appellant's failure to file the record within thirty days, such record, however, being filed before the motion was heard.—Gorton v. Livingston Circuit Judge, 97 Mich. 561.

¶ 160. The certified copy of the decision and report of the commissioners on a claim, required by Comp. L. 1897, § 9390, on an appeal to the circuit court, is the record on which the appeal rests and must be filed in time; but if filed before a valid motion to dismiss is heard dismissal should not be ordered.—Pruden v. Clark, 148 Mich. 163.

§ 32. Control over and conduct of appeal.

Abandonment or discontinuance of appeal, see post § 33.

Objections to appeal and motions to dismiss, see post § 34.

¶ 161. Heirs appealing where administrator declines to appeal, control and manage the appeal.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 162. An heir who appeals alone from the allowance of a claim against the estate controls the appeal and can discontinue or dismiss it without the consent of his coheirs since they are not parties.—Comstock v. St. Clair Circuit Judge, 95 Mich. 48.

¶ 163. Where one interested in the allowance of a will admitted to probate does not take or join in an appeal from the probate court, he cannot contest the will on the appeal in the circuit; his true position being that of an appellee.—Jackson v. Hosmer, 14 Mich. 88.

§ 33. Abandonment or discontinuance of appeal.

Affirmance for want of prosecution of appeal, see Jud. Act, chap. LXV, § 18; Comp. L. 1915, § 14162.

¶ 164. Claimant against an estate did not abandon his appeal from the decision of the commissioners rejecting such claim, filed within the time allowed by statute, together with his bond, nor was he guilty of laches; where before the certified copies of the report of the commissioners and order of appeal had been filed in the circuit court, such claimant secured the appointment by the probate court of other commissioners, who passed favorably upon his claim, but which decision, upon appeal to the supreme court, was held to be invalid, and where claimant thereupon filed the papers necessary to perfect such appeal.—Durand v. Saginaw Circuit Judge, 76 Mich. 624.

§ 34. Objections to appeal and motions to dismiss.

Notice required on motion to dismiss appeal from decision of commissioners, see Motions and Orders ¶ 3.

¶ 164a. The objection that an application to the circuit court for leave to appeal after sixty days from an order of the probate court does not present a case within the statute, is jurisdictional, and is not waived by joining issue in the circuit court and proceeding to a hearing on the merits.—Palms v. Campau, 11 Mich. 109.

¶ 165. An appeal to the circuit court from the probate court is properly dismissed when taken in the name of an attorney in fact for the real party in interest, and signed by him, the words attorney in fact appended to the signature being considered discriptio personæ. —Hamelin v. Delta Circuit Judge, 126 Mich. 9.

¶ 166. If the appeal bond is defective the appeal should not be dismissed absolutely, but conditionally, in case an amended or new bond shall not be filed within a reasonable time to be fixed by the court.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 167. The bond on appeal remains filed with the judge of probate, but on an authenticated copy the circuit court may be moved to dismiss the appeal, and has authority to do so.—Dickinson's Appeal, 2 Mich. 337.

¶ 168. An appeal from an order transferring insurance money from an estate to the estate of a distributee fails when it appears that appellant has no claim provable against the former estate.—In re Sherman's Estate, 117 Mich. 605.

§ 35. Procedure and practice on appeal in general.

Pleadings and framing of issues on appeal, see post § 36.
Amendment on appeal, see post § 37.
Trial of issues of fact, see post §§ 38, 39.
Scope of issues on appeal, see post §§ 40-43.
Construction and conclusiveness of record and intendments thereof, see post § 44.
Judgment on appeal and scope of relief, see post §§ 45-47.
Costs on appeal, see post § 48.
Operation and effect of appellate judgment, see post § 49.
Proceedings after judgment, see post § 50.
Authority over and conduct and control of appeal, see ante § 32.
Necessity of raising question for review in lower court, see Saving Questions, I.
Mode and sufficiency of objection to preserve question for review, see Saving Questions, II.
Necessity and sufficiency of ruling of lower court to save question for review by supreme court, see Saving Questions, III.
Necessity and sufficiency of exceptions to save question for review in supreme court, see Saving Questions, IV.
Waiver of objections and exception after taking as affecting right to review question in supreme court, see Saving Questions, V.
Proper mode of signing appeal papers on behalf of municipal party, see Municipal Corporations ¶ 858.
Method of reviewing judgment of the circuit on appointment of substituted trustees, see Appeal § 3, ¶ 30.
Matters of evidence, instructions and trial practice on hearing in circuit of claims covered by appeal from allowance or disallowance, see Estates of Decedents, VI, C, 5.

¶ 169. Probate appeals are to be tried and determined on the same principles that would be administered by the probate court itself.—Brown v. Forsche, 43 Mich. 492.

¶ 170. Appeals from interlocutory probate orders cannot take the form of a common-law action, nor can proceedings for the removal of an administrator or the appointment of a guardian.—In re Mower's Appeal, 48 Mich. 441.

¶ 171. Proceedings to obtain from commissioners the allowance of a claim against an estate are subject, on appeal to the circuit court, to the same substantial rules as a common-law action, the cause of action being a common-law right.—McKinney v. Hamilton's Estate, 53 Mich. 497.

¶ 172. An order that an issue be framed on an appeal from commissioners need not delay proceedings to a trial.—People ex rel. Torrey v. Wayne Circuit Judge, 38 Mich. 614.

¶ 173. Appeals from commissioners are always at issue, and if noticed for trial in due time must be placed on the docket, even though no plea had been filed when notice was given.—People ex rel. Torrey v. Wayne Circuit Judge, 38 Mich. 614.

¶ 174. A decree of the probate court allowing an executor's account was appealed from by the executor for refusal to allow in full a claim for extraordinary services, and a legatee also appealed because of the allowance of several sales and disbursements by the executor and because anything was allowed for extraordinary services. Held, that after the legatee had waived a jury on all questions except that of compensation, the appeals should have been consolidated.—Wisner v. Mabley's Estate, 70 Mich. 271. See supra, § 341.

¶ 175. On appeals from commissioners on claims against estates, it is the safer practice to confine the jury's attention to the items on which testimony is offered as they are introduced during the trial, rather than to permit pleadings to be read to them which include

items that they cannot properly consider.—Patrick v. Howard, 47 Mich. 40.

¶ 176. Probate appeals require no separate notice of trial for the first term after they are taken, but only at subsequent terms. The notice given with the appeal is sufficient for the first term.—People ex rel. Good v. Wayne Circuit Judge, 39 Mich. 1.

¶ 177. The fact that the notice of trial in an appeal case is entitled in the name of the heir in whose interest the appeal was taken, the administrator having declined to appeal, does not sustain the objection that the appeal was not taken in the name of the administrator as required by the order allowing it.—King v. Ingham Circuit Judge, 69 Mich. 84.

¶ 178. Whether, and under what circumstances, the circuit court on appeal from an order of the probate court refusing probate of a will can allow part of the proponents to renounce and be discharged in order to become witnesses, quære.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 179. Denial of probate should not be affirmed without hearing on merits—affirmance asserts jurisdiction; on refusal of antemortem probate proper order on appeal is one quashing whole proceeding.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 180. An order denying probate of a will should not be affirmed without a hearing on the merits.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 180a. Although on appeal the circuit court may hear two accounts of trustees at the same time, it must nevertheless treat them as separate accounts, and pass upon them as such.—In re Ward's Estate, 152 Mich. 218.

§ 36. Pleadings and framing of issues on appeal.

Amendment of pleadings, see post § 37.
Trial of issues of fact, see post § 38.
Submission of issues to jury, see post § 39.
General law of pleading, see Pleading.
Treating demurrer to petition as a statement of facts proved for purposes of review, see Appeal ¶ 1382.

¶ 181. Formal pleadings are not necessary in the circuit court on an appeal from the probate court from the allowance of a claim.—Hoffman v. Estate of Pope, 74 Mich. 235.

¶ 182. On appeal from the allowance of an administrator's account, the account itself and the exceptions filed thereto are a sufficient presentation of the issue, and the administrator need not file a declaration.—In re Mower's Appeal, 48 Mich. 441.

¶ 183. Where a claim for personal injuries filed with the probate commissioners contains a short, plain statement of the accident, injury, and consequent damage to claimant, and an obvious intimation that the accident was due to decedent's negligence, such statement is a sufficient declaration for the case on appeal to the circuit court.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

¶ 184. Where an appeal is taken from the decision of the probate claim commissioners on a claim for personal injuries, the statement of claim filed stands as the declaration, in the absence of more formal pleadings.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

¶ 185. On appeal from the rejection of a claim by commissioners on an estate the declaration must conform to the claim and the bill of particulars.—Hillebrands v. Nibbelink, 40 Mich. 646.

¶ 186. The original form of a claim submitted to commissioners on an estate is what must be regarded on an appeal from their decision, the nature and identity of the case or claim are not affected by a formal declaration.—Kroll v. Ten Eyck's Estate, 48 Mich. 230.

¶ 187. Where on appeal from an allowance by commissioners no declaration is filed or new issue made, the report of the commissioners will stand as a declaration, and any judgment in excess of the claims presented to them will be erroneous.—White v. Allen, 18 Mich. 194.

¶ 188. On appeal from commissioners on an estate the probate claim need not be put in the form of a declaration; the case cannot be enlarged, and no claim can be heard that was not passed on by the commissioners.—Patrick v. Howard, 47 Mich. 40.

¶ 189. Where, on appeal from the decision of commissioners disallowing a claim against the estate of a deceased person, declaration is filed in the circuit court on such claim, but containing, also, a count on an account stated with the administrators as such, such count may be treated as surplusage, and judgment against the claimant will not be reversed because the jury failed to pass upon the issue made on such count.—Fish v. Morse, 8 Mich. 34.

¶ 190. On appeal from allowance of a claim it is not essential to frame an issue for trial of a defense of limitations, since a barred claim is of no validity and the issues involve such question.—McGee v. McDonald's Estate, 66 Mich. 628.

¶ 191. No technical rule is applied to the framing of issues for the trial on appeal of a claim against an estate.—Comstock v. Smith, 26 Mich. 306.

¶ 192. New issues need not be framed on appeals in will cases.—Ellair v. Wayne Circuit Judge, 46 Mich. 496.

¶ 193. It is discretionary with the trial court whether it will order an issue framed on appeal from an allowance of a claim against an estate of a decedent.—McGee v. McDonald's Estate, 66 Mich. 628.

¶ 194. Where an administrator appeals to the circuit court from an order of the probate court allowing a claim, the reason assigned for the appeal being that the claim is on a note on which the claimant had previously recovered judgment against the decedent, the issue is sufficiently clear and no formal pleadings are necessary.—Hoffman v. Estate of Pope, 74 Mich. 235.

¶ 195. A written issue need not be made or joined in the probate court, but the party aggrieved may appeal to the circuit court where an issue may be framed if deemed essential.—Turnbull v. Richardson, 69 Mich. 400.

¶ 196. Where an issue is formed in the circuit court on an appeal from the allowance of a will, it is not necessary for contestant to plead specially the decedent's soundness of mind; the general issue is sufficient.—Taff v. Hosmer, 14 Mich. 309.

¶ 197. Allowing defendant, in an action in the probate court based upon a note purporting to have been executed by the decedent, to file in the circuit court, upon appeal to that court, an affidavit denying the execution of such note by the decedent, held to be in the discretion of the court under C. C. Rule 33, if such rule is applicable to cases appealed from the probate court.—Hampton v. Van Nest's Estate, 196 Mich. 404.

¶ 198. On appeal from allowance of a claim, where there is no formal issue made up the administrator is not required, under How. St. § 5896, which makes it the duty of administrators or executors to exhibit the claims of the deceased in offset to those of creditors, to give notice of set-off until the court, upon motion, orders him to do so, or until an issue has been framed which precludes any claim of set-off.—Westra v. Westra's Estate, 101 Mich. 526.

¶ 199. On appeal from the probate of a will to the circuit court, a plea of the general issue puts in issue the sanity of the testator. —Taff v. Hosmer, 14 Mich. 309.

§ 37. Amendments on appeal.

¶ 200. An executor's final account, as presented for settlement in probate court, may, in furtherance of justice, be amended in the circuit court on appeal by adding omitted items.—Jackson v. Leech's Estate, 113 Mich. 391.

¶ 201. On an appeal from commissioners' disallowance of a claim against a decedent's estate the claim as heard by the commissioners cannot be enlarged by amendment.—Dayton v. Dakin's Estate, 103 Mich. 65.

¶ 202. On an appeal to the circuit court from a guardian's final account, the ward has the right to change the basis of the account from a claim to a proportionate part of the proceeds of a sale of realty, to a claim for rent for such interest.—Cummin v. Baldwin, 123 Mich. 103.

¶ 203. On appeal to the circuit court, the refusal to permit a petition for the probate of a lost or destroyed will to be amended by setting forth the contents and provisions of the alleged will, was error.—Ewing v. McIntyre, 133 Mich. 459.

¶ 204. Where a claim was filed in the probate court against a decedent's estate, and, after its disallowance by the commissioners upon the claimant's default, a stipulation was entered into between the executrix and residuary legatee and the claimant that the estate might be settled and closed and that the executrix and residuary legatee would personally assume the payment of such claim, subject to the prosecution, appeal and final disposition in the usual manner of such claim the same as though such stipulation had not been made, and the estate was thereupon settled and closed, and appeal from such disallowance to the circuit court was perfected, held that the circuit court had no jurisdiction to remand the claim to the probate court for the purpose of amendment of the claim.—In re MacDonald's Estate, 196 Mich. 392.

§ 38. Trial of issues of fact.

Submission of issues to jury, see post § 39.
Scope of issues on appeal, see post §§ 40-43.
Notice of trial, see ante ¶¶ 176, 177.
Trial de novo in circuit court, see Jud. Act, chap. LXV, § 11; Comp. L. 1915, § 14155.

¶ 205. Where a proceeding in the probate court involves common-law questions and stands in the place of a suit at law, it takes the form of a common-law action on appeal to the circuit court, and there it is proper and not unusual to provide for making up a common-law issue which will be removable to the supreme court on exceptions by writ of error. But the case is not necessarily to be treated in the circuit precisely as an action at law would be, as, for example, where questions are involved which ought not to go to a jury. —In re Mower's Appeal, 48 Mich. 441.

§ 39. ——Submission of issues to jury.

Right to jury trial of issues on appeal from probate, see Jury § 9.
Extra compensation to representative as matter of probate judge's discretion which cannot be submitted, see Estates of Decedents ¶ 1074.

¶ 206. The issue on appeal may be tried without a jury if neither party demands one. —American Baptist Missionary Union v. Peck, 9 Mich. 445.

¶ 207. It is a party's right to have all questions of fact on appeal from the probate to the circuit court tried by jury.—In re Stebbins' Estate, 94 Mich. 304.

¶ 208. In probate court proceedings on appeal if the jury disagree, the court should call another jury if either party requests it. —Grovier v. Hall, 23 Mich. 7.

¶ 209. Upon an appeal to the circuit court from a probate order granting guardianship under How. St. §§ 6314, 6315, it is desirable, if not absolutely required, that the specific issue of whether the person in question is incapable of taking care of himself and managing his property, by reason of old age or any other cause be submitted to the jury rather than ordering the jury to find a verdict for one party or the other.—Storick's Case, 64 Mich. 685.

¶ 210. Comp. L. 1871, § 5220; How. St. § 6783, provides that, on appeal from the probate to the circuit court, the latter shall proceed to trial according to the rules of law, and if there be any question of fact it may be submitted to a jury. Held, that this does not contemplate a general trial or a general verdict; the findings of the jury are to aid the court in determining questions that belong to its own equitable discretion.—Gott v. Culp, 45 Mich. 265.

¶ 211. The construction of the will in course of the settlement and distribution is a question for the court, on appeal from the probate court and should not be given to a jury.—In re Mallary's Estate, 127 Mich. 119.

¶ 212. If an appeal can be taken from an order of the probate court authorizing the guardian of an infant to lease its real estate, the question whether it is for the best interest of the infant that the lease should be made is not triable by a jury.—In re Cook's Estate, 99 Mich. 63.

¶ 213. Questions of fact such as are raised upon the petition for the appointment of a guardian for an incompetent, or so many thereof as the parties, or either of them, or the court, may desire, can be submitted to the jury on appeal from the probate court. (How. St. § 6783.)—Norton v. Sherman, 58 Mich. 549.

§ 40. Scope of issues on appeal.

Issues not raised or waived in probate court, see post § 41.

Errors and objections not specified in petition and notice of appeal, see post § 42.

Matter extraneous to order appealed from, see post § 43.

Trial of issues of facts, see ante §§ 38, 39.

Defense of limitations as issue, see also ante ¶ 190.

Necessity for framing new issues in will contest, see ante ¶ 192.

Defense of limitations as within original issues and triable on appeal without framing new issue, see also Limitations ¶ 394.

¶ 214. New issues framed in the circuit court upon an appeal in an administrator's accounting should be framed on the matters in controversy and be as specific as possible. If submitted to a jury a general verdict should not be taken. Findings upon separate questions of fact that are properly framed may be given such legal or equitable force as is proper. The circuit court, when the case is disposed of, must have the means of stating the account as it should be finally settled.—Loomis v. Armstrong, 49 Mich. 521.

¶ 215. Where, on an appeal from the allowance of a claim against an estate, no formal issue is made in the circuit court, the case must be tried in the same manner as if it were before the commissioners on claims. —Westra v. Westra's Estate, 101 Mich. 526.

¶ 216. The issue upon presentation of a claim before commissioners continues the same on appeal.—Hatheway's Appeal, 52 Mich. 112.

¶ 217. The question whether there was fraud inducing legatees to consent to the allowance of an executor's account as presented to the probate court cannot be tried on an appeal to the circuit court from an order of the probate court allowing such account, but the question should be decided on an application for distribution of the estate.—Sanborn's Estate, 109 Mich. 191.

¶ 218. How. St. § 6322, providing for payments by guardians on approval by the probate judge, authorizes the guardian to ask the probate judge to pass upon the question of whether a debt shall be paid, and, where the guardian joins with the creditor in a stipulation to submit the question to the probate court, he cannot question the jurisdiction of the court on an appeal from its decision.—State v. Dunbar's Estate, 99 Mich. 99.

¶ 219. On an inquisition in the probate court to determine a party's competency and appoint a guardian, if there was any testimony tending to support the jury's finding of incompetency, on appeal to the circuit court, the evidence will not be weighed and the case must be remanded. In re Kellogg, 196 Mich. 119. (Bird, Moore and Brooke, JJ., dissenting.)

¶ 220. Upon an appeal from the decree of a probate court allowing or disallowing a will, the substance of the controversy must be the same as on the issue of devisavit vel non.—American Baptist Missionary Union v. Peck, 9 Mich. 445.

¶ 221. While it is proper to make in the circuit court a new issue in the common-law form, the issue cannot differ materially from that necessarily made on the application for probate; and it makes no difference that a formal issue is not made up in the circuit court, since the substance of the issue is the same whether made up in form or not.—American Baptist Missionary Union v. Peck, 9 Mich. 445; Ellair v. Wayne Circuit Judge, 46 Mich. 496.

¶ 222. No matter how many different persons appeal from the probate of a will they can only raise one issue, and there can be but one trial of that issue, which is to determine the question of will or no will.—Frazer v. Wayne Circuit Judge, 39 Mich. 198.

¶ 223. A statement in the opinion, upon appeal from an order allowing the probate of a will, that there was evidence that testator's belief in contestant's illegitimacy, which occasioned the making of the will, was produced by spiritualistic communications, is not sufficient to constitute a decision that the belief was an insane delusion, and such question will be considered upon the subsequent appeal.—O'Dell v. Goff, 153 Mich. 643.

¶ 224. All appeals from the probate of the same will are directed to the sole issue of its validity, and therefore belong together and are indivisible.—People ex rel. Frazer v. Wayne Circuit Judge, 39 Mich. 198; and see Fraser v. Jennison, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171.

¶ 224a. Where there is an appeal from the balance shown in the first annual account of a trustee, it is not necessary to appeal a second time on such balance, in an adjudication of the second annual account, since an adjudication of the latter affects only the new items included therein.—In re Ward's Estate, 152 Mich. 218.

§ 41. ——Issues not raised or waived in probate court.

Errors and objections not specified in petition and notice of appeal, see post § 42.
Matters extraneous to order appealed from, see post § 43.

¶ 225. Technical objections which were not raised in the probate court on the hearing of an application for the appointment of a guardian for an incompetent person, or in the petition for appeal, will not be considered on appeal in the circuit court.—In re Alexander, 136 Mich. 518.

¶ 226. An appeal from the settlement of the final account of an administrator brings the whole account before the circuit court, and appellant may raise questions not raised and passed upon in the probate court, where there has been no appearance entered, and no rights waived; even though appellant's attorney was present in the probate court at the time of hearing.—Reed v. Whipple, 140 Mich. 7.

¶ 227. If proceedings for the confirmation of an administrator's sale can be appealed from the probate to the circuit court, the issue remains the same and no new issue can be introduced in the circuit.—In re Campau's Estate, 48 Mich. 236.

¶ 228. The question whether a fair price was realized for property sold at administrator's sale cannot be raised for the first time after confirmation of the sale and on appeal from the order confirming it, if such an appeal can be taken.—In re Campau's Estate, 48 Mich. 236.

¶ 229. Where the sole issue tried on the hearing of two petitions heard together, for the appointment of a guardian for an alleged incompetent, one being under Comp. L. 1897, § 8709, and the other under § 8712, was the question of incompetency, but the reasons for the appeal stated in the petition for appeal were that respondent had once been decreed incompetent, that she was then competent, and that she had a contract with a certain party to handle and control her property; such objections to the proceeding were waived by going to a hearing upon the merits of the question of competency, and the evidence having been conflicting and the instructions correct, the finding in favor of petitioner was affirmed.—In re Alexander, 136 Mich. 518.

¶ 230. An objection that the probate court had no jurisdiction to admit a will to probate cannot be considered upon appeal, where the parties have stipulated that the will was "duly probated."—Defreese v. Lake, 109 Mich. 415.

§ 42. ——Errors and objections not specified in petition and notice of appeal.

Matters extraneous to order appealed from, see post § 43.

¶ 231. On an appeal from the probate court to the circuit court the latter court is limited in its hearing to the reasons stated in the petition for an appeal.—In re Beers, 148 Mich. 300.

¶ 232. Where an appeal on the ground of lack of jurisdiction is made under the statute, to the circuit court, from an order of the probate court granting a rehearing on the allowance of an administrator's account, only the reasons stated in the appeal can be considered in the circuit court.—In re Mill's Estate (Appeal of Mills), 158 Mich. 504.

¶ 233. An administrator who appears before the commissioners at the hearing upon a claim for the examination of which the commission has been revived simply objecting to jurisdiction, is not in a position, upon

the creditor's appeal from an order of disallowance, to raise the objection that no notice of the hearing was served upon him, or upon the heirs or other creditors of the estate especially where he did not move to dismiss the appeal for want of jurisdiction.—Heavenrich v. Nichols' Estate, 113 Mich. 508.

¶ 234. Comp. L. 1897, §§ 669, 671, require notice of appeal to be given to the adverse party with his reasons therefor, and therefore an appellant from a probate court is confined to the issues raised in his claim of appeal.—Jersey v. Jersey, 146 Mich. 660.

¶ 235. Comp. L. 1897, § 669, regulating appeals from the probate court, requires appellant to state the reasons of his appeal, and the appellate court is limited to the determination of the questions so presented. In re Ward's Estate, 152 Mich. 218.

¶ 235a. Inasmuch as on appeal from an order of the probate court the circuit court is limited in its hearing to the reasons stated in the petition for an appeal, where the only reasons for taking the appeal were that the order for issuing of citation varies from the petition and order and are void, that no specific sum is ordered paid but leaves the amount with the asylum authorities to fix, substituting their judgment for that of the court, and the appellant is not legally liable for the support of his daughter, the circuit court judge is not authorized to make an order for a different amount than that made by the probate judge.—In re Beers, 148 Mich. 300.

§ 43. ——Matters extraneous to order appealed from.

¶ 236. On appeal from an order of the probate court passing upon the account of the executor it is improper to consider the question whether the testator, in giving his wife the use and net income of the rest, residue, and remainder of his estate, authorized her to so use it as to deplete the body of the estate.—In re Miner's Estate, 201 Mich. 115.

¶ 237. Whether, after appealing from probate on the sole ground of testamentary incapacity, contestant can raise the question of undue influence, quære.—Hoban v. Piquette, 52 Mich. 346.

¶ 238. An appeal from the probate order approving of the appointment of a permanent guardian by will does not affect the rest of the will.—Gross v. Stone, 63 Mich. 319.

¶ 239. Whether the contestant of a will can raise the issue that the testator was unduly influenced after appealing from the probate of the will on the sole ground that he lacked testamentary capacity, quære.—Hoban v. Piquette, 52 Mich. 346.

§ 44. Construction and conclusiveness of record and intendments thereon.

¶ 240. An appeal from the disallowance of the claim against an estate will not be dismissed after several years' pendency upon the oral statement of the commissioners that their previous report of disallowance is untrue and that they had not passed upon the claim.—Crosby v. Montcalm Circuit Judge, 125 Mich. 24.

¶ 241. Under Act No. 271, Pub. Acts 1905, providing that the probate court may set aside decrees and grant rehearings within ninety days, the probate court granted a petition for rehearing in the matter of allowing an administrator's final account. The allegations of the petitioner were sufficient to show mistake or fraud, and the probate court held they were supported by sufficient evidence. The administator appealed from the order allowing the petition without setting out the evidence in the record. Held, on such a record the petition was properly granted under the statute.—In re Mills' Estate (Appeal of Mills), 158 Mich. 504.

¶ 242. A claim as filed with a credit applied thereon and a statement that it was subject to a further credit of the amount to be realized from the sale of certain land under a certain contract at a certain time cannot be regarded as a contingent claim on appeal from a disallowance by commissioners, and their disallowance sustained because of their lack of power to pass on such claims (see Comp. L. 1897, § 9411 et seq.); where at the time they reported disallowance the time for such application was past and where there was nothing to show that the contract had not been performed and the money realized to apply as agreed.—Crosby v. Montcalm Circuit Judge, 125 Mich. 24.

§ 45. Judgment on appeal and scope of relief.

Final judgment or remand to probate court, see post § 46.
Rendition of judgment against sureties, bonds, see post § 47.
Costs on appeal, see post § 48.
Operation and effect of appellate judgment, see post § 49.

¶ 243. The action of a circuit court in affirming an order of the probate court appealed from amounts to an assertion of jurisdiction, and is improper where the court considers the proceeding extrajudicial.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 244. Formal entry of judgment is required in the circuit court on appeal from a disallowance of claim against a decedent's estate.—Rayl v. Wayne Circuit Judge, 91 Mich. 4.

¶ 245. Where an appeal is taken to the circuit court from the action of the com-

missioners upon a claim, the circuit court should not render judgment in the common-law form, but should simply certify to the probate court the allowance or disallowance of the claim.—La Roe v. Freeland, 8 Mich. 531; Tyler v. Gallop's Estate, 68 Mich. 185.

¶ 246. Judgment entry in the circuit court on appeal from decision of commissioner of claims should be an allowance or disallowance of claim, which should be certified to probate court.—Tyler v. Gallop's Estate, 68 Mich. 185.

¶ 247. On appeal from an order of the probate court denying an administrator leave to sell, the circuit court should find and place on record all material facts relied on to warrant a judgment reversing the order and granting leave.—Daly's Appeal, 47 Mich. 443.

¶ 248. On an appeal from the probate to the circuit court upon an administration account, the judgment of the circuit court should settle and determine the account, and that determination should be certified to the probate court for action there upon the basis of such judgment; but the circuit court cannot fix the time within which the administrator must pay over the balance found against him, and if it attempts to, though it will not be ground for reversing an otherwise correct judgment on writ of error, the order will not bind the probate court.—Hall v. Grovier, 25 Mich. 428.

¶ 249. Formal inaccuracies in the entry of a judgment in the circuit court sitting in appeal from a settlement of account by the probate court, consisting in adding to the judgment a provision for the time within which to make payments adjudged due by the settlement, such being a matter for the probate court when the judgment is certified to it, are cured by the statute of amendments.—Hall v. Grovier, 25 Mich. 428.

¶ 250. The conclusions of the circuit court upon an appeal from probate proceedings for the settlement of a guardian's account should take the shape of an order showing what is allowed and what is not, and providing that it be certified to the courts below.—Bondie v. Bourassa, 46 Mich. 321.

¶ 251. Where the ante-mortem probate of a will was denied because the proceeding provided by the statute was extra-judicial, the proper order on appeal was not one of affirmance, but one quashing or dismissing the proceeding.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 252. Where a probate court has directed an executor to pay an attorney for services rendered the estate, the direction is made without authority, and in an appeal to the circuit court from the order of the probate court allowing the executor's account, the allowance for attorney's fees may be set aside, although no appeal was taken from the order allowing the said fees.—In re Bender's Estate, 154 Mich. 44.

§ 46. ——Final judgment or remand to probate court.

Proper terms and relief to be embodied in judgment, see Estates of Decedents, VI, C, 5; VII, A, 3.

Finality of judgment of the circuit for purpose of appeal or error to the supreme court, see Appeal § 33.

Disallowance of appeal by circuit as final order reviewable by error, see Appeal § 33.

Reviewable proceedings of circuit court on appeal from probate, see Appeal §§ 27-30.

Proper mode of reviewing judgment of the circuit on discharging guardian of incompetent, see Appeal § 3, ¶ 31.

Proper method of reviewing circuit judgment on appointment of substituted trustees, see Appeal § 3, ¶ 30.

¶ 253. Where the probate court denies the administrator leave to sell, and on appeal the circuit court reverses this order and grants leave, it should enter the proper judgment itself, Comp. L. 1871, § 5226 (How. St. § 6789), instead of directing the probate court to enter it; otherwise its judgment is inoperative if not obeyed, and will be quashed on certiorari.—Daly's Appeal, 47 Mich. 443.

§ 47. ——Rendition of judgment against sureties' bonds.

Liability on appeal bonds, see Jud. Act, chap. LXV, § 8; Comp. L. 1915, § 14152.

¶ 254. Judgment for costs cannot be rendered in the circuit court against a surety on a cost bond upon an appeal from the decision of commissioners on claims against an estate without a trial upon the bond.—Willard v. Fralick, 31 Mich. 431; Reed v. Northrup, 50 Mich. 442; Booth v. Radford, 57 Mich. 357.

¶ 255. Where a probate court refuses an accounting, a circuit court on reversing the order should enter an order for an accounting in the probate court as the filing of an executor's account would be improper in the circuit court.—In re Kilbourne's Estate, 173 Mich. 258.

§ 48. Costs on appeal.

General law of costs, see Costs.

Statute regulating costs on appeal from probate courts, see Jud. Act, chap. XLVII, § 24; Comp. L. 1915, § 13705; Jud. Act, chap. LXV, § 20; Comp. L. 1915, § 14164.

¶ 256. How. St. § 5894, providing that, where a commission to hear claims against the estate of a deceased person is revived upon the application of a creditor who has failed to present his claim in season, "all costs and charges resulting from such application, and the proceedings thereon, had in the probate court, shall be paid" by the applicant, does not cover the costs on an appeal to the circuit, the same being governed by How. St. § 8982, which provides that, "upon appeals from probate courts to a circuit court * * * costs shall be paid by the appellant or respondent, as shall be directed" by the appellate court.—Shepherd v. Shepherd's Estate, 108 Mich. 82.

¶ 256a. Where a will contest has been appealed from a probate to a circuit court, the latter has authority only to decree that taxable costs be paid out of the estate; it cannot order an allowance to be made out of the estate, to perfect an appeal of proponents.—Goff v. Cass Circuit Judge, 152 Mich. 121.

§ 49. Operation and effect of appellate judgment.

Conclusiveness of circuit judgments on appeal from probate, see Former Adjudication.

¶ 257. Appellants are all bound alike by the rulings in the probate proceedings on appeal from the probate of the same will, where sole issue is its validity.—Frazer v. Wayne Circuit Judge, 39 Mich. 198; and see Fraser v. Jennison, 106 U. S. 191, 27 L. ed. 131, I Sup. Rep. 171.

§ 50. Proceedings after judgment on appeal.

Review of findings of circuit on appeal, see Appeal § 459.

¶ 258. A verdict and judgment in the circuit court, in affirmance of a probate order appointing a guardian for an incompetent, may properly be remitted to the probate court for enforcement (How. St. § 6789).—Norton v. Sherman, 58 Mich. 549.

¶ 258a. In an appeal from the probate court to the circuit court, the latter decided in favor of the appellants. The appellees, the nonresident heirs of the testator, wished to take the case to the supreme court, but were informed by their attorney that the administrator was the proper party to take the appeal. The administrator failed to serve proper notice on the appellants of his purpose to appeal, and the order given extending the time to settle a bill of exceptions was set aside by the circuit court. The court granted a second order to the administrator, however, in the request for which the appellees joined. The present relator brings mandamus to compel the judge to set aside this order. The mandamus was denied on the ground that in treating the request for the extension of time made by the administrator as the request of the appellees, the circuit court had abused its discretion.—Fitzgibbons v. Ionia Circuit Judge, 152 Mich. 209.

§ 51. Certiorari to review probate proceedings.

General principles of certiorari, see Certiorari.

Certiorari to review action of circuit on review of probate court, see Certiorari § 14.

Power of circuit court to issue certiorari to circuit court, see Certiorari § 65.

¶ 259. Where testamentary trustees failed to qualify, and the probate court appointed others in their stead, the proceeding does not arise in the course of the common law, and hence certiorari and not error is the proper remedy for review.—In re Erdman's Estate, 179 Mich. 567.

¶ 260. Certiorari to review proceedings for the sale of lands by an executor will not lie on the petition of one who is not shown by the return of the probate judge to have any interest in the lands.—Hewitt v. Oakland County Probate Judge, 67 Mich. 1.

¶ 261. The practice in certiorari proceedings to the probate court before the circuit court is governed by C. C. Rule 46.—Seilnacht v. Wayne Probate Judge, 190 Mich. 461.

¶ 262. The return of service of notice in proceedings to appoint a guardian for an incompetent, as contained in the return to certiorari is sufficient to show that service was made in the manner and time directed.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

¶ 263. In an application for a guardian to be appointed over the estate of an alleged insane person, the finding of fact as to insanity by the jury, or by the court in the absence of a jury, is conclusive on review by certiorari.—In re Phillips, 154 Mich. 139.

PROBATION.

Cross-References.

Probation—
See Pardons and Paroles § 8.
Sentence of prisoner, see Indictment, XI.
Record of sentence for breach of parole, see Indictment § 503.
Appointments to office on probation, see Municipal Corporations § 168.

PROCEDENDO.

TREATS of the writ to command an inferior court to proceed to final hearing of a pending cause.

Mandate on error or appeal to lower court to proceed after disposal of case above, see Appeal § 551 et seq.
Power of supreme court to issue writs of procedendo, see Jud. Act, chap. I, § 9; Comp. L. 1915, § 12014.

The writ of procedendo has been practically superseded for many years by that of mandamus.—People v. Swift, 59 Mich. 529.

PROCEEDINGS to PROCEEDS.

Cross-References.

Proceedings; Procedure—
These words have such a variety of legal applications that no complete detailed list of references is possible. See generally the topic treating of the particular proceeding or of the subject to which it relates.
Civil procedure in general, see Actions; Pleading; Process; Appearance; Trial; Instructions; Verdicts; Judgments.
Chancery procedure, see Equity.
Criminal procedure, see Indictment.
Probate court procedure, see Probate Courts.
In justices' and municipal courts, see Justices of the Peace; Municipal Courts.
Proceeds—
Right to proceeds resulting from sale of assets or property, see topic treating of the property or the suit or proceeding to convert it, e. g., Foreclosure; Executions; Estates of Decedents, VII (sale of land for debts); Chattel Mortgages § 134; Pledges § 11.
Equitable conversion of proceeds of land into land, see Equity § 12.
Legacy or devise of "proceeds," see Wills, VI.

PROCESS.

TREATS of the writ, notice, or citation by which the defendant parties to actions and proceedings are summoned into court and of the service and return or proof of the summoning. It excludes Civil Arrest; Attachment; Garnishment; Replevin; and the notice incident to Forcible Entry and Detainer. See those topics. It also excludes final and executive process to carry judgments into execution. See Executions; Assistance, Writ of; Contempt. Equitable Writs of Injunction; Ne Exeat; Sequestration, are treated in topics so named; and the prerogative writs are treated in Appeal and Error; Certiorari; Mandamus; Prohibition; Quo Warranto. Mere notices are treated in Notices. Subpœnas to witnesses are treated in Witnesses, I.

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I. IN GENERAL; KINDS AND REQUISITES; ISSUANCE.

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Elements of "due process," see Constitutional Law § 127 et seq.
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Capias, see Civil Arrest.
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Justification of acts of officer by judicial process, see Officers § 65.
Conformity of declaration to process, see Pleading § 30.
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§ 1. In general; filing declaration and notice as process.

Service in actions begun by declaration, see post § 13.
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Commencement of action by declaration and notice or by original writ, see Jud. Act, chap. XIII, § 4; Comp. L. 1915, § 12407.
Process to commence chancery suits, see Jud. Act, chap. XIII, § 5; Comp. L. 1915, § 12408.
Term process as including declaration, see Jud. Act, chap. XIII, § 20; Comp. L. 1915, § 12423.

¶ 1. Although the commencement of a suit by filing declaration, entering rule to plead and serving copy with notice is statutory, and must conform to the statute, yet it stands on no different footing from other process.—Granger v. Detroit Superior Court Judge, 44 Mich. 384.

¶ 2. Action against a city may be commenced by declaration, even though the charter provides that all process against the city shall be served by leaving a certified copy with one of three designated officers at least ten days before the day of appearance mentioned therein.—City of Menominee v. Menominee Circuit Judge, 81 Mich. 577.

¶ 3. A declaration filed and served as commencement of suit is "process"; the rule to plead within twenty days from service and notice being a sufficient statement of the return day.—City of Menominee v. Menominee Circuit Judge, 81 Mich. 577.

§ 2. Federal process.

United States courts in general, see Courts, V, F.

¶ 4. The federal government has authority to regulate and control the execution of process issuing from its own courts, irrespective of the process acts of the states.—Chamberlain v. Lyell, 3 Mich. 448.

¶ 5. The act of congress of May 19, 1828 (adopting for the process of the United States courts the laws of the several states on the subject), having been made applicable to the states subsequently admitted by the act of Aug. 1, 1842, is to be construed as adopting such laws of said states on the subject as were in force at the last-mentioned date.—Gorham v. Wing, 10 Mich. 486.

¶ 6. Acts of 1828 and 1842 operate to prohibit the issue of writs of capias ad respondendum by the courts of the United States, except in cases where the statutes of Michigan allow imprisonment for debt.—Ward v. Cozzens, 3 Mich. 252.

§ 3. Præcipe and issuance.

See also post ¶ 254.

Issue of federal process, see also ante § 2.

Necessity of describing defendants in præcipe, see post ¶ 14.

Alias process, see post § 8.

Execution and return of process, see post II.

Issuance of writ by deputy clerk, see Courts § 6.

Prayer for process under former chancery practice, see Equity § 92a.

Denial or grant of extraordinary writ or process as a judgment sufficient to be conclusive, see Former Adjudication § 15.

Issuance of preliminary injunction before subpœna, see Injunctions § 117.

Issuance, service and return of justices' summons in garnishment, see Justices of the Peace § 70.

Power to issue process either in term time or vacation, see Jud. Act, chap. XIII, § 3; Comp. L. 1915, § 12406.

¶ 7. A præcipe for issue of process should specify the court, the names of the parties, the kind of action, the kind of writ, the return day and the amount of damages.—Potter v. John Hutchison Mfg. Co., 87 Mich. 59.

¶ 8. In a præcipe, it is sufficient to state the names of the parties to the suit without stating their character and the capacity in which they sue.—Williams v. International Grain & Stock Board, 99 Mich. 80.

§ 4. Form, requisites, and sufficiency.

See also ante ¶ 3.

Filling out and alteration, see post § 9.

Materiality of defects in process, see also post § 51.

Taking summons from files for service, see post § 51.

Waiver and cure of defects and irregularities, see post § 56.

Amendments of process, see post § 57.

Appealability of ruling on sufficiency of process and service, see Appeal § 40.

Sufficiency of attachment writ to protect United States marshal, see Attachment ¶ 254.

Description of action in capias, see Civil Arrest § 12.

Sufficiency of the process to support default, see Defaults § 1.

Conformity of declaration in justices' court to process, see Justices of the Peace § 89.

Form and style of governor's citation to state officer, see Officers ¶ 205a.

Effect and materiality of nonconformity of declaration to process, see Pleading ¶ 825.

¶ 9. The time fixed for service of summons should be stated in the summons itself, or form a part of the underwriting, where the latter is necessary to inform the party of the object of the hearing; and the underwriting, as well as the summons, should be signed by the master.—Whipple v. Stewart, Mich. 357.

¶ 10. Where a writ was tested and issued on the 7th day of February, 1867, but made returnable on Tuesday, the 2d day of April, without expressing the year, held, that it must be understood as referring to April of the then current year.—Nash v. Mallory, 17 Mich. 232; Vinton v. Mead, 17 Mich. 388.

¶ 11. The stamp act cannot be applied to the process of state courts. Congress has no power to levy taxes on such process.—Fifield v. Close, 15 Mich. 505.

§ 5. ——Names and descriptions.

In chancery subpœnas, see post § 6.

Amendments as to names and descriptions, see post § 57.

Effect of misnomer in writ on adjudicative force of judgment, see Former Adjudication § 7.

¶ 12. The common law requires the process to state with certainty who are the parties, and does not sanction the use of a copartnership name, or generally allow anything else than the Christian names and surnames of the suitors, and this is still the law of the circuit courts.—Barber v. Smith, 41 Mich. 138; Smith v. Canfield, 8 Mich. 493.

¶ 13. In a summons it is sufficient to state the names of the parties to the suit, without stating their character and the capacity in which they sue.—Williams v. International Grain & Stock Board, 99 Mich. 80.

¶ 14. The failure to describe the defendant as a foreign corporation in the præcipe and in a summons issued under How. St. § 8087, which authorizes the commencement of suit against a foreign corporation where garnishment proceedings have been instituted in aid of the principal suit, will not deprive the court of jurisdiction.—Williams v. International Grain & Stock Board, 99 Mich. 80.

§ 6. ——Chancery subpœna.

Amendments of chancery subpœna, see post § 57.

Rule of court as to form of chancery summons, see 1916 C. C. Rule 19.

¶ 15. Chancery Rule 122 requires the underwriting to the chancery subpœna to designate the defendants against whom a personal decree is sought. It is suggested that it may be a material defect to omit the signature to the underwriting from the copy of the subpœna served.—Vaughan v. Black, 63 Mich. 215.

¶ 16. A chancery subpœna, the caption of which is "State of Michigan. The Circuit Court for the County of Newaygo in Chancery," is fatally defective, not being styled "In the name of the People of the State of

Michigan," as required by Const. art. VI, § 35, and by How. St. § 7290.—Forbes v. Darling, 94 Mich. 621.

¶ 17. The omission to include in the chancery subpœna in mortgage foreclosure proceedings, which is served on the mortgagor, the name of another defendant who was made so under the subsequent incumbrances clause, when the underwriting states that a personal decree is sought against the mortgagor, and the bill is filed to reach interests in property and not to obtain any further relief against the other defendant, as required by Chancery Rule No. 4, is a mere irregularity which does not invalidate the foreclosure proceedings.—Kerr v. Weeks, 191 Mich. 652.

¶ 18. The underwriting in the subpœna stated that a personal decree for divorce was sought against defendant, and that the bill was filed to reach interests in property. Held, that the underwriting was sufficient to indicate that property interests were involved, and that this might include an allowance of alimony out of defendant's property. —Seibly v. Ingham Circuit Judge, 105 Mich. 584.

§ 7. ——Style, teste, signature and indorsements.

Style of chancery subpœna, see ante § 6.
Signing return of process, see post § 47.
Amendments to rectify style and teste, see post § 57.
Signing at place other than county seat by deputy clerk, see Courts § 6.
Style of judicial process, see Const. art. VII, § 22.
Provisions as to style, teste and indorsement of process, see Jud. Act, chap. XIII, § 2; Comp. L. 1915, § 12405.

¶ 19. Const. art. VI, § 35, providing that "the style of all process shall be 'In the name of the People of the state of Michigan,' " applies only to process issued by courts or judicial officers.—Tweed v. Metcalf, 4 Mich. 579; Wisner v. Davenport, 5 Mich. 501.

¶ 20. Process not styled "in the name of the People of the State of Michigan" is void. —Forbes v. Darling, 94 Mich. 621.

¶ 21. Const. art. VI, § 35, requiring all process to be styled "In the name of the People of the state of Michigan," applies to the judicial department only, and not to the governor's citation to state officers to appear before him to answer charges.—Attorney-General v. Jochim, 99 Mich. 358.

¶ 22. A citation in preliminary proceedings to condemn land for the construction of a drain is not such process as Const. art. VI, § 35, requires to be "in the name of the People of the state of Michigan."—Wolpert v. Newcomb, 106 Mich. 357.

¶ 23. Const. art. VI, § 35, providing that all process shall run "In the Name of the People of the State of Michigan," does not apply to the notice of the rule to plead served with a copy of a declaration as commencement of suit, but only to process issued by the courts. —Penfold v. Slyfield, 110 Mich. 343.

¶ 24. Where the governor has designated the judge of one circuit to fill a vacancy in another, and has notified the clerk thereof, process should be tested in the name of the judge designated, and no acceptance by him is necessary.—Howerter v. Kelly, 23 Mich. 337.

¶ 25. Under R. S. 1838 a deputy county clerk was not required to sign a writ in the clerk's name. A summons signed "W. M., deputy clerk, and in the absence of the clerk," held sufficient.—Calender v. Olcott, 1 Mich. 344.

¶ 26. Original writs in the circuit court may be indorsed nunc pro tunc, either as security for the costs or by the attorney when either indorsement has been omitted before service.—Parks v. Goodwin, 1 D. 56.

§ 8. Number of writs; alias process.

Rule of court regulating alias and pluries writs, see Courts ¶ 32.
Necessity of new process to reinstate dismissed parties to bill, see Equity ¶ 794.
Delay in taking out alias writ as break in action letting in bar of limitations, see Limitations § 76.
Successive writs to keep cause from becoming barred, see Limitations § 76, ¶ 283.
Rule of court as to further or alias process, see 1916 C. C. Rule 19.

¶ 27. A circuit court summons, issued on the day after the return day of a former summons issued in the same case, which has not been returned, is not an alias.—Peck v. German Fire Ins. Co., 102 Mich. 52.

¶ 28. One day prior to the expiration of the year limited for bringing suit upon a fire insurance policy, a summons was issued from the circuit court, and sent by the clerk to the attorneys for plaintiff, who, through an oversight, failed to transmit it to the sheriff of the proper county for service. Held, that the right of action was not saved by the issue one day after the return day of said writ, of a second summons, tested as of the day of issue of the first summons, and its service upon the insurance company.—Peck v. German Fire Ins. Co., 102 Mich. 52.

¶ 29. The fact that the first summons was not made returnable on the first Tuesday of any month, or on any day in term, is unimportant; and the clerk had no authority, on his own motion, to make so radical an amendment as was attempted by the issue of the second summons.—Peck v. German Fire Ins. Co., 102 Mich. 52.

¶ 30. The failure to take out an alias summons for more than two months after the return day of the original summons, which was not served, interrupts the continuity of the action.—Colling v. McGregor, 144 Mich. 651.

¶ 31. A second summons purporting to be an alias writ, but otherwise good as an original writ, is not obnoxious to 1897 C. C. Rule 1, subds. (a) and (b), relating to the issuance of original and alias writs, because not issued and served according to the practice laid down by such rule for alias writs.—Frantz v. Detroit United Ry., 147 Mich. 199.

¶ 32. A summons purporting to be an alias summons but which in fact had no proper basis as such is not for that reason void, and if the first suit had failed the summons may be treated as a new writ for a new suit where the statute of limitations had not run against the action.—Frantz v. Detroit United Ry., 147 Mich. 199.

¶ 33. An alias summons may be treated as a new writ for a new suit if the first suit has gone down; it is not void merely because the return to the original summons did not furnish a proper basis for it.—Axtell v. Gibbs, 52 Mich. 639.

¶ 34. Under How. St. § 7316, providing that where, in an action against two or more joint defendants, one or more of them shall not reside or be found in the county where suit is brought, * * * and where property in "his or their possession" shall be attached in said county plaintiff may sue out writs "directed to the sheriff of the county where such defendants not so served may be found," such writs cannot be sued out unless it appears from the return to the attachment that the property taken was in the possession of either of the defendants.—Baxter v. Kent Circuit Judge, 92 Mich. 291.

¶ 35. A clerk of court is not obliged, and may refuse, to give an attorney, on his applying therefor, a writ signed and sealed in blank; but if he chooses to give him such a writ, it will not be held void.—Sweet v. Newaygo Circuit Judge, 95 Mich. 449.

¶ 36. In a suit in Mecosta county against several defendants, the summons against them was issued on the 11th day of August, returnable September 1st. Service was had on a part of the defendants in Mecosta county, and on August 18th the sheriff returned a writ with a certificate to that effect, and a further notation that the other defendants were not found. On August 26th, a like summons was issued by the clerk of Mecosta, directed to the sheriff of Isabella county, directing service on a defendant, one Macklin, which summons was returned with certificate of service. No question of substituted service was involved. Held, the return of the first writ was not premature so as to make void the service upon defendant Macklin.—Hakes v. Macklin, 170 Mich. 228.

§ 9. Filling out and alteration.

¶ 37. The mere filling out of a summons by an attorney after it is signed and sealed by the clerk does not vitiate the writ, no abuse being shown.—Potter v. John Hutchison Mfg. Co., 87 Mich. 59.

§ 10. Control of process and preventing abuse thereof.

Control of federal process, see also ante § 2.

¶ 38. As to the authority of a court to control its own process and to prevent an abuse of the same, upon motion, see Blair v. Compton, 33 Mich. 414.

¶ 39. The process of courts of justice is not to be used for inquisitorial purposes or for oppression. Use, in a second attachment suit, of evidence obtained from books of account which were seized upon a prior writ issued upon an affidavit known to be insufficient was prevented.—Rosenthal v. Muskegon Circuit Judge, 98 Mich. 208.

¶ 40. Where the process of the court has caused an abuse, and no innocent party has obtained rights under it, the court, in setting it aside, may restore what has been wrongly seized.—Campau v. Coats, 17 Mich. 235.

II. EXECUTION AND RETURN.

A. MANNER OF EXECUTION AND SERVICE.

§ 11. In general.

Service on corporations, associations and municipalities, see post II, B.
Constructive or substituted service, see post II, C.
Return or proof of service, see post II, D.
Privilege and exemption from service, see post § 23.
Waiver or admission of service, see post § 26.
Service and return of justices' process, see Justices of the Peace § 36 et seq.
Service on appeal or error, see Appeal § 72.
Manner of service peculiarly requisite to attachment and garnishment, see Attachment, V, VII; Garnishment, IV.
Personal service to complete attachment, see Attachment § 80.
Service of trial notice, see Calendar §§ 3-5.
Process served in foreign state, see also Conflict of Laws § 9.
Stage and completeness of service to admit of notice to covenantor to defend, see Covenants for Title § 21.
Writs of habeas corpus, how served, see Habeas Corpus § 8.
Service of mandamus writ or order, see Mandamus § 141.
Service of mechanics' lien claim, see Mechanics' Liens § 28.
Mode of serving notices other than process, see Notices § 3 et seq.
Character of service requisite to jurisdiction in personam and in rem, see Courts §§ 41, 42, 60.

Inefficacy of fraudulent or illegal service to confer jurisdiction, see also Courts § 61.
Immateriality of nonresidence or absence after service to affect jurisdiction, see Courts ¶ 222.
Sufficiency of service to support default, see Defaults § 1.
Service of notice for hearing on preliminary application in drain proceedings, see Drains §§ 17-18.
Service of citation in condemnation proceedings for drains, see Drains §§ 28-31.
Accomplishment of personal service within state on nonresident as depriving plaintiff of extended time to come within period of limitations, see Limitations ¶ 165.
Necessity of service to make "commencement" of action within statutes of limitations, see Limitations § 75.
Service of process under Water Craft Act, see Shipping § 32.
Provisions as to manner of serving summons, see Jud. Act, chap. XIII, § 21; Comp. L. 1915, § 12424.
Rule of court as to service of chancery summons, see 1916 C. C. Rule 19.

¶ 41. As a general rule where a statute prescribes a method of serving process, such method must be followed.—Lyon v. Baldwin, 194 Mich. 118.

¶ 42. A suit to remove a cloud upon title which consists of a tax title arising from the nonpayment of taxes is a proceedings in rem, which does not require personal service.—G. F. Sanborn Co. v. Johnson, 148 Mich. 405.

¶ 43. Under Pub. Acts 1895, No. 202, providing that no decree of divorce shall be granted unless the defendant be domiciled within the state, or shall have been domiciled therein at the time the cause for divorce "arose," or shall have been personally served with process within this state, or with copy of the order of publication, or shall have voluntarily appeared, it is necessary, in order to confer jurisdiction upon the court to render a decree for divorce on the ground of desertion against a defendant who became a nonresident before the two years of abandonment were completed, that personal service should be obtained, since a cause of divorce for desertion does not arise until the desertion has been completed by abandonment for the statutory period of two years (How. St. § 6228). But where failure to support, while defendant was a resident, is alleged as a ground for divorce it is not essential to the jurisdiction that defendant should be so served.—Bentley v. Wayne Circuit Judge, 110 Mich. 626.

¶ 44. Where proceedings are to be had under an order of reference it is not necessary to serve a copy of such order with the master's summons, but defendant is bound to take notice of it without service.—Whipple v. Stewart, W. 357.

¶ 45. In declaring by copy on a note the copy served need not contain a receipt that has been written upon the note for a part of the amount, nor a memorandum of protest for nonpayment.—Buhl v. Trowbridge, 42 Mich. 44.

§ 12. Time to make service.
Statements in summons as to time for service, see ante § 4.
Diligence in seeking to obtain service as prerequisite to service by publication, see post §§ 38, 40.
Time of delivery of summons as jury question on plea of limitations, see Limitations ¶ 441.
Duty of officer to use diligence in making service, see Jud. Act, chap. XIII, § 38; Comp. L. 1915, § 12441.
Provisions as to service on Sunday or holidays, see Jud. Act, chap. XIII, §§ 25-26; Comp. L. 1915, §§ 12428-12429.

¶ 46. Jurisdiction of a personal action begun by summons against an absent defendant cannot rest upon a service made only by copy at defendant's last place of residence several days before the return day or an adjourned day.—Iron Cliffs Co. v. Lahais, 52 Mich. 394.

§ 13. ——Actions begun by declaration.
Service of copy of declaration and notice, see post § 19.
Interpretation of return as to time of service, see post § 48.
Time for filing declaration after service, see Pleading § 27.
Time for pleas to declaration, see Pleading § 56.

¶ 47. Service of declaration being a substitute for process, service before filing is void, and the proceedings cannot be amended so as to save the jurisdiction.—Ellis v. Fletcher, 40 Mich. 321; South Bend Chilled Plow Co. v. Manahan, 62 Mich. 143.

¶ 48. A judgment by default will be set aside where the declaration was served before it was filed or rule to plead entered; since the record shows service before suit was commenced.—Marshall v. Calkins, 114 Mich. 697.

§ 14. Place of service.
See also post ¶¶ 204, 212.
Extraterritorial service, see post § 59.
Place of service of process upon corporations, see post § 28.
Territorial limits for execution of criminal process, see Arrest § 24.
Class legislation as to place for service, see Constitutional Law § 222.
Territorial limitations of court's jurisdiction, see Courts § 43.
Power of superior courts to cause person out of city to be served, see Municipal Courts § 13.
Place for execution of writ of replevin to enforce rights existing under village ordinance, see Replevin, II.

Provisions as to place of service, see Jud. Act, chap. XIII, §§ 27-28; Comp. L. 1915, §§ 12430-12431.

¶ 49. The general rule is that service of process can only be made in the county of its issue.—Baxter v. Kent Circuit Judge, 92 Mich. 291.

¶ 50. Service of process from the circuit court can only be made in the county in which the court is held, except in cases where the statute otherwise prescribes.—Turrill v. Walker, 4 Mich. 177.

§ 15. Serving joint defendants outside the county.

Service on nonresident joint defendant from superior court where other has been served as a resident, see Municipal Courts § 13.

¶ 51. Under Comp. L. 1869, Act No. 54, all persons authorized by law to be joined as defendants—e. g., the maker and indorsers of a note—were "joint defendants" within the meaning of that section, and service having been made against one in the county where suit was begun, the others could be served in another county.—People ex rel. Hosie v. Wayne Circuit Judge, 22 Mich. 493.

¶ 52. The maker of a note and a third person, not the payee, who indorses it before delivery, are joint defendants within the meaning of How. St. § 7316, providing for service in another county upon one of such defendants after service upon the other in the county where suit was brought.—Allison v. Washtenaw Circuit Judge, 104 Mich. 141.

¶ 53. Service cannot be made upon a joint defendant out of the county, under statute (see How. St. § 7316), until service has been made and proved on one or more of the defendants within the county.—Denison v. Smith, 33 Mich. 155; Clark v. Lichtenberg, 33 Mich. 307.

¶ 54. Service on a joint defendant beyond the jurisdiction was held valid where the return showed that service on the other defendants was made earlier and that the service beyond the jurisdiction was made on the date of the return.—Munn v. Haynes, 46 Mich. 140.

¶ 55. Where service on defendants within the jurisdiction must be proved before service is made on a joint defendant outside of it, but is not shown by the return, an amended return not filed until after all have been served, but showing that service was made on resident defendants first, is not important, and is no better than the original return.—Munn v. Haynes, 46 Mich. 140.

¶ 56. In an action on a promissory note, where the makers and indorsers resided in different counties and were joined as defendants in a suit, no jurisdiction was obtained over the makers where the declaration had been served on the indorsers in the county where the suit was brought and subsequently served upon the makers in the county where they resided, and a default judgment rendered against the makers is unwarranted and will be set aside.—First National Bank of Ludington v. Dwight et al., 85 Mich. 509.

¶ 57. Under How. St. § 7316, proof of service upon one or more of the joint defendants must be filed in the clerk's office of the county where suit is brought before service can be had upon another defendant in another county, and the absence of such proof is not shown by a return afterwards made showing actual prior service in the home county.—Allison v. Washtenaw Circuit Judge, 104 Mich. 141.

¶ 58. Where a tort action is brought against nonresident and resident defendants jointly, under Pub. Acts 1901, No. 225, if the joint liability is challenged by plea in abatement, the plaintiff must show joint liability in order to give jurisdiction to the court over the nonresident defendants.—Rosenthal v. Rosenthal, 151 Mich. 493.

§ 16. Service beyond the state.

Place of service, see ante § 14.
Admission of service, see post § 26.

¶ 59. Extraterritorial service of process is of no validity.—People v. Tyler, 7 Mich. 161; Tyler v. People, 8 Mich. 320.

¶ 60. The service of a subpœna upon a defendant out of the state is irregular.—Pratt v. Bank of Windsor, H. 254.

¶ 61. Service in Michigan on a resident of Michigan of process from a justice of the peace of another state in an action on a promissory note made in the justice's state and county cannot give jurisdiction to render a personal judgment on such note.—Howard v. Coon, 93 Mich. 442.

§ 17. Person or officer to make service.

Nonliability of private person serving process without authority, see Malicious Prosecution ¶ 13.
Provisions as to persons who may serve process, see Jud. Act, chap. XIII, §§ 22-25; Comp. L. 1915, §§ 12425-12428.

¶ 62. Service of declaration beginning suit may be made by the sheriff.—Norvell v. McHenry, 1 Mich. 227.

¶ 63. Service of summons in garnishment should be made by an officer authorized to serve process or by some person deputed to make the particular service.—Johnson v. Delbridge, 35 Mich. 436.

¶ 64. A coroner's power to serve process under How. St. § 606 is not limited to courts of record, but it is confined to cases

where the sheriff is himself a party or is directly interested in the suit, and does not exist where defendant is a deputy sheriff; since by How. St. § 596 the sheriff and his deputies are authorized to serve any process issued by a justice of the peace.—Hubel v. Rorison, 81 Mich. 41.

§ 18. ——Party or other private person.

¶ 65. A party to a suit cannot serve the summons therein himself (How. St. § 6827). —Bush v. Meacham, 53 Mich. 574.

§ 19. ——Service of copy of declaration and notice.

Upon railroad corporations, see post § 31.
Return of service of copy of declaration and notice, see post § 45.

¶ 66. Under How. St. § 7291, relating to the commencement of suits by declaration, service of the copy of declaration and notice of rule to plead may be made by the plaintiff in person, even though he be an officer authorized to serve process in general.—Penfold v. Slyfield, 110 Mich. 343.

¶ 67. Service of a declaration beyond the jurisdiction may be made by private persons. —Munn v. Haynes, 46 Mich. 140.

§ 20. Persons to be served or subject to service; agents and substitutes.

Stating names of parties in process, see ante § 5.
Service upon joint defendants, see also ante § 15.
Privilege or exemption from service, see post § 23.
Proper officer or agent of domestic corporation to be served, see post § 29.
Officer or agent of foreign corporation to be served, see post § 32 et seq.
Service of process on insane person, see Insane Persons, V.
Provisions as to person to be served, see Jud. Act, chap. XIII, §§ 29-41; Comp. L. 1915, §§ 12432-12444.
Provisions as to service upon prisoner, see Jud. Act, chap. XIII, § 41; Comp. L. 1915, § 12444.
Registration in health department of name of agent for owner of dwelling for service of process, see Pub. Acts 1917, No. 167, § 107.

¶ 68. Where defendant was confined in state prison, service of a chancery subpœna upon the keeper of the prison was held sufficient.—Johnson v. Johnson, W. 309.

¶ 69. Summons may be served personally upon an insane person under guardianship.— Ingersoll v. Harrison, 48 Mich. 234.

¶ 70. In a suit against a very young infant defendant who has no general guardian, subpœna may be served upon his mother who is also the trustee of his estate.—Peck v. Kent Circuit Judge, 96 Mich. 639.

¶ 71. Defendant in an attachment suit involving forest products of which defendant was the owner, was absent from the city on July 1, 1910, when the officer came to serve summons, and said officer on said day made service upon defendant's bookkeeper who was in charge of his lumber business. Defendant returned to the city and was at home all the time between July 3 and July 20, 1910. Held, under Comp. L. 1897, § 10761, the service made was void since under said statute service can be made on an agent only when defendant cannot be found.—Craig v. Brown, 169 Mich. 161.

§ 21. ——Joint and several codefendants.

Serving joint defendants outside county, see ante § 15.
Service on joint defendants in attachment, see Attachment § 81.
Judgments against joint debtors part only of whom served with process, see Judgments § 20.

¶ 72. Personal service upon one partner gives the circuit court jurisdiction though no property is attached, and a judgment based upon such service supports levy of execution upon the partnership property.—Smith v. Runnells, 94 Mich. 617.

¶ 73. Where one of several copartners has been served with process the firm property is liable.—Rickman v. Rickman, 180 Mich. 224.

¶ 74. Under Comp. L. 1897, § 10010, as amended by Pub. Acts 1901, No. 225, authorizing service of process on nonresidents of the county in an action of trespass on the case, brought against two or more defendants, the court acquires no jurisdiction over a nonresident defendant who is not jointly liable with the resident defendant.—Brown v. Bennett, 157 Mich. 654.

¶ 75. Under the Jud. Act, chap. XIII, § 27, Comp. L. 1915, § 12430, providing that when a personal transitory action is commenced in the county where plaintiff resides against a defendant or defendants residing without the county service of process must be had in the county where the suit is commenced, but if such service is had upon one defendant within such county the remainder of the defendants may be served anywhere within the state, and C. C. Rule 18, § 1; providing that if there is more than one defendant, the proof of service shall, at request of plaintiff, be made immediately after service on each defendant, and in such case proof of service may be indorsed upon or attached to a copy of the writ, and the original retained until return day for service on other defendants, it is necessary to file proof of service upon one defendant served in the home county in the office of the clerk of court of such county before the original writ is sent into and served in another county on other defendants. —Engel v. Smith, 200 Mich. 895.

§ 22. ——Service of declaration on different defendants.

¶ 76. In suits by declaration against joint defendants the rule to plead must be entered against all; and the filing of declaration, entry of rule to plead and service on any defendant puts the case on the footing of an issue of any other joint process served on a defendant.—Ralston v. Chapin, 49 Mich. 274.

¶ 77. Under § 10375, Comp. L. 1897, § 13089, How. St., 2nd Ed., testimony may be received against one joint debtor without proof of inability to make service on the other defendants of the declaration by which the action was begun.—Sheldon Axle Co. v. Landman, 186 Mich. 61.

§ 23. Privilege and exemption from service or arrest.

Privilege of attorney from service, see Attorneys § 16.

Amenability of attorney to service of citation or notice in same proceeding by reason of which he is in attendance, see Attorneys ¶ 47a.

Privilege from civil arrest, see Civil Arrest § 2.

Immunity of women from imprisonment for debt, see Civil Arrest § 2.

Liability of person arrested on capias to second arrest, see Civil Arrest § 3.

Privilege of party in attendance on court from service of process or arrest, see Parties § 18.

¶ 78. Privilege from arrest while going to or from court exists in the case of all proceedings of a judicial nature whether in court or not, and protects a person going to or from a place of confinement under a former arrest.—People ex rel. Watson v. Superior Court Judge, 40 Mich. 729.

¶ 79. A person arrested on the civil process of a federal court was taken to the place of holding court, and being thus brought within the jurisdiction of a local court was arrested on civil process issuing therefrom, after he had been released from the first arrest, but before he could leave the place. Held, that he was entitled to be discharged.—People ex rel. Watson v. Superior Court Judge, 40 Mich. 729.

¶ 80. Neither the common law privilege nor the statutory privilege (Comp. L. 1897, § 10157) of witnesses and suitors from arrest applies to the case of a seller of a boat, who comes within the county to conclude a sale of a boat and thereby to clear up a pending federal suit against the boat for supplies and so to discharge a lien on her.—Monroe v. St. Clair Circuit Judge, 125 Mich. 283.

¶ 81. When a defendant is arrested on criminal warrant in one county and taken into another where he gives bail, he cannot there be arrested on a civil warrant for the same matter at the suit of the prosecutor.—Baldwin v. Branch Circuit Judge, 48 Mich. 525.

¶ 82. Service of summons in a civil case upon the defendant in a criminal case, who after arrest and release on bail is in the act of consulting counsel on his way home to another county, should be set aside as breach of privilege and abuse of process.—Jacobson v. Wayne Circuit Judge, 76 Mich. 234.

¶ 83. By common law an attorney at law is privileged from the service of process while attending upon the supreme court, and while going to the court and returning therefrom to the county of his residence.—Hoffman v. Bay Circuit Judge, 113 Mich. 109.

¶ 84. The privilege of exemption of attorneys from arrest in certain cases, given by How. St. § 7253, is not exclusive of the common-law privilege from service of process while attending court, or while going thereto or returning therefrom.—Hoffman v. Bay Circuit Judge, 113 Mich. 109.

¶ 85. Service of a justice's summons upon a nonresident of the county while he is in such county attending upon a trial of an action as a party and witness should be set aside.—Letherby v. Shaver, 73 Mich. 500.

¶ 86. The prompt service of process on a factory employee may not be interfered with by a rule of the factory owner that no person shall be allowed to visit an employee during working hours except on business relating to the factory.—In re Ryan, How. N. P. 127.

§ 24. Exhibition, reading and delivery of copy.

Setting aside service where copy served differs from original, see post § 51.

Service of copy of bill or declaration with process, see Jud. Act chap. XIII, § 6; Comp. L. 1915, § 12409.

¶ 87. Service of a copy of a master's summons without showing the original is void.—Howard v. Palmer, W. 391.

¶ 88. Service of process by merely laying it on the body of a man too sick to understand it is invalid.—People ex rel. Midler v. Superior Court Judge, 38 Mich. 310.

¶ 89. Under Comp. L. 1897, § 9985, providing for commencement of a suit by filing a declaration, entering a rule to plead, and serving a copy of the declaration and a copy of the rule, the copy of the declaration served need not show an indorsement of filing by the clerk.—Michigan Buggy Co. v. Smallegan, 138 Mich. 79.

§ 25. Forcible entry to make service.

¶ 90. Where distinct portions of the same building are used for a store and dwelling, the rule that an officer, in serving process, must not force the outer door of respondent's

dwelling applies only to the outer door of that part of the building which is occupied by the family for domestic purposes; and if the building has a common entrance, it applies to the inside door which separates the dwelling from the rest of the interior.—Stearns v. Vincent, 50 Mich. 209.

¶ 91. For the purpose of forcibly entering to serve civic process a store on the first floor is not a dwelling though the second floor is used for that purpose; and the rule does not apply that a "dwelling-house," when considered in relation to burglary, includes whatever is within the curtilage, if used with it for domestic purposes; and that it covers all those buildings the forcible breaking of which for felonious purposes during the hours which peaceable and law-abiding persons give up to rest would naturally cause alarm, distress and danger.—Stearns v. Vincent, 50 Mich. 209.

¶ 92. A householder waives his right to close the outer door against an officer serving process, by allowing him to enter; and if the officer once gains entrance through the outer door without force or fraud the privilege is gone, and he can force any other door open if necessary to make complete service of his process.—Stearns v. Vincent, 50 Mich. 209.

¶ 93. An action for trespass will not lie against a constable for unlocking the door of a shop and of a residence to serve a writ of replevin on shop fixtures and household goods after demanding admittance, since Comp. L. 1897, § 10655, provides that an officer may, after demand, break open any house or other building for the purpose of serving a writ of replevin and § 752 makes this provision applicable to proceedings in justice's court.—Rentschler v. Fox, 130 Mich. 498.

§ 26. Admission and waiver of service.

Waiver and cure of irregularities in process, service or return, see post § 56.

Appearance waiving service under wrong statute, see Appearance § 11, ¶ 53.

Waiver of exemption or privilege by failure to object seasonably, see also Courts ¶ 297.

Sufficiency of acknowledgment of service to support default, see Defaults § 2.

¶ 94. An admission of "due personal service" of subpœna by a defendant in another state is sufficient to confer jurisdiction upon a court of this state; but it seems that the bare admission of the fact of service beyond the court's territorial jurisdiction should not be deemed sufficient.—Jones v. Merrill, 113 Mich. 433.

¶ 95. A party may waive service of process by any act clearly evidencing an intention to do so.—Jones v. Merrill, 113 Mich. 433.

¶ 96. A stipulation indorsed by the defendant upon a summons in connection with an acceptance of service, that the plaintiff may proceed with the case the same as though service had been made as commanded in the summons, is sufficient to confer jurisdiction upon the court, although it was made beyond the territorial jurisdiction.—Allured v. Voller, 107 Mich. 476.

B. ON CORPORATIONS, ASSOCIATIONS, AND MUNICIPALITIES.

§ 27. On domestic corporations or associations in general.

On townships, see post § 37.

On school districts, see post ¶ 159.

On railroad corporations, see post § 31.

On foreign corporations, see post § 32.

Constructive or substituted service upon corporations, see post § 39.

Return and proof of service on corporations, see post § 46.

Provisions as to service on corporations and associations, see Jud. Act, chap. XIII, § 29 et seq., Comp. L. 1915, § 12432 et seq.

Mode of serving partnership associations, see Comp. L. 1915, § 7959.

¶ 97. Pub. Acts 1903, No. 232, § 30, providing that "service * * * of process against any corporation formed or existing under this act may be made on the president, secretary or treasurer, or upon the agent in charge of any business office of such corporation within this state, or if neither of such officers or agent can be found, then" by posting, is identical with Pub. Acts 1885, No. 232, § 30; and, being a re-enactment of it made in revision, does not therefore impliedly repeal the consistent provisions of Pub. Acts 1887, No. 242, § 3, which prescribed a cumulative method of service applicable to all corporations but railroad companies.—Goodrich v. Hackley-Phelps-Bonnell Co., 141 Mich. 343.

¶ 98. Where statutes providing for the organization of domestic corporations also provide for the manner in which process of the courts shall be served upon them, such manner of service must be followed.—Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569.

¶ 99. A corporation must be served with process through its agent.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 100. A corporation has but an artificial personality by reason of its corporate existence, visible only in its officers and agents, and personal service of process can only be made by serving some natural person who represents it in some agency capacity.—Cox v. Railway Conductors' Co-operative Protective Ass'n, 194 Mich. 213.

¶ 101. How. St. § 6862, which provides that the first process against a corporation

shall be a summons, which may be served by leaving a copy with its president, cashier or secretary, or other principal officer, or at its banking house or office, applies solely to domestic corporations.—Reath v. Western Union Telegraph Co., 89 Mich. 22.

¶ 102. Comp. L. 1897, §§ 10444, 10445, providing a mode of suing and serving insurance companies and mutual benefit associations, is a procedural law applicable to insurance companies only, even if it is a law of procedure rather than an insurance law; and accordingly it is not applicable to a fraternal beneficiary association formed under Comp. L. 1897, chap. 212, which among other things provides that such association shall be exempt from the provisions "of the insurance laws of this state, excepting as provided by this act."—Monger v. New Era Ass'n, 145 Mich. 683.

§ 28. ——Office or place for service.

See also post ¶ 168.

Place of service in general, see ante § 14.

¶ 103. Under Comp. L. 1971, § 2857, amended, Pub. Acts 1875, p. 214 (How. St. § 4021) service of process on a manufacturing corporation cannot be made outside of the county where its business office is fixed. —Dewey v. Central Car & Mfg. Co., 42 Mich. 399.

¶ 104. Under Act 242 of 1887 (How. St. § 8137) process may be served upon the proper officers of a corporation in the county where plaintiff resides, although its business office is in another county.—Potter v. Hutchinson Mfg. Co., 79 Mich. 207.

¶ 105. The office fixed by majority vote of the stockholders as the business office of a corporation under Comp. L. 1897, § 7056, being section 20 of the act relating to manufacturing corporations, is the only office at which service of process may be had upon the agent in charge, under section 30 of the act (Comp. L. 1897, § 7066).—Toledo Ice Co. v. Munger, 124 Mich. 4.

¶ 106. Plaintiff lived in a county not reached by defendant electric railroad company. He was injured by defendant in the county of Oakland and service of process was had on the agent of defendant in said county at Pontiac, where an assistant division superintendent was stationed, tickets were sold, and freight was received and unloaded. The principal office of defendant was in another county. Held, under Comp. L., § 6454, and Act No. 208, Sess. L. 1901, said service of process was in the proper county so as to give the circuit court of said county jurisdiction.—Pollock v. Detroit United Ry. Co., 168 Mich. 581.

¶ 107. Where two railroads are charged with torts which contributed to the injury of a passenger the service of process on one railroad outside the county in which the trial is had after due service on the other railroad in the latter county is proper and confers jurisdiction upon the court.—Boyle v. Waters, 199 Mich. 478.

§ 29. ——Proper officer or agent to be served.

Persons to be served in general, see ante § 20.

Hearing of motion to quash service on corporation, see post § 53.

Proper officer to be served with notice of expiration of time to redeem from sale of corporation's land for taxes, see Taxes, XI, B.

Opening default against corporation for want of showing of service on proper officer, see Defaults § 28.

¶ 108. Summons requiring garnished corporation to show cause, etc., in justice's court must be served upon a "principal officer" (Laws 1885, No. 175).—First Nat. Bank v. Burch, 76 Mich. 608.

¶ 109. Summons against a corporation was served on one of its members as its president, and he and also another person who was the secretary, treasurer and manager of the corporation, told the officer that a third person was president, upon whom, accordingly, service was made. Held, that the corporation could not, in order to negative service, show that such latter person was not its president.—Wilson v. California Wine Co., 95 Mich. 117.

¶ 110. A traveling salesman of a domestic mercantile corporation is an agent upon whom service of a summons may be had within the meaning of Comp. L. 1897, § 10468. —Moinet v. Burnham, Stoepel & Co., 143 Mich. 489.

¶ 111. Pub. Acts 1885, No. 232 and the acts amendatory thereof as found in Pub. Acts 1903, No. 232, § 30 providing for service of process upon "the agent in charge of any business office of such corporation" is not the only authority for the service of process on a domestic mercantile corporation, but service may also be had in conformity with Comp. L. 1897, § 10468 providing for service "upon the agent of such corporations" viz., agents who are not, as well as those who are, in charge of the business office of the corporation.—Moinet v. Burnham, Stoepel & Co., 143 Mich. 489.

¶ 112. Service of process on an officer of a corporation even though he is one who may be served under the statute is unauthorized where his relation to the plaintiff or to the claim in the suit is such as to make it to his interest to suppress the fact of service.—Atwood v. Sault Ste. Marie Light, Heat & Power Co., 148 Mich. 224.

¶ 113. Service of process on an officer of the corporation who had himself assigned the claim upon which suit is brought is unauthorized.—Atwood v. Sault Ste. Marie Light, Heat & Power Co., 148 Mich. 224.

§ 30. ——Garnishment process.

¶ 114. The "general or special agent" of a corporation upon whom a summons in garnishment may be served (Comp. L. 1871, § 6463, How. St. § 8055) is an agent having a general or special controlling authority, either generally or in respect to some particular department of corporate business.—Lake Shore & M. S. Ry. Co. v. Hunt, 39 Mich. 469.

¶ 115. A bookkeeper is not an officer or agent within the meaning of the statute (How. St. § 8055, Comp. L. 1871, § 6463 as amended, Laws 1885, Act No. 175) authorizing garnishee proceedings against corporations, and has no power to appear for or bind such corporations in such proceedings.—Pettit v. Muskegon Booming Co., 74 Mich. 214.

¶ 116. In garnishee cases, where service is upon an agent, he must be capable in law of receiving such service as the law authorizes and recognizes; and it must be made in conformity with the statute. Such agent cannot, by waiver or acceptance of service not valid in the law, bind the rights and interests of the principal defendant.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

§ 31. On railroad corporations.

Return and proof of service on corporations, see post § 46.

Provisions as to service on railroads, see Jud. Act, chap. XIII, § 30; Comp. L. 1915, § 12433.

¶ 117. Service on the attorney of a railroad company in proceedings to open a street across its premises is not authorized.—Detroit, M. & T. R. Co. v. City of Detroit, 49 Mich. 47.

¶ 118. Laws 1885, Act No. 207, amending How. St. § 8147, provides that process, etc., against any railroad company may be served "upon any station agent or ticket agent at any station," etc. Held, that service upon a "commercial agent" is bad.—City of Detroit v. Wabash, St. L. & P. R. Co., 63 Mich. 712.

¶ 119. How. St. § 8137, which provides that a summons or a copy of the declaration in any suit against a corporation shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, and How. St. § 8147, which provides for the service of process in suits against railroad companies upon any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such company, both apply to the service of process upon railroad companies, it being intended by the former section to extend, rather than restrict, such service.—Turner v. St. Clair Tunnel Co., 102 Mich. 574.

¶ 120. A person who had the immediate management of all trains through a tunnel under the St. Clair river to a point several miles on the American side and who had charge of all the tunnel company's property and was the highest person in authority there, being paid by it and two railroad companies which used the tunnel, and issuing orders in his own name while reporting to a general superintendent in Montreal is the "agent" of the tunnel company within How. St. § 8137, providing for service of process.—Turner v. St. Clair Tunnel Co., 102 Mich. 574.

¶ 121. In an action against a railroad company which has sold all its property to another company, service upon a ticket agent of the purchasing company does not confer jurisdiction though prior to the sale, he was the agent of the selling company at the same place.—Thomson v. McMorran Milling Co., 132 Mich. 591.

¶ 122. Comp. L. 1897, §§ 6255, 6279, 6339, 6340, providing for the consolidation of railroad companies, does not make a purchasing company the agent of a company whose property it buys, so that service upon its agent will be good as service upon the selling company though it is provided that "nothing herein contained shall prejudice the rights of pre-existing creditors of the corporation from which such property and rights are purchased or leased" and "all rights of creditors * * * shall be and are hereby preserved unimpaired and the respective corporations shall continue to exist so far as may be necessary to enforce the same."—Thomson v. McMorran Milling Co., 132 Mich. 591.

¶ 123. The act of 1849 (Comp. L. 1857, § 4849), authorizing the service of process against railroad companies upon conductors, etc., is not repealed, as respects justices' courts, by section 49 of the justices' act of 1855 (Comp. L. 1857, § 3701, How. St. § 6862).—Fowler v. Detroit & M. Ry. Co., 7 Mich. 79.

¶ 124. Act No. 208, Pub. Acts, 1901, providing that when an interurban electric railway company is to be served with process the service may be made "upon any conductor upon any of the cars of such company, along the line of or at the end of the railroad of such company," provided that "the provision for service upon conductors of electric railways shall not apply to conductors on electric railways operating within the limits of incorporated cities," means that service may be made on any conductor

either along the line or at the end of the line within a city, and that the proviso applies only to lines operated wholly within the limits of a city.—Halladay v. Detroit United Ry., 155 Mich. 436.

¶ 125. A station agent is still an agent of the railway company, and service on him of a declaration and rule to plead in an action for injuries against such company is binding on the company, though prior to such service the company has been placed in the hands of receivers, where there was nothing removing such agent contained in the order appointing receivers nor in the notice of such appointment given by the receivers, and the notice provides that until further orders agents of the company "will perform the duties heretofore performed by them," and the receivership does not contemplate the dissolution of the company.—Ennest v. Pere Marquette Ry. Co., 176 Mich. 398.

§ 32. On foreign corporations.

On domestic corporations, see ante § 27.
On railroad corporations, see ante § 31.
Return and proof of service on corporations, see post § 46.
Hearing on motion to quash service on foreign corporation, see post § 53.
Subjection of foreign corporation to possibility of change in law respecting mode of service, see Foreign Corporations ¶ 16.
Implied assent of foreign corporation doing business in state to statutory mode of service, see Foreign Corporations ¶ 17.
Validity of retroactive law for service on foreign corporation as to existing causes of action, see Constitutional Law § 237.
Provision as to service upon foreign corporations, see Jud. Act, chap. XIII, § 31 et seq.; Comp. L. 1915, § 12434 et seq.

¶ 126. Service of summons against a foreign corporation, on the secretary, is irregular and unauthorized. Our statutes providing for service of process on various named corporation officers do not apply to foreign corporations. Except in cases where special provision has been made otherwise, the remedy as to foreign corporations must be sought as at common law.—People ex rel. Watson v. Wayne Circuit Judge, 24 Mich. 38.

¶ 127. Prior to the amendment in 1881 of Comp. L. 1871, § 1624 (How. St. § 3723), service upon a foreign express company could not be made upon its "agent," but had to be upon a person authorized by power of attorney to receive it.—American Express Co. v. Conant, 45 Mich. 642.

¶ 128. The officer or agent of a foreign corporation need not, in order to be validly served within this state under How. St., § 8145, be here upon official business for his corporation, or be specially authorized to receive service.—Shickle, H. & H. Iron Co. v. S. L. Wiley Const. Co., 61 Mich. 226.

¶ 129. How. St., § 8137, as amended by Laws 1887, Act No. 242, which provides for the commencement of suits against corporations by summons or declaration, and for service of such process on the presiding officer, cashier, secretary or treasurer, or any other officer or agent, of such corporation, or by leaving it at its banking house or office, is not designed to reach foreign corporations.—Reath v. Western Union Telegraph Co., 89 Mich. 22.

¶ 130. There is no statute providing for the service of process upon a foreign corporation where the cause of action did not accrue within the state. How. St., § 8147, which provides that in an action against any railroad company "in this state" process may be served upon a station agent or a ticket agent of the company, is supplemental to section 8137, and applies to domestic corporations only.—Grand Trunk R. Co. v. Wayne Circuit Judge, 106 Mich. 248.

¶ 131. The requirement that notice must be sent to the home office of a foreign corporation against which suit is brought in Michigan is not jurisdictional; and in a proceeding in personam is extraterritorial, if not nugatory.—Emerson, Talcott & Co., v. McCormick Harvesting Mach. Co., 51 Mich. 5.

¶ 132. How. St. § 8145, providing for the commencement of suits against foreign corporations where the cause of action accrues in this state, has no application to a suit for the enforcement of a lien for labor performed for a mining corporation in the Upper Peninsula, where no service is had upon any officer or agent of the corporation as provided by that section. In that case substituted service by publishing notice as provided in How. St. § 8904, is the proper procedure.—McLaren v. Byrnes, 80 Mich. 275.

¶ 133. Under § 10, Act 3, Special Session of 1907, valid service upon a foreign corporation may be made by the service of process on any officer or agent of such corporation.—Arnold v. Huber Mfg. Co., 166 Mich. 190.

¶ 134. It is presumed that an officer of a foreign corporation is such for purposes of service under statute.—Shickle, H. & H. Iron Co. v. S. L. Wiley Const. Co., 61 Mich. 226.

¶ 135. One in the employ of a nonresident corporation in the capacity of a traveling salesman, supplying goods to retail dealers in several states, is an agent of such corporation, within the meaning of Pub. Acts 1895, No. 61, authorizing service of process in commencement of suit against any corporation not organized under the laws of this state, in all cases where the cause of action accrues within the state, upon "any agent" of the corporation.—Ryerson v. Wayne Circuit Judge, 114 Mich. 352.

¶ 136. How. St. § 8145, providing for service of process upon the agent of a foreign corporation, applies only where the cause of action arises within the state.—Maxwell v. Atchison, Topeka & S. F. R. Co., 34 Fed. 286.

¶ 137. Service of process on the agents of a corporation in another state for matters within the sphere of their agency is, in effect, service on the corporation itself, as much as if such agents resided in the state where the corporation was created.—St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 100, 1 Sup. Ct. Rep. 354.

§ 33. ——On officer or agent temporarily within the state.

¶ 138. The service of process on an officer of a foreign corporation casually within the state but not on the business of the corporation, and not authorized by the corporation to receive such service, is not a good service.—Newell v. Great Western Ry. Co. of Canada, 19 Mich. 336.

¶ 139. Where an expert machinist employed by the local agent of a foreign corporation is sent out to investigate a certain engine to determine whether such company shall trade a new engine therefor, he is such an agent as may validly be served with process so as to gain jurisdiction of the corporation under § 10, Act 3, Special Session of 1907.—Arnold v. Huber Mfg. Co., 166 Mich. 190.

¶ 140. Jurisdiction of a foreign corporation not doing business within the state is not acquired under Act No. 3, Public Acts 1909, How. St., 2nd ed., § 13521, in an action based on a cause arising in the foreign state, by the service of process within this state on an officer of the corporation while temporarily therein.—Matthews v. Montreal Min. Co., 183 Mich. 541.

§ 34. ——Foreign corporations doing business within the state.

Duty of foreign corporation to designate agent for service, see Foreign Corporations § 8.

Necessity that foreign corporation shall be or have been doing business in state to warrant service on its agent, see also Foreign Corporations ¶ 81.

¶ 141. Comp. L. 1897, § 10442, which provides for service upon foreign corporations doing business in Michigan, relates only to foreign corporations doing an interstate business, and not to those doing merely a local business.—Showen v. J. L. Owens Co., 158 Mich. 321.

¶ 142. Plaintiff sued defendant railway for a personal injury suffered by him while riding on defendant's train in Canada. Held, the Michigan court could obtain jurisdiction of the defendant by service of a summons upon the superintendent, ticket agent and conductor of defendant, if in fact defendant was doing local business in Michigan.—Sherrill v. Grand Trunk Ry. Co. of Canada, 161 Mich. 495.

¶ 143. Process in an action against a foreign corporation admitted under Act No. 206, Pub. Acts 1901, §§ 9647-9655, How. St., 2nd ed., as amended by Act 266, Pub. Acts 1911, § 9654, How. St., 2nd ed., to do business within the state, and which has a resident manager, must be served in the same manner as if the defendant were a domestic corporation, and not under § 10442, Comp. L. 1897, as amended by Act No. 3, Pub. Acts 1909, § 13521, How. St.—Yund v. Excelsior Wrapper Co., 185 Mich. 143.

¶ 144. Act No. 3, Pub. Acts 1909, § 13521, How. St., 2nd ed., relating to services of process on foreign corporation, applies only to those transacting interstate commerce business within the state.—Yund v. Excelsior Wrapper Co., 185 Mich. 143.

¶ 145. A state may impose as a condition upon which a foreign corporation shall be permitted to do business within the state that it shall stipulate that, in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated.—St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

§ 35. ——Foreign insurance companies.

See also post ¶ 255.

¶ 146. The provision of Laws 1873, Act No. 155, How. St. §§ 4362-4368, authorizing service of process against foreign insurance companies by delivery to the commissioner of insurance, who is required to send duplicates to the company or its agents within the state, does not apply to any but courts of record.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

¶ 147. There is no exception to the mode of service provided in Laws 1873, p. 206, How. St. § 4367, against foreign insurance companies. It applies to all cases of suits against them.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

¶ 148. In an action against a nonresident co-operative insurance organization not authorized to do business in this state, it was held that there was evidence tending to show that the person upon whom service was made was at the time thereof acting as defendant's agent in receiving pay for assessments, and in giving the receipts of the company for such payments and service of summons on him in an action against the society was sufficient.—Vorheis v. People's Mut. Benefit Society, 86 Mich. 31.

¶ 149. One who had been, but had ceased to be, a mere solicitor of applications in a company which sells sick, accident, and fu-

neral benefits, is not a "managing agent" within the meaning of the Ohio statute, providing for service of process upon the managing agent of a foreign corporation; and service upon such person did not give the court jurisdiction over such corporation.—Spiker v. American Relief Soc., 140 Mich. 225.

¶ 150. A plaintiff living in one county may begin suit in that county against a foreign insurance company by serving process on the agent appointed under Comp. L. 1897, § 5198, for the service of process, who lives in another county.—People ex rel. Wipfler v. Fidelity & Deposit Co. of Maryland, 163 Mich. 94.

¶ 151. In an action against an insurance company upon a foreign judgment based upon service of process upon an alleged agent who solicited applications for insurance for the defendant, an insurance company not authorized to do business in the state, and forwarded payments to defendant, held that it was a question for the jury whether such person was in fact an agent of the defendant in its business in such state upon whom personal service of process might be made.—Cox v. Railway Conductors' Co-operative Protective Ass'n, 194 Mich. 213.

§ 36. ——Garnishment process against foreign corporations.

Service of garnishment on foreign corporations, see Garnishment § 51.

Statutory provisions as to service of process on nonresident or foreign corporation principal defendants in garnishment cases, see Jud. Act, chap. XXVIII, § 30; Comp. L. 1915, § 13151.

¶ 152. The general or special agent in Michigan of a foreign insurance corporation is the proper person to be served, in behalf of the corporation, with a summons in garnishment, and to make answer.—Lorman v. Phœnix Ins. Co., 33 Mich. 65.

¶ 153. How. St., § 8145, does not provide for service of garnishment process against foreign corporations.—Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155. (But see Laws 1889, Act No. 266, later enacted.)

¶ 154. An attorney appointed by a foreign corporation to receive service of process in "actions upon any liability or indebtedness incurred or contracted" by the company (Comp. L. 1871, § 1624), is not competent to be served with notice of garnishment proceedings.—Moore v. Wayne Circuit Judge, 55 Mich. 84.

¶ 155. Under Laws 1889, Act No. 266 (How. St., § 8086), service of garnishment process against a foreign corporation may be made upon any officer or agent found in Michigan, whether here upon corporate business or not.—First Nat. Bank v. Burch, 80 Mich. 242.

¶ 156. Under How. St., § 8086, as amended by Laws 1889, Act No. 266, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation within the state, a writ of garnishment against a foreign mining company may be served upon a resident agent whose duty consists in acting as custodian of the company's property and in inspecting the work of its contractors.—Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464.

§ 37. On municipal and other public corporations.

See also ante ¶ 2.

Return and proof of service on corporations, see post § 46.

Sufficiency of service of declaration on municipality to commence action and toll statute, see Limitations § 75.

Provisions as to service on municipal corporations, see Jud. Act, chap. XIII, § 35; Comp. L. 1915, § 12438.

¶ 157. Process against a township cannot be served upon its supervisor outside of the county.—Pack, Woods & Co. v. Township of Greenbush, 62 Mich. 122.

¶ 158. How. St., § 737, provides that all process against a township shall be served upon its supervisor. Held, that such service cannot be made outside of the county to which his township belongs, and therefore that a township cannot be sued except in the county where it lies.—Pack, Woods & Co. v. Township of Greenbush, 62 Mich. 122.

¶ 159. Under How. St., § 5108, providing for service of summons upon a school district by leaving the summons with the assessor of the district, and Local Acts 1871, No. 408, § 3, providing for the election of a president, secretary, and treasurer of the union school district of Rogers Township, whose "powers and duties shall severally be the same as those of the moderator, assessor and director organized under the general laws," service of summons may be had on the secretary of such union district, the word "severally" meaning respectively.—Board of Supervisors of Presque Isle Co. v. Thompson, 61 Fed. 914.

C. BY PUBLICATION OR SUBSTITUTED SERVICE.

§ 38. Constructive or substituted service in general.

Personal service, see ante § 11 et seq.

Publication in attachment proceedings, see Attachment §§ 85-89.

Right to appear and answer after judgment by default on published service, see Defaults § 29.

Publication and service of notice of hearing on petition for administration, see Estates of Decedents §§ 28-29.

Substituted service in forcible entry and summary proceedings, see Forcible Entry § 28.
Substituted service in garnishment actions, see Garnishment § 54.
Bringing in new parties by publication, see also Parties ¶ 36.
Provisions as to substituted service, see Jud. Act, chap. XIII, §§ 46-49; Comp. L. 1915, §§ 12449-12452.

¶ 160. In special proceedings against parties not served or not appearing the substituted service must be strictly regular under the statutes.—King v. Harrington, 14 Mich. 532.

¶ 161. There can be no constructive notice where there is no jurisdiction.—Harbaugh v. Martin, 30 Mich. 234.

¶ 162. Where jurisdiction is obtained by substituted in lieu of actual service the statutes must be strictly complied with or the proceedings cannot be sustained.—Merrill v. Montgomery, 25 Mich. 73.

¶ 163. Due diligence in making service of a subpœna upon a defendant who cannot be found is not exercised unless the effort to serve it is continued so long as service can lawfully be made.—Soule v. Hough, 45 Mich. 418.

¶ 164. In the absence of personal service there cannot be any valid constructive notice which does not plainly and distinctly and without misleading inform those who see it of the precise nature of the proceeding.—Streeter v. McMillan, 74 Mich. 123.

¶ 165. Substituted service is not favored, and all necessary facts to confer jurisdiction must affirmatively appear upon the record; and, not only must the statutory affidavit have been made, but it must be a part of the record.—Adams v. Wayne Circuit Judge, 98 Mich. 51.

¶ 166. A statute authorizing substituted service of process or notice must be strictly complied with in order to confer jurisdiction upon the court or officer authorized to act thereunder.—Colton v. Rupert, 60 Mich. 318; Campau v. Charbeneau, 105 Mich. 422.

¶ 167. As a general rule personal notice is requisite to a personal judgment; but substituted service, as by publication, is especially adapted to cases in rem or in that nature where it is difficult to ascertain with certainty the ownership of claims or interests in specific property.—Williams v. Flint & P. M. R. Co., 116 Mich. 392.

§ 39. Upon corporations.

Service upon corporations generally, see ante § 27.

¶ 168. In an action against a private domestic corporation there can be no substituted service under Comp. L. 1857, § 4835, How. St., § 8137 for want of finding the officers designated by statute, except in the county where the corporation's business office is situated.—People ex rel. Detroit Fire & Marine Ins. Co. v. Saginaw Circuit Judge, 23 Mich. 492.

¶ 169. Substituted service may be made upon corporations not acting, as well as upon those acting. The inability to find the last officers of corporations that have ceased to do business authorizes the same proceedings to obtain service as in case of inability to find the proper actual officers in active corporations.—Merrill v. Montgomery, 25 Mich. 73.

§ 40. Affidavit for order of publication.

In divorce suits, see post § 42.
Affidavit of publication in attachment, see Attachment § 89.

¶ 170. An affidavit of nonresidence is an essential prerequisite to an order for the appearance of nonresident defendants in partition cases; and without such affidavit the order is void, and the court acquires no jurisdiction of the nonresidents by its publication.—Platt v. Stewart, 10 Mich. 260.

¶ 171. Affidavits to bring in absent defendants may be filed as soon as the bill is filed in the suit to which they are incident.—Gordon v. Tyler, 53 Mich. 629.

¶ 172. While Comp. L. 1897, § 485, How. 2nd Ed., § 12003, relating to the issuance of orders for appearance in chancery causes does not permit the order to be made until after the commencement of the suit, there is no such prohibition as to the making of the affidavit on which the order is required to be based, especially where there is no suggestion that an unreasonable time has elapsed between the making of the affidavit and the issuance of the order.—Clarke v. Wayne Circuit Judge, 193 Mich. 33.

¶ 173. An affidavit sworn to before a suit in chancery is actually commenced by filing the bill is sufficient to authorize the court to issue an order for appearance under Comp. L. 1897, § 485, How. 2nd Ed., § 12003, where it appears that the bill was verified and the affidavit sworn to on the day before the bill was filed, and was intended to be used and was used in the suit.—Clarke v. Wayne Circuit Judge, 193 Mich. 33.

¶ 174. An affidavit for an order of publication in chancery must state the facts of inquiry on which it bases the conclusion therein expressed that defendant is absent from the state or concealed within it.—Thompson v. Shiawassee Circuit Judge, 54 Mich. 236.

¶ 175. The affidavit preliminary to an order for the appearance of a nonresident or

absent defendant must state every fact necessary to give the officer jurisdiction to make the order.—Colton v. Rupert, 60 Mich. 318.

¶ 176. The proof of defendant's absence and of diligence in seeking to obtain service on him upon which to base an order of publication in foreclosure should rest on the applicant's own knowledge; and the showing of diligence should extend to the whole state. —Soule v. Hough, 45 Mich. 418.

¶ 177. The affidavit for an order requiring a nonresident's appearance is not void though based upon information and belief, and though not stating the source of affiant's knowledge.—Colton v. Rupert, 60 Mich. 318.

¶ 178. An affidavit for publication, in cases of absent or concealed defendants, on information and belief, giving the source of the information, is sufficient.—Volkhart v. Volkhart, How. N. P. 268.

¶ 179. An order of publication against nonresident defendants must be based upon facts existing when it is made, and is defective if grounded upon an affidavit made several days before.—New York Baptist Union v. Atwell, 95 Mich. 239.

¶ 180. An order of publication against a nonresident defendant is defective if made on the 20th of the month and based on an affidavit made on the 15th.—New York Baptist Union v. Atwell, 95 Mich. 239.

¶ 181. Where a defendant in foreclosure is proceeded against as a resident upon whom service cannot be made because of his absence from the state, an affidavit made by the complainant's solicitor upon his own knowledge, that such defendant is a resident of the county, that he had left his residence some four years before, and had not returned, and that, by reason of his absence, subpœna cannot be served on him, is sufficient, without attempting to serve a subpœna, to warrant the granting of an order of publication.— Torrans v. Hicks, 32 Mich. 307.

¶ 182. An affidavit of publication signed and sworn to by Charles H. Lee, which begins with the recital "Fred. B. Lee of said county, being duly sworn," etc., held to be the same in legal effect as if there had been in the body of it no recital of any name as that of an affiant. The misrecital is to be treated as a clerical error, and the affidavit sustained.—Torrans v. Hicks, 32 Mich. 307.

¶ 183. A foreclosure is invalid that is based on an order of publication made upon complainant's affidavit that defendants could not be found, the subpœna having been returned before the return day.—Soule v. Hough, 45 Mich. 418.

¶ 184. Whether jurisdiction of foreclosure proceedings is not acquired where the affidavit for the order of publication is sufficient, quære.—Whitford v. Crooks, 50 Mich. 40.

¶ 185. In a mortgage foreclosure suit, service of defendant being made by publication, the affidavit of nonresidence of defendant simply stated that the complainant in said suit lived in Chicago and had told affiant that he knew the defendant and that the latter resided in Chicago. Held, said affidavit was sufficient proof of the fact of nonresidence to give the court jurisdiction to enter a decree.—Powell v. Pierce, 168 Mich. 427.

§ 41. The order and publication thereof.

Amendment of order, see post § 58.

¶ 186. Under Comp. L. 1871, § 5117, subd. 2, an order requiring a nonresident defendant to enter his appearance within two months from the date of the order was sufficient.—Pettiford v. Zoellner, 45 Mich. 358; Colton v. Rupert, 60 Mich. 318.

¶ 187. The rule in New York Baptist Union v. Atwell, 95 Mich. 239, holding that an order for publication against a nonresident defendant in chancery must be made on the same day with the affidavit whereupon it is based, was later limited and explained.— Adams v. Wayne Circuit Judge, 98 Mich. 51.

¶ 188. Where an order of publication and for the appearance of a nonresident defendant in chancery was obtained early Monday morning upon an affidavit made late Saturday afternoon which alleged that defendant resided in Oregon, the delay was held not unreasonable, and the order was sustained.— Adams v. Wayne Circuit Judge, 98 Mich. 51.

¶ 189. An order of publication requiring a nonresident defendant to "appear and answer the bill of complaint within four months from the date of this order" is sufficient, under How. St., § 6671, specifying "not less than four months," it being unnecessary that the order should fix a specific day for the appearance four months or more hence.— Lewis v. Weidenfeld, 114 Mich. 581.

¶ 190. An order for the appearance of a nonresident defendant in foreclosure was correctly entitled, but by mistake the name of Garrett B. Hunt, one of the complainants, appeared in three publications as "Grant B. Hunt"; which was corrected in subsequent publications. Held, that the order was not legally published.—Colton v. Rupert, 60 Mich. 318.

§ 42. Affidavit, order, and publication in divorce suits.

Personal service in divorce cases, see ante § 11.

Raising objections in collateral proceedings, see post § 54.

Provisions as to process in divorce suits, see Comp. L. 1915, § 11400.

¶ 191. The defendant in a suit for a divorce need not be given notice of the proceedings otherwise than by publication of an order for service by publication where such defendant is a nonresident, and the publication may be made in any newspaper printed in the county.—Paynton v. Paynton, 194 Mich. 504.

¶ 192. Where a wife, suing for a divorce, swears positively that her husband does not reside in this state but in a specified foreign locality, it is enough to support an order of publication.—Pettiford v. Zoellner, 45 Mich. 358.

¶ 193. It seems that the affidavit for an order of publication in divorce is sufficient if it tends to establish a foundation for the order, and if the officer to whom it is presented finds enough in it to satisfy his judgment; and his decision cannot be set aside, in a collateral proceeding, for defects in the proofs submitted to him therefor.—Pettiford v. Zoellner, 45 Mich. 358.

¶ 194. Affidavits of the publication of orders for defendant's appearance in a divorce proceeding are sufficient to give jurisdiction if they state positively the fact of publication, and if the affiant swears that he is employed in the office of the newspaper in which the order was published, and knew well the facts stated in the affidavit. It is unimportant that he does not describe himself as clerk, if it appears that he is entrusted with the duty of making affidavits of publication.—Pettiford v. Zoellner, 45 Mich. 358.

¶ 195. An order of publication against an absent or concealed defendant in a divorce case is not void because based upon an affidavit which stated on information and belief that defendant was a resident of this state, and which only shows his last place of residence in this state, offering nothing to show his present place of residence, or to show that the nonservice was by reason of his absence from the state or of his concealment within it.—Morrison v. Morrison, 64 Mich. 53.

¶ 196. An affidavit for an order of publication, in a divorce proceeding, made after the return of a subpœna duly issued and with a return indorsed thereon by the sheriff, stating that he is unable to find the defendant after diligent search and inquiry, which affidavit states that the defendant is concealed within the state so that process cannot be served on him, and which refers to the return of the sheriff to establish the inability to find the defendant, confers jurisdiction upon the court, within the terms of How. St., § 6670, though the order was not made until three days after the affidavit was sworn to, as the statute provides that the order may be made when the defendant is a resident, upon proof by affidavit that the process for his appearance has been duly issued, and that the same could not be served by reason of the defendant's absence or concealment.—People v. Booth, 121 Mich. 131.

¶ 197. Constructive service is supported by an affidavit for an order for appearance in a divorce suit, though the affidavit is entitled in the cause and the bill was not filed until the following day; since the affidavit is valid notwithstanding no suit was yet commenced as in the title, and since if false it would be perjury, as defined and laid down in Comp. L. 1897, § 11306, How. 2nd Ed., § 14719, where it appears that the bill was verified and the affidavit sworn to on the day before the bill was filed, and that the affidavit was intended to be and was used in the suit.—Clarke v. Wayne Circuit Judge, 193 Mich. 33.

¶ 198. R. S. 1838 required a different order for the appearance of a nonresident defendant in divorce cases from that in other suits in chancery; and an order in the form required in other cases gave the court no jurisdiction to decree a divorce.—Freeman v. Freeman, 1 Mich. 480.

¶ 199. An order of publication in a divorce proceeding which as signed read "four months" instead of "five months" held erroneous.—Jankovich v. Wayne Circuit Judge, 188 Mich. 284.

§ 43. Affidavit and proof of publication.

Return or proof of service of process, see post § 44 et seq.

Proofs of publication necessary to taking default or decree pro confesso, see Defaults § 2.

Proof of publication of notices other than process, see Notices § 8.

¶ 200. The recital of an affidavit in the order is not evidence that such an affidavit was made.—Platt v. Stewart, 10 Mich. 260.

¶ 201. Whether the mode of proving publication in cases of mortgage foreclosure is limited to that prescribed by statute, Comp. L. 1871, §§ 5924-5927, How. St. §§ 7497-7500, quære.—Brown v. Phillips, 40 Mich. 264.

¶ 202. The following affidavit of publication of an order for the appearance of nonresident defendants in a foreclosure case is held sufficient under Comp. L. 1871, § 5927, How. St. § 7500: "[Title and venue.] L. G. H., a printer in the office of the C. W. M., a public newspaper printed, published and circulated in the county of St. Joseph and state of Michigan, being duly sworn, says that the annexed notice, chancery order, has been published in said newspaper at least once in each week for six successive weeks; that the first publication of such notice in said newspaper was on the 12th day of December, A. D. 1872, and the last publication of the same was on the 30th day of January, A. D. 1873. [Signature and jurat.]"—Brown v. Phillips, 40 Mich. 264.

¶ 203. An affidavit that an order of appearance of a nonresident defendant was published once in each week for six successive weeks, commencing January 6 and ending February 10, 1870, shows a sufficient publication, where no action was taken by complainant until after the expiration of the week in which the order was last published.—Colton v. Rupert, 60 Mich. 318.

¶ 204. Publication of an order of appearance may be proven by the affidavit of a person other than the printer of the notice, if familiar with the facts.—L. Starks Co. v. Eppink, 185 Mich. 233.

D. RETURN OR PROOF OF SERVICE.

§ 44. In general.

Recitals in process as to return thereof, see ante § 4.
Return as affecting issuance of alias summons, see ante § 8.
Manner of execution and service, see ante § 11 et seq.
Affidavit and proof of publication, see ante § 43.
Signing return, see post § 47.
Interpretation and construction of return, see post § 48.
Conclusiveness of return, see post § 49.
Amendments of return or proof of service, see post § 59.
Returns to attachments, see Attachment VI, E.
Necessity and sufficiency of showing of service or publication in record, see also Courts § 79.
Allegations to support service in adjoining county in action for labor, see also Courts ¶ 258.
Filing proof of service to take default, see Defaults § 2.
Best evidence of process and contents, see Evidence § 122.
Return to execution, see Executions, IX.
Return of justices' process, see Justices of the Peace § 36 et seq.
Return of justices' attachment, see Justices of the Peace § 60 et seq.
Service and return of justices' writs of replevin, see Justices of the Peace § 79.
Return and proof of service of mechanic's lien claim, see Mechanics' Liens § 29.
Proof of service of notices, see Notices § 8.
Provisions as to return of process, see Jud. Act, chap. XIII, § 38; Comp. L. 1915, § 12441.
Rules of court as to compelling return of process, see 1916 C. C. Rule 20.

¶ 205. Proof of service of process to give the courts jurisdiction cannot rest in parol.—King v. Bates, 80 Mich. 367.

¶ 206. A return of service should always inform the court that lawful service has been made.—Town v. Tabor, 34 Mich. 262.

¶ 207. Proof of service of a notice that is equivalent to process should be made by copy sworn to or officially certified; an affidavit of service showing the substance or purport of the notice is not sufficient.—McCaslin v. Camp, 26 Mich. 390.

¶ 208. Where service is to be made by mail, if it does not appear that the conditions existed on which its validity must depend, the proof of service is, as a general rule, insufficient.—Clark v. Adams, 33 Mich. 159.

¶ 209. The return of a service of summons in replevin "by delivering a certified copy of said writ to his wife personally," it not appearing that defendant could not be found and that the service was at his dwelling, is bad.—Wheeler v. Wilkins, 19 Mich. 78.

¶ 210. Where the affidavit of service upon an officer, as representing a corporation, simply says that the person named was formerly the acting president, "and the only president thereof, to the knowledge or belief of this deponent," and it does not appear what means of knowledge the deponent had, there is no sufficient proof of regular service. Where an officer makes a return he assumes the responsibility of identifying the party served.—Merrill v. Montgomery, 25 Mich. 73.

¶ 211. The sheriff certified "that on the 9th day of Sept., 1876, he served the declaration of which the within is a copy on John O. Hammond, and on the 11th day of Sept., 1876, he served on the defendant, Erastus L. Hammond, * * * by delivering to said defendant," etc. Held that, as the entire return clearly showed that service was made on both defendants, the omission to add the letter "s" to the word "defendant" did not fatally affect it.—Hammond v. Baker, 39 Mich. 472.

¶ 212. The city marshal of Manistee has no authority to serve process outside of the city. Held, that his return to a writ of attachment issued by a justice would not confer jurisdiction to proceed, if it did not show affirmatively that it was served within the city.—Alverson v. Dennison, 40 Mich. 179.

¶ 213. The sheriff's certificate of service in a suit begun in the superior court of Detroit stated that he served the declaration "on Edward A. Elliott in the city of Detroit, the defendant named in said declaration, by delivering to him in said county of Wayne a true copy thereof." Held sufficient, as the city is within the county. Judgment would not be reversed for the irregularity in form (Comp. L. 1871, § 6051, subd. 13; How. St. § 7635, subd. 13).—Elliott v. Preston, 44 Mich. 189.

¶ 214. A constable's return to a writ of attachment, reciting that he had "personally attempted to serve the within attachment on the defendant by reading the same and offering a copy to him at the house of Daniel Dean,

but he ran away. I could not deliver a copy to him," is not valid as a return of personal service; it does not show that the officer was actually in the presence or hearing of the defendant, or that the defendant knew that he had a writ against him, or that his flight had any connection with the suit.—Holden v. Ranney, 45 Mich. 399.

¶ 215. The return of service indorsed upon a declaration recited that the sheriff "served the declaration of which the within is a true copy" * * * by delivering, etc., "a true copy thereof, and of the foregoing complaint and the notice relating thereto." Held, that the use of the word "complaint" was an immaterial error, and did not affect the showing of due service.—Hammond v. Baker, 39 Mich. 472.

¶ 216. A certificate of service with the venue laid in the county of Wayne and city of Detroit, and signed simply "John B. Kendall, Sheriff," without specifying of what county, and certifying to a personal service upon defendants named, on a day specified, "in said county of St. Clair," is not sufficient proof of service.—Clark v. Lichtenberg, 33 Mich. 307.

¶ 217. The affidavit or return of service of the master's summons to appear and submit to an examination under a creditor's bill should show the time and manner of service. Where the affidavit of service was in general terms that the summons was served as required by the rule of court, and the respondent made an affidavit showing that it was served less than a full day before the time for appearance, the service was held insufficient.—Whipple v. Brown, H. 436.

¶ 218. Where a notice was to appear before one master, and the return under a rule to show cause was by another that defendant did not appear, it was held irregular.—Whipple v. Brown, H. 436.

¶ 219. The subpœna and underwriting provided for by First Chancery Rule 122 may properly be treated as one instrument; and a return by an officer that he served a copy of the "within subpœna," which subpœna upon its face contains the underwriting, leaves no room to doubt that service was made of all that appears upon the face of the subpœna, and no more, and is sufficient.—Corning v. Burton, 102 Mich. 86.

¶ 220. The return of service of a chancery subpœna stated that the officers served the same "on Ethan A. Critchfield and Elizabeth Critchfield, personally on Mrs. Elizabeth Critchfield, by delivering to each of said defendants a true copy of the within subpœna," and that at the same time the officer showed to each of said defendants the original subpœna with the seal of the court impressed thereupon. Held, the service was valid as a personal service upon Ethan A. Critchfield, since the words, "personally on Mrs. Elizabeth Critchfield," should be treated as surplusage and rejected as such.—Hennes v. Charles Hebard & Sons, 169 Mich. 670.

§ 45. Of service of copy of declaration and notice.

Proofs of service of copy of declaration and rule to plead as basis for default, see Defaults § 2.

¶ 221. Where the suit is commenced by declaration, the certificate of service may be indorsed on the original declaration on file, or on a copy.—Larned v. Wilcox, 4 Mich. 333.

¶ 222. It seems that, where a sheriff's return of personal service of a declaration commencing suit does not state the place of service, the presumption is that he discharged his duty by serving within the county.—Norvell v. McHenry, 1 Mich. 227.

¶ 223. Where the affidavit of service of a declaration fails to show how the service was made, a judgment taken by default will be set aside.—People's Mut. Ben. Soc. v. Wayne Circuit Judge, 97 Mich. 627.

§ 46. Of service on corporations.

Manner and mode of making service on corporations, see ante II, B.

Affidavit and proof of publication, see ante § 43.

Sufficiency of proof of service of foreign corporation in action on resultant foreign judgment, see Foreign Judgments § 15.

¶ 224. Where a charter does not require an officer to reside in the county where the corporate business is done, and does require him to reside in the state, an affidavit that none of the officers named in the statute, on whom service could be made, reside in the county, will not be sufficient, without further proofs to justify the inference that they cannot be found in the state. It should appear that inquiries had been made in such a way as to be likely to elicit the truth. Comp. L. 1857, § 4836, How. St. § 8137 contemplates some diligence in searching for the persons to be served, after, and not before, suit is brought.—Merrill v. Montgomery, 25 Mich. 73.

¶ 225. Under Comp. L. 1897, § 7066, being section 30 of the act relating to manufacturing corporations, and providing that service of process against a corporation might be had by service upon an agent in charge of any business office of such corporation, a return which does not show that the agent upon whom service was had, was an agent in charge of such a business office of the company, does not confer jurisdiction, since he might have been some other unqualified agent.—Toledo Ice Co. v. Munger, 124 Mich. 4.

¶ 226. A return of service of a justice's summons in garnishment against a foreign corporation upon "the agent of said corporation having charge of its affairs within said county" but not showing what was the nature of such affairs there, does not confer jurisdiction under How. St. § 8055, which provides that service may be made upon "the president, cashier, secretary, treasurer, general or special agent, superintendent, chief clerk, or other principal officer of such corporation." For aught that appears the agent may have been a mere custodian of property.—Kirby Carpenter Co. v. Trombley, 101 Mich. 447.

¶ 227. A return showing the service of a declaration as commencement of suit against the Wabash Railroad Company, on the "Wabash Railroad" by delivering a copy to a person designated as "city ticket agent," held insufficient.—Price v. Delano, 187 Mich. 49.

¶ 228. A return of service of summons on a corporation as being served "on Citizens' Telephone Company, the defendant's agent, by delivering to S. E. H. a copy thereof" does not show proper service on the Citizens' Telephone Company and will not confer jurisdiction upon a justice of the peace.—Hoben v. Citizens' Tel. Co., 176 Mich. 596.

¶ 229. An affidavit that service was made upon a railroad company "by leaving a copy with their freight agent at Dorr station," without giving the agent's name or showing that he was in charge of the freight office, is bad.—Truax v. Sterling, 74 Mich. 160.

¶ 230. An indorsement of acceptance of service on behalf of a foreign corporation by parties who therein describe themselves as agents of the corporation has no legal force by itself as evidence of the fact of such agency, or as proof of such service as the law contemplates.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

¶ 231. In an action against a railroad company, a return stating that "the within summons" was served "on the defendant by handing a copy to the station-agent" was sustained; it implies that the station-agent was defendant's agent.—Talbot v. Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66.

§ 47. Signing return.

¶ 232. A return to a writ may be signed by a deputy-sheriff in his own name.—Wheeler v. Wilkins, 19 Mich. 78.

¶ 233. A return of service signed by the under-sheriff in his own name is good.—Calender v. Olcott, 1 Mich. 344; Allen v. Hazen, 26 Mich. 142.

§ 48. Interpretation and construction of return.

¶ 234. Where there is more than one defendant, a return that the sheriff cannot find the defendants is equivalent to saying that neither can be found.—Hitchcock v. Hahn, 60 Mich. 459.

¶ 235. Where an affidavit of service of declaration states that service was made "on the 28th day of June, last past," the jurat, showing that the affidavit was made July 31, 1844, may be resorted to to show the time of service.—Norvell v. McHenry, 1 Mich. 227.

¶ 236. The certificate of service of subpœna on a day antedating that of its issue is a manifest clerical error; and as a subpœna need not be served any particular time before the return day, and as service on its return day is good, it is fairly presumable from such a certificate that it was served during its life and not at an impossible day. And if this is afterward shown to have been the fact, such a slip in the certificate would hardly support an appeal to the discretion of the court.—Johnson v. Shepard, 35 Mich. 115.

¶ 237. An endorsement on a summons, by the person who has served it, that he had no "direct interest" in the result of the action, leaves an inference that the serving party was interested indirectly.—Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72.

¶ 238. A return of service of process upon "Charles C. Comstock, as president of the Grand Rapids Chair Company [a corporation], who is the owner of said goods and chattels described in within writ," sufficiently shows a service upon the corporation, to which the word "who" may be treated as relating.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 239. A return of service of a log lien attachment on C., "as president of" a named corporation, "who is the owner of" the goods and chattels described in the writ will be intended as referring to the corporation for the grammatical antecedent of "who," and therefore as showing service on the owner of the logs.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 240. The sheriff's return that he has served a copy of the declaration and notice to plead on defendant necessarily implies service of a copy of the note attached to the declaration.—Bliss v. Paine, 11 Mich. 92.

¶ 241. Where a notice was attached to a declaration that a note, a copy of which was given, would be read in evidence under the declaration, and the sheriff returned that he had served on the defendant a copy of the declaration and notice, it was held that the return necessarily implied service of a copy of the note, since that constituted an essential part of the notice.—Bliss v. Paine, 11 Mich. 92.

§ 49. Conclusiveness of return.

Amendments of return, see post § 59.

Conclusiveness of return to execution, see Executions § 111.
Conclusiveness of record showing return of service for foreign judgment, see Foreign Judgments §§ 5, 6.

¶ 242. The return of a ministerial officer of personal service is unimpeachable.—Facey v. Fuller, 13 Mich. 527.

¶ 243. The return, by an officer, of service of process is conclusive, in any collateral proceeding, upon the parties to the suit in which the process issued.—Michels v. Stork, 52 Mich. 260.

¶ 244. The sheriff's return that "after diligent search and inquiry he is unable to find a defendant in his bailiwick" cannot be disputed by plaintiffs in a second suit against the same defendants upon the same demand by testimony that such service failed through the neglect or default of the officer.—Johnson v. Mead, 78 Mich. 326.

¶ 245. The affidavit of a private person showing personal service of a declaration as commencement of suit may be contradicted by defendant.—Detroit Free Press Co. v. Bagg, 78 Mich. 650.

¶ 246. A return of personal service made by a private person may be contradicted by the defendant.—Campbell v. Wayne Circuit Judge, 111 Mich. 247.

§ 50. Effect of false return.

Raising objections in collateral proceedings, see also post § 54.
Falsity in return as affecting jurisdiction by good service, see Courts ¶ 204.

¶ 247. An officer's return of service of process may, under certain circumstances, be set aside upon sufficient cause shown in the same proceeding; but where it shows the service to have been legal and proper, though false, it gives jurisdiction.—Low v. Mills, 61 Mich. 35.

III. DEFECTS AND OBJECTIONS; QUASHING, SETTING ASIDE AND AMENDMENTS.

Amendment of served copies of declaration, see Pleading § 131.
Amendments of pleadings to cure misnomer of parties, see Pleading § 110.
Requisites and sufficiency of pleas in abatement, necessity of giving plaintiff a better writ, see Pleading § 65.

§ 51. In general; materiality of objections.

Conclusiveness of return, see ante § 49.
Setting aside service of process upon person privileged therefrom, see also ante ¶ 82.
Setting aside return, see also ante ¶ 247.
Estoppel to make objections, see post § 55.
Matters of process reviewable on appeal from judgment, see Appeal § 290.
Time for application to open default as depending on whether service was valid or invalid, see Defaults § 35.
Defective process in main case as objection to garnishment, see Garnishment § 91.
Effect of error in copy of declaration served, see Pleading § 28.
Setting aside process as penalty for failure to secure costs, see Security for Costs § 7.

¶ 248. The service of a subpœna was set aside as irregular where the copy delivered to the defendant differed from the original in being tested October 31, 1840, instead of 1843.—Gould v. Tryon, W. 339.

¶ 249. Where a defendant is brought in by publication, the question of the validity of the subpœna which was prematurely returned not served is unimportant.—Torrans v. Hicks, 32 Mich. 307.

¶ 250. Where the defendant in foreclosure is brought in by publication, the question of the validity of a subpœna that was issued and returned not served is not involved when the order of publication was based on a sufficient showing by affidavit; the fact that the subpœna had been prematurely returned is unimportant.—Torrans v. Hicks, 32 Mich. 307.

¶ 251. The rule to plead should be entered before service of a copy of the declaration, but when both acts are done on the same day and within a short time, and the defendant is not misled by the omission to enter the rule until after service, he has no right to have the declaration stricken from the files.—Blanck v. Ingham Circuit Judge, 44 Mich. 98.

¶ 252. If in a summons there is a mistake in naming the day of the week, but the day of the month is named correctly, that part of the summons may be rejected as surplusage, and the summons still be good unless the defendant has been misled by it.—Ingersoll v. Kirby, W. 27.

¶ 253. A writ of summons on a corporation obtained from the clerk's office after its return and before the return day is not absolutely void, and if taken from the files for service the court has discretion to approve the act by ordering the service to stand and the return to be filed as of the date of service.—Brady v. Toledo, A. A. & M. R. Co., 73 Mich. 457.

¶ 254. A summons signed and sealed in blank by the clerk of the court and delivered to plaintiff's attorney, not for a particular suit but for any suit that he might thereafter bring, is not void, and the suit should not be quashed because the summons was so issued.—Sweet v. Newaygo Circuit Judge, 95 Mich. 449. Correcting dictum in Potter v. John Hutchison Mfg. Co., 87 Mich. 59.

¶ 255. In a suit against a foreign corporation on a receiver's bond, the fact that plaintiff omits to serve a joint defendant with process does not invalidate the service upon said corporation's agent appointed under Comp. L. 1897, § 5198.—People ex rel. Wipfler v. Fidelity & Deposit Co. of Maryland, 163 Mich. 94.

§ 52. Modes of taking objections.

Appearance to question process or service, see Appearance.
Dismissal for defects in process or procedure, see Discontinuance § 17.
Want of process as ground for vacating judgment, see Judgments § 52.
Motion to set aside service as proper mode of pleading under Judicature Act, see also Pleading ¶ 331.
Plea in abatement as proper mode of testing sufficiency of service, see Pleading § 61.
Pleas to the process as pleas in abatement, see also Pleading § 61.

¶ 256. A motion to quash a summons and not a plea in abatement is the proper remedy where defendant claims that he is not a resident of the county and was decoyed within the county for the purpose of enabling the officer to serve the summons on him.—Barth v. Marcuse, How. N. P. 11.

¶ 257. An irregular service of a declaration as commencement of suit may be quashed on motion, where the defendant has not appeared generally, and there are no controverted questions of fact.—Yund v. Excelsior Wrapper Co., 185 Mich. 143.

§ 53. ——Trials of fact on motions.

Writ of error to order on motion to quash, see Appeal § 48, ¶ 220.

¶ 258. On a motion to quash service on a corporation an issue may be made up and tried whether the person served was one on whom service could legally be made, and it is not the right of the opposite party to have time to demur or plead as in the case of a declaration.—Turner v. St. Clair Tunnel Co., 102 Mich. 574.

¶ 259. A motion to quash service of process made by a foreign corporation may be heard on affidavits where there are no disputed questions of fact.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

¶ 260. Where a motion to quash service of process is made by a defendant, it must frame a plea to try disputed questions of facts, and they cannot be determined on affidavits.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

¶ 261. A showing of fraud in obtaining jurisdiction by resort to an act ordinarily proper but alleged to have been a trick may be rebutted by evidence that no such trick was necessary because there were opportunities without it.—Copas v. Anglo-American Provision Co., 73 Mich. 541.

§ 54. ——Raising objection in collateral proceedings.

See also ante ¶ 193.
Conclusiveness of return, see ante § 49.
Estoppel to make objections, see post § 55.

¶ 262. A divorce granted upon an order of publication, issued by a circuit court commissioner on an affidavit based upon information and belief, was sustained in a collateral proceeding involving the validity of a later marriage and the consequent right to property.—Pettiford v. Zoellner, 45 Mich. 358.

¶ 263. Failure to serve notice of rule to plead in action begun by declaration must be taken advantage of in the action itself, and is not ground for collateral attack on the resultant default judgment.—Griffin v. McGavin, 117 Mich. 372.

¶ 264. Service of process beyond the jurisdiction of the court which issued it cannot oblige the party served to appear and defend in that court.—McEwan v. Zimmer, 38 Mich. 765.

§ 55. Estoppel to make objections.

Raising objections in collateral proceedings, see ante § 54.

¶ 265. Where, when summons against a corporation was served upon a certain stockholder as president, he and one who was secretary, manager, and treasurer of the corporation, told the officer that a third person was president, upon whom, accordingly, service was made, the corporation was estopped from showing, in order to negative service, that such latter person was not its president.—Wilson v. California Wine Co., 95 Mich. 117.

§ 56. Waiver and cure of defects and irregularities.

Effect of permitting serving officer to enter outer door, see ante § 25.
Waiver or admission of service, see ante § 26.
Appearance as waiving objection that service was against privilege, see Appearance § 11, ¶ 54.
Appearance as waiving service under wrong statute, see Appearance § 11, ¶ 58.
Defective publication as waived by appearance to come in and defend after judgment, see Appearance § 11.
Appearance as dispensing with publication against nonresident, see Appearance § 11.
Necessity of taking objection below to writ or service in order to have review of question on error or appeal, see Saving Questions, I.
Waiver of defects in replevin writs by going to the merits, see Replevin, II.
Cure of nonconformity of declaration to writ by statute of amendments, see Pleading ¶ 892.

¶ 266. When defendant pleads to the merits the character of the process used to commence the action becomes immaterial.—Miller v. Rosier, 31 Mich. 475.

¶ 267. By appearing generally and pleading to the merits defendant waives objections to the process or proceedings by which he was brought into court.—Gunn Hardware Co. v. Denison, 83 Mich. 40.

¶ 268. After the lapse of nearly a year from entry of a decree after an order pro confesso on personal service, advantage cannot be taken of such defects as that the subpœna served was signed by the deputy register in his own name; that it described the complainant as "Nelson Creveling of Minnie J. Boudman," while the decree was in favor of "Nelson Creveling, guardian of Minnie J. Boudman"; and that the copy of the subpœna served was not subscribed by the complainant or his solicitor or by the officer making service.—Creveling v. Moore, 39 Mich. 563.

¶ 269. All objections to the process or proceedings by which a defendant is brought into court are waived by pleading to the merits.—Hannah & Lay Mercantile Co. v. Mosser, 105 Mich. 18.

¶ 270. Pleading the general issue in forcible entry proceedings waives the irregularities in the summons and venire.—Falkner v. Beers, 2 Dougl. 117.

¶ 271. After pleading and going to trial the right of a defendant to relief because of misconduct in the service of process upon him rests in the discretion of the court.—Greeley v. Stilson, 27 Mich. 153.

¶ 272. The statute of amendments (Comp. L. 1871, § 6051, How. St. § 7635, subd. 2) covers only formal defects, and those by which neither party shall have been prejudiced; it does not reach jurisdictional defects.—Denison v. Smith, 33 Mich. 155.

¶ 273. Appearing before the master to object that no time was fixed for the service is not a waiver of the irregularity.—Whipple v. Stewart, W. 357.

¶ 274. Entry by clerical error of a ten-day rule to plead held corrected by a notice indorsed on the declaration of a twenty-day rule.—Howe v. Maltz, 35 Mich. 500.

¶ 275. The omission to serve notice of rule to plead with the declaration is an irregularity for which the proceedings will be set aside at any time. The defendant waives no rights by failing to notice the defect within any specific time, for he has no notice of the purpose for which the declaration is served.—Turrill v. Walker, 4 Mich. 177.

¶ 276. The objection that the jurat in the proof of service is defective is one that should be made in the trial court; otherwise it will not be heard on appeal unless the defect has caused injustice.—Froman v. Froman, 53 Mich. 581.

¶ 277. Where two writs of summons were simultaneously issued in the same case by different officers, the plaintiff in error, in a record that exhibits them only as allied proceedings in one case, cannot claim that they began two distinct suits, if only one was practically instituted. And the defect in procedure is within the statute of amendments Comp. L. 1871, § 6051, subd. 1 (How. St. § 7635, subd. 1).—Bogue v. Prentis, 47 Mich. 124.

§ 57. Amendments of process and return.

Filling out and alteration of process, see ante § 9.
Amendments of process, see post § 57.
Amendment of pleadings to add, substitute, or change parties, see Pleading § 109.
Amendment of declaration by striking name of president as codefendant with corporation served by serving copy on him, see Pleading ¶ 650.
Provisions as to amendment of process and return, see Jud. Act, chap. XVI, § 1 et seq.; Comp. L. 1915, § 12478 et seq.

¶ 278. An objection to a writ that it is not tested in the name of the people of the state of Michigan is not sufficient to allow the party to make the point that the style of the writ is not in the name of the people, etc. And, as the objection is purely technical, an amendment should not be allowed to rectify it to the overthrow of substantial justice.—Johnson v. Provincial Ins. Co. of Toronto, 12 Mich. 216.

¶ 279. Amendments of process without which the court obtains no jurisdiction to try the case can only be made by the trial court, and upon notice to the opposite party, who is entitled to make a showing.—King v. Bates, 80 Mich. 367.

¶ 280. The power to cure errors and irregularities by amendment is a useful one, and when no provision to the contrary is made it applies as well to attachment suits as to others.—Barber v. Smith, 41 Mich. 138; Drew v. Dequindre, 2 D. 93.

¶ 281. Where the summons described plaintiff as "Absalem Baxter" instead of "Absalom Backus," an amendment correcting the error was sustained.—Final v. Backus, 18 Mich. 218.

¶ 282. The omission of plaintiffs' Christian names in a summons is not such a defect as to destroy the process; but it is open to amendment.—Barber v. Smith, 41 Mich. 138.

¶ 283. Under Comp. L. 1897, § 10268, it is within the discretion of the trial court to permit an amendment to the summons in or-

der to make the damages claimed conform with a declaration, as amended.—Groat v. Detroit United Ry., 153 Mich. 165.

¶ 284. A mere irregularity in failing to include all the defendants in a chancery subpœna, as required by Chancery Rule No. 4, is amendable.—Kerr v. Weeks, 191 Mich. 652.

¶ 285. An amendment to a summons by inserting the individual member of a firm alone in place of the firm name was allowed, on motion, where the constable's return showed service on "defendant," and plaintiff declared against "defendant," and the individual member was served individually and not in the firm name, and he so pleaded to the declaration.—Bockheim v. Linn, How. N. P. 261.

§ 58. ——Of order of publication.

Order for publication, see ante § 41.

¶ 286. When the amendment of an order for publication sought under Comp. L. 1897, § 10260, How. St., 2nd Ed., § 12969, is in the furtherance of justice and neither surprises nor deprives the opposite party of any essential rights, it should be permitted.—Jankovich v. Wayne Circuit Judge, 188 Mich. 284.

¶ 287. The defendant in a divorce proceeding is not deprived of any rights by an amendment by the court of an order of publication which, as originally signed by the court read "four months" instead of "five months" and was corrected by the solicitor for complainant, and, as thus corrected, was duly published.—Jankovich v. Wayne Circuit Judge, 188 Mich. 284.

§ 59. ——Of return or proof of service.

Return and proof of service, see ante § 44 et seq.

Conclusiveness of return, see ante § 49.

¶ 288. A return to a municipal court declaring that service had been made in the county was held to mean in the county outside of the municipality, and was therefore full and conclusive as to that territory. A subsequent ex parte amendment to show that service had been made in the municipality also could not affect a joint defendant outside of the municipal jurisdiction. He was not bound to watch the records after the former return had been made.—Denison v. Smith, 33 Mich. 155.

¶ 289. Even if the under-sheriff did not have power to sign a return in his own name, yet when the writ appears from the return to have been served by the proper officer the return is amendable, and a judgment will not be reversed because of the defect.—Calender v. Olcott, 1 Mich. 344.

¶ 290. Whether a return on which the jurisdiction over property depends can be amended after discontinuance of suit, quære. Haynes v. Knowles, 36 Mich. 407.

¶ 291. Where it is sought to amend the proof of service of process in order to show jurisdiction, and thereby give validity to the judgment so that it may be used in another suit to sustain rights claimed under it, the party adversely interested is entitled to notice. But such amendments are not generally permitted to affect the rights which third persons may have acquired while the proceedings remained defective.—Montgomery v. Merrill, 36 Mich. 97.

¶ 292. A return cannot be amended in matters affecting the jurisdiction without giving notice to the parties affected by such amendment.—Haynes v. Knowles, 36 Mich. 407.

¶ 293. An officer who is sued for misconduct cannot, pending the trial, manufacture evidence for himself by an ex parte amendment of his return curing the official action which is the basis of the suit against him.—Haynes v. Knowles, 36 Mich. 407.

¶ 294. As a general rule, in all cases where the defect or mistake is owing to the default of any clerk or officer of the court, an amendment will be allowed.—Calender v. Olcott, 1 Mich. 344.

¶ 295. A sheriff's return never becomes part of the record until actually on file with the clerk, and he may amend it without leave at any time before filing.—Watson v. Toms, 42 Mich. 561.

¶ 296. Where a motion is made to open a final judgment obtained by default, the circuit court has power to allow a sheriff to amend his return of service of a declaration by showing that a copy of a note appended thereto was also appended to the copy which he served.—Wilcox v. Sweet, 24 Mich. 355.

¶ 297. It seems to be within the discretion of a judge, in trying an action upon a recognizance of special bail, to permit the sheriff to amend his return to a capias in the original suit by adding the date.—Heymes v. Champlin, 52 Mich. 25.

¶ 298. Where a judgment, taken by default on a service of a declaration by a deputy-sheriff, is offered in evidence in another cause and objected to on the ground that the certificate of service does not show that any copy of rule to plead was served with the declaration, it is error to permit the person who made such service to amend his return without any affidavit or other showing, and after ceasing to be deputy-sheriff, so as to make it show that a copy of rule to plead was indorsed on the copy of the declaration so served by him. Such amended certificate did not constitute any official return of the service of rule to plead, upon which there could be legal liability. A proof of service by affidavit should have been required instead of such amendment.—Arnold v. Nye, 23 Mich. 286.

¶ 299. Proceedings in justice's court to amend the return of service of an attachment after judgment were quashed on certiorari where notice thereof had not been duly served, and the amendment consisted in changing the name of the person on whom the writ had been served, and against whom judgment was rendered.—Clark v. McGregor, 55 Mich. 412.

¶ 300. Where a service of summons on a defendant, the Citizens' Telephone Company, is returned in an action before a justice of the peace as being served "on Citizens' Telephone Company, the defendants agents, by delivering to S. E. H. a copy thereof," the defective return cannot be aided in the supreme court by Comp. L. 1897, secs. 10272, 10273, How. 2nd Ed., §§ 12973, 12974, relating to amendment of returns.—Hoben v. Citizens' Tel. Co., 176 Mich. 596.

PROCESSES to PROHIBITED ARTICLES.

Cross-References.

Processes—
Of manufacture as property, see Property § 1.
Processions—
In streets as nuisances, see Highways § 175.
Prochein Ami—
See Guardians ad Litem.
Proclamations—
Judicial notice of, see Indictment § 128.
Production of Books and Papers—
See Discovery and Inspection.
Profane Swearing—
As criminal offense, see Crimes, II; Indictment.
Disorderly conduct under city ordinance, see Municipal Corporations, VI.
Profert—
See Pleading, VIII.
Professional Employment—
Within law relating to capias or arrest of fraudulent debtors, see Civil Arrest §§ 6, 21, 22.
Professions—
See Attorneys; Medicine and Surgery; Religious Societies.
Actionable defamation of professional repute, see Libel.
Professors—
As experts qualified to give opinions, see Evidence § 273 et seq.
Profiteering—
See Combinations.
Profits—
How computed, see Contracts § 188; Master and Servant, II; Partnership, VII, E.
Element in estimating and measuring damages, see Damages, I.
Rights between parties in particular relations or in succession of estates, see Life Estates, II; Partnership; Joint Adventures; Tenants in Common, II. Vendors and Purchasers, VIII-X.
Accountability for profits, see Accounting Suits; Agency, IV; Corporations, XVII, G; Estates of Decedents, X, C; Trusts, VI, XI; also topics in last preceding reference.
Participation in profits as element of partnership, see Partnership § 4.
Recovery of mesne profits of land, see Ejectment, VI; Dower, VI, D.
Prohibited Articles—
Under insurance policies, see Insurance, XII, B.

PROHIBITION, WRIT OF.

TREATS of the writ from a superior to an inferior court to cause it to desist from an attempted exercise of jurisdiction which does not belong to it.

Analysis.

§ 1. In general; nature, occasion, and propriety of the writ.
§ 2. Other available remedies.
§ 3. Courts, tribunals, and officers amenable to the writ.
§ 4. Pleading and procedure.
§ 5. Judgment and disposal of application.

§ 1. In general; nature, occasion, and propriety of the writ.

Scope and limits of jurisdiction in general, see Courts, V.
Propriety of writ of prohibition to prevent prosecution under void ordinance, see also Municipal Corporations ¶ 369.

¶ 1. A writ of prohibition is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, and can only be resorted to in clear cases and where other remedies are ineffectual. It may lie at the suit of one or more parties on either side to restrain the action of the court

so far as it exceeds its jurisdiction and thereby affects the petitioner; but it is discretionary writ, and will not be granted unless it appears that the petitioner has vainly applied for relief to the court against which he wishes it to issue.—Hudson v. Detroit Superior Court Judge, 42 Mich. 289.

¶ 2. The writ is proper to restrain action by an inferior court clearly in excess of jurisdiction.—Scott v. Chambers, 62 Mich. 532.

¶ 3. The writ issues to stay proceedings begun in one court to cancel a judgment entered by a competent court of co-ordinate jurisdiction.—Maclean v. Speed, 52 Mich. 257.

¶ 4. Prohibition will issue to restrain a court of equity from proceeding with the exercise of power conferred upon it by an invalid act.—Houseman v. Kent Circuit Judge, 58 Mich. 364.

¶ 5. The writ was granted to restrain a circuit judge from entertaining garnishment proceedings where no jurisdiction had been gained over the principal defendant.—People ex rel. McCloskey v. Wayne Circuit Judge, 26 Mich. 100.

¶ 6. An assignee in bankruptcy may be entitled to this writ to restrain a state court from enjoining his proceedings in the bankrupt court to quiet his title to goods turned over to him by the marshal as assets of the bankrupt's estate.—Hudson v. Detroit Superior Court Judge, 42 Mich. 289.

¶ 7. A writ of prohibition will be granted to prevent a court at law from reopening and retrying an issue adjudicated in chancery.—Bates v. Alpena Circuit Judge, 82 Mich. 91.

¶ 8. The writ of prohibition lies to prohibit the exercise by an inferior tribunal or officer of judicial powers with which it or he is not legally vested, and to prevent action in excess of the jurisdiction conferred by law, but not to regulate or control the manner in which a lawful jurisdiction shall be exercised.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 9. A writ of prohibition is the proper remedy to restrain certain contempt proceedings before a judge of a superior court where it is set up that the respondent has no jurisdiction over proceedings of this character.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 10. Prohibition will not lie to restrain the court from the further prosecution of garnishment proceedings, in which default and interlocutory judgment has been entered against the garnishee defendant for failure to disclose and the matter referred to the court to determine the amount of the judgment to which the plaintiff was entitled.—Gorman v. Calhoun Circuit Judge, 140 Mich. 230.

§ 2. Other available remedies.

Occasion, propriety, and office of certiorari and mandamus, see Certiorari; Mandamus.

Appeals and writs of error, see Appeal.

Injunctions against parties from proceeding with litigation, see Injunctions, II.

¶ 11. The writ cannot be issued to restrain any action of inferior courts which can be reviewed by any of the ordinary methods.—People ex rel. Campau v. Wayne Circuit Court, 11 Mich. 398.

¶ 12. The writ of prohibition is an extraordinary one and will not be granted where the petitioner has a complete and adequate remedy by some other proceedings.—Port Huron Savings Bank v. St. Clair Circuit Judge, 147 Mich. 551.

¶ 13. The writ of prohibition will not issue where the petitioner has a complete and adequate remedy by some other proceeding.—Triangle Land Co. v. Auditor General, 172 Mich. 289.

¶ 14. Prohibition and not mandamus or appeal is the remedy to prevent respondent circuit judge from proceeding in a divorce case and to require the vacation of orders already made in a divorce case by the husband, where a similar suit was already pending in another circuit brought by relator wife; since mandamus would not prevent future action and appeal might not afford relief if the orders should be put into execution.—Wells v. Montcalm Circuit Judge, 141 Mich. 58.

¶ 15. The rule as to granting or denying the writ of prohibition is the same as is applied in mandamus cases.—Port Huron Savings Bank v. St. Clair Circuit Judge, 147 Mich. 551.

¶ 16. Errors of the circuit court in chancery in forcing an election between a suit for an accounting and a pending action in assumpsit, in overruling a plea of the pendency of the law action in abatement of the chancery suit, in accepting an election in favor of the chancery suit and thereupon ordering the discontinuance of the law action (which could not be done because a set-off was pleaded) and answer by defendant to the chancery suit within ten days, and finally in defaulting defendant for failure to so answer are adequately remediable by ordinary methods of review, if such errors are not waived; and therefore prohibition will not issue against further proceeding with the chancery suit.—Port Huron Savings Bank v. St. Clair Circuit Judge, 147 Mich. 551.

§ 3. Courts, tribunals, and officers amenable to the writ.

See also ante ¶¶ 2-4.

¶ 17. The officer or body upon whom or upon which the legislature has conferred the power to remove municipal officers for cause acts in a quasi judicial capacity, and the method of procedure must be of a quasi judicial character; and such officer or body becomes an inferior tribunal, amenable when acting in excess of the jurisdiction conferred to the writ of prohibition.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 18. The writ of prohibition lies against the procedure of the common council of Detroit for the removal of the city counsellor upon charges that relate to matters that are prior to his nomination to, and induction into, his office.—Speed v. Common Council of Detroit, 98 Mich. 360.

¶ 19. Since no appeal lies from a decision of the State Court of Mediation, established by Comp. L. 1897, §§ 559-568, and its decisions are irreviewable, prohibition will issue to prevent the rehearing of a case by such court.—Renaud v. State Court of Mediation, 124 Mich. 648.

¶ 20. A writ of prohibition is not the proper remedy to restrain the auditor from issuing a certificate of error and cancelling a tax deed, as the restraining of an administrative or ministerial character is not within the province of the writ.—Triangle Land Co. v. Auditor General, 172 Mich. 289.

¶ 21. Where a charter commission has wrongfully assumed the power and authority to remove a member, a remedy of the ousted member is by an original writ of prohibition by the supreme court.—Eikhoff v. Charter Commission of Detroit, 176 Mich. 535. (Ostrander and Kuhn, JJ., dissenting.)

§ 4. Pleading and procedure.

Rule for awarding costs, see Costs § 49.

Practice and procedure in other extraordinary actions, see Certiorari; Mandamus; Quo Warranto; Habeas Corpus.

Statutes regulating practice, see Jud. Act, chap. XXXVI, § 10 et seq.; Comp. L. 1915, § 13446 et seq.

Necessity of printed briefs to present records and points and argument, see Sup. Ct. Rule 56.

¶ 22. A bill in equity was filed against the special guardian of a non compos, by one who, on appeal from the probate court, had been appointed general guardian. The bill alleged that error had been brought on the order appointing complainant such guardian; that defendant also prolonged by appeal proceedings taken for his removal, and threatened further legislation, and was grossly misbehaving as special guardian; and it prayed for an injunction, the appointment of a receiver, and for an accounting. It was held that the bill showed a case of equity jurisdiction to grant the preliminary relief prayed, and a writ of prohibition to restrain the action of the court of chancery upon it was refused.—People ex rel. Campau v. Wayne Circuit Court, 11 Mich. 393.

¶ 23. Where a judge of probate is ordered to show cause why a writ of prohibition should not issue restraining the appointment by him of an administrator, on the ground that the paper in which the notice of the hearing of the petition for such appointment was published is not a newspaper, within the meaning of the statute (How. St. §§ 5866, 6808) regulating the publication of probate notices, the return of the probate judge as to the character of said paper is binding upon the court issuing such order.—Lynch v. Wayne Probate Judge, 101 Mich. 171.

§ 5. Judgment and disposal of application.

¶ 24. An application for a writ of prohibition to compel the secretary of state to refrain from filing the nomination petitions of candidates for the office of judge of the circuit court, will be considered and retained as an application for a writ of mandamus, when it appears that, though prohibition is not the proper remedy, a dispute has arisen as to the manner of nominating candidates to fill vacancies which will result in litigation if not settled before the election, and briefs have been filed by the parties and the attorney general.—Oren v. Secretary of State, 171 Mich. 590.

PROHIBITIONS to PROOFS OF LOSS.

Cross-References.

Prohibitions—
- On legislative action, see Constitutional Law.
- Under the guise of police power, see Constitutional Law § 98.
- On liquor traffic, see Intoxicating Liquors.

Prolixity—
- In record and bill of exceptions, see Appeal, VI, D; Indictment § 592; Costs § 117.
- Rules for brevity in pleading, see Pleading, I; Equity, VII, B.

Promises—
- As contracts, see Contracts; Negotiable Instruments.
- As consideration for counter promise, see Contracts § 106 et seq.
- Of immunity or clemency as rendering confession involuntary, see Indictment § 257 et seq.

Promissory Notes—
- See Negotiable Instruments.
- As payment, see Payment §§ 6-8.

Promissory Representations—
- As basis for estoppel, see Estoppel § 42.
- As fraud or deceit, see Fraud §§ 14-17.

Promotion of Corporations—
- See Corporations, VI.

Proof—
- See Evidence, X; Indictment, VIII, C, and see portions of specific topics devoted to evidence.

Competency of offered evidence, see Evidence, III-IX; Indictment, VIII, B.
Burden of proof, see Evidence, II; Indictment, VIII, A, and see also specific topics.
Order of proofs, see Trial, V; Indictment, IX, B.
Conformity to pleadings, variance, see Pleading, X; Indictment, I, E.
Proof of Service—
See Process, II, D; Notices § 8.
Proofs of Loss—
See Insurance, XV.

PROPERTY.

TREATS of the legal nature of property in its most general sense and of the law of lost goods.

Analysis.

§ 1. In general; subjects, nature, and kinds.
§ 2. Ownership, possession, and incidents.
§ 3. Lost goods.

§ 1. In general; subjects, nature, and kinds.

[Note. "Property" as a legal concept is too general to admit of a collection of cases or cross-references exhaustive of the bearings of the word. See generally topics treating of the particular kind of property in question or of the particular contract, tort, or proceeding in question.]

Rights of property and guaranties under the constitution, see Constitutional Law.
Property defined, as used in the due process clause, see Constitutional Law § 138.
Liquors as property under constitutional prohibition, see Intoxicating Liquors ¶¶ 185, 186.
Doctrine of equitable conversion of personalty into realty, see Equity § 12.
Equitable conversion as applied to partnership property, see Partnership § 25.
Real or personal nature for purposes of devolution, see Descent §§ 7, 8.
Real or personal nature of chattel annexed to land, see Fixtures.
Severed timber as real or personal property, see also Deeds ¶ 227.
Property in fish or game at large or when captured, see Fish and Game § 8.
Nature of property in trees before and after severance as factor in conversion, see Conversion § 9.
Crops as part of the land, see also Deeds § 64.
Property included in term "goods, wares and merchandise" within statute of frauds, see Frauds, Statute of § 39.
Dogs as property, see Animals § 1.
Property rights in sunken and derelict logs, see Forestry § 4.
Good will as property right, see Good Will ¶ 2.
Literary and intellectual productions as property, see Literary Property.
Nature of property in mines and minerals, see Mines.
Property as consideration or payment for stock to corporation, see Corporations §§ 266-268.
Property as consideration for promise, see Contracts § 110.
Franchises as personal property for purposes of taxation, see Taxes § 106.
Measure of damages for torts to property, see Damages, III, B, C.
Property subject to attachment or execution, see Attachment, III; Executions, IV; Exemptions; Homesteads.
Property susceptible of conversion, see Conversion §§ 7-9.
Property susceptible of larceny, see Larceny § 2.
Property to which mechanics' lien attaches, see Mechanics' Liens, III.
Municipal property rights and titles, see Municipal Corporations § 100 et seq.
Description in indictments, see Indictment § 28.
General and special ownerships, see Bailments; Pledges; Chattel Mortgages; Sales, XII; Executions.
Transfers, conveyances, and incumbrances, see Assignments; Deeds; Sales; Vendors and Purchasers; Mortgages; Chattel Mortgages; Pledges; Bailments.
Matters pertaining to real property, see Real Property and cross-references collected there.

¶ 1. "Property" includes a leasehold.—City of Detroit v. C. H. Little Co., 141 Mich. 637.

¶ 2. Ice already formed, whether in the water or out, is personalty, and may be sold as such.—Higgins v. Kusterer, 41 Mich. 318.

¶ 3. A secret process of manufacture for a commodity is property.—O. & W. Thum Co. v. Tloczynski, 114 Mich. 149.

¶ 4. A person's occupation or calling, by means of which he earns a livelihood and endeavors to better his condition and to provide for and support himself and those dependent upon him, is property, within the meaning of the law, and entitled to protec-

tion as such.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

§ 2. Ownership, possession, and incidents.

See also cross-references, ante § 1.

Doctrine of accession and confusion, see Accession and Confusion.

Assignable rights in property, see Assignments, I.

Title to goods in transit, see Carriers, II, C.

Right to transfer or alienate mortgaged chattels, see Chattel Mortgages, II, B.

Corporate powers respecting property and franchises, see Corporations, XIII.

Property of associations, see Associations § 7.

Partnership capital and property, see Partnership, III.

Applicability to personalty of the rule against perpetuities, see Perpetuities.

Rights and restrictions on use implied from or incident to contracts, see also Contracts §§ 197, 196.

Validity of purchase tending to produce combination in trade, see Combinations ¶ 5.

Proper remedy to obtain possession of chattels, see Attachment ¶ 1; Replevin.

Effect of judgment in trover to pass title, see Conversion § 44.

Judgment in replevin as res adjudicata of right of property, see Former Adjudication § 43.

Effect on ownership or title of contract void under statute of frauds, see Frauds, Statute of § 131.

Property of beneficial society, see Fraternal Associations § 10.

Presumptions as to title and possession and as to title from fact of possession, see Evidence §§ 54, 56; Sales, XI.

Possession as presumptive title to support trover, see Conversion §§ 19-21.

Opinions and conclusions as to ownership, see Evidence §§ 214, 215.

Evidence of possession and occupancy as proof of common ownership in crops, see also Evidence ¶ 2903.

Possession by corporate agent as possession by corporation, see Corporations § 150.

Possession of indorsed stock certificates as presumptive evidence of title, see Corporations § 284.

Power to divest property by distraint, see Animals.

¶ 5. Possession of personal property under a claim of ownership is presumptive evidence of ownership until the contrary is shown.—Trevorrow v. Trevorrow, 65 Mich. 284.

¶ 6. The increase from personalty cannot be claimed as part of it by levying creditors if they have allowed it to accumulate for a long time under the transferee's management.—Wheeler v. Wallace, 53 Mich. 355.

§ 3. Lost goods.

Abandonment of property, see Abandonment.

Rewards for lost property, see Rewards.

Replevin to reclaim lost goods from finder, see Replevin.

Interest in lost goods as consideration for promise, see Contracts ¶ 404.

Joint finders of lost goods, mutual rights, see also Contracts ¶ 454.

Equitable lien of finders of lost goods, see Liens ¶¶ 33, 34.

Necessity that agreement for division of property found to be in writing, see Frauds, Statute of ¶ 14.

Rewards for finding and return of lost property, see Rewards.

¶ 7. At common law the finder of lost goods has a complete title as against all but the owner.—Cummings v. Stone, 13 Mich. 70.

¶ 8. Neglect to tender a reward offered for lost goods does not prevent replevying them from the finder.—Wood v. Pierson, 45 Mich. 313.

PROPOSALS to PUBLIC CHARITIES.

Cross-References.

Proposals—
- To make or enter into contract, see Contracts, III; Public Contracts, II.

Pro Rata Distribution—
- Under wills, see Wills, VI.
- Of intestate property, see Descent; Estates of Decedents, XIII.
- Among creditors, see Assignments for Creditors § 23 et seq.; Bankruptcy § 12; Estates of Decedents § 221; Corporations § 226; and see Marshalling Assets.
- Application of payments among several debts, see Payment, III.

Prosecuting Attorneys—
- See Attorneys, III.

Prosecution—
- For crime, see Indictment and Prosecution.
- Under city ordinances, see Municipal Corporations, XVI, B.
- Actionable malicious prosecution or false imprisonment, see False Imprisonment; Malicious Prosecution.
- Civil action for statutory penalties, see Penalties.

Prospecting—
- See generally Mines.

Prospective Construction—
- See Statutes, V, VI.

Prospective Damages—
- See Damages.

Prospective Values—
- See Values; Eminent Domain § 37 et seq.

Prostitution—
- As a crime, see Crimes § 120.
- Credibility of prostitutes as witnesses, see Witnesses, VI.
- Corroboration of testimony of prostitutes, see Indictment § 317; Divorce § 67.
- Libelous or slanderous imputations of prostitution, see Libel and Slander.

Protection—
- Constitutional right to equal protection

of the laws, see Constitutional Law § 224 et seq.
Right of self-protection, see Assault and Battery; Homicide.
Duty of protection to person of passenger from other persons, see Carriers, IV, E.
Duty to support and protect wife, child, or ward, see Husband and Wife, I; Parent and Child, II; Guardianship § 58.
Protection by Process or Command—
Justification for official act, see Officers §§ 65-67; Sheriffs, IV; False Imprisonment § 9 et seq.
Protest—
Of negotiable paper, see Negotiable Instruments § 57.
Of payment, see Payment § 57; Taxes, VIII; Local Improvements § 130.
Province of Court and Jury—
See Instructions, I; Indictment, IX, D; Trial, VI.
Provisional Relief—
See Injunctions, IV; Receivers; Equity § 187.
Provisos—
Construction of statutes, see Statutes, V.
Mode of pleading to meet or cover statutory provisos, see Indictment §§ 82, 89; Pleading § 17.
In contracts, deeds, and wills, see Contracts § 177; Deeds, III, D; Wills, VI.
Effect on negotiability of note, see Negotiable Instruments § 3.
Provocation—
To assault, see Assault §§ 6, 15 et seq.; Homicide.
As excusing act urged as ground for divorce, see Divorce § 39.
As excusing or mitigating defamatory utterance, see Libel §§ 44, 52.
As excusing intemperate argument or conduct of counsel, see Argument of Counsel § 28; Trial, II; Indictment § 891.
As matter mitigating damages, see Damages § 161.
Proxies—
To vote corporate stock, see Corporations, IX.
Proximate Cause or Consequence—
Doctrine that injury must proximately result in damage to be actionable, see Actions § 2; Torts; Negligence, III; and see topics treating of the specific tort or neglect, e. g., Highways, XII, XIII; Railroads, VIII; Street Railways, IV; Master and Servant, III.
Limitation of damages to proximate consequences of the wrong, see Damages, I.
Under Civil Damage Act, see Intoxicating Liquors § 76.
Public—
For matters described by the word "public" as an adjective, see specific topics and cross-reference headings treating of the particular matter which is public. See also those immediately following.
Public Acts and Resolves—
See Statutes.
Public Auctions—
See Auctions.
Public Boards and Commissions—
See Officers; Municipal Corporations, XV.
Public Bonds—
See Municipal and Public Bonds.
Public Bridges—
See Bridges; Highways.
Public Buildings—
See Counties § 18; Municipal Corporations §§ 104, 127.
Public Carriers—
See Carriers.
Public Charities—
See Charities.

PUBLIC CONTRACTS.

TREATS of the power and authority to make public contracts; forming and executing the contract and its necessary and proper provisions; interpretation and effect; actions to enforce; and bonds for performance and for the protection of labor and claims.

Analysis.

I. In general; power and authority.
§ 1. Contractual power in general.
§ 2. Appropriation or fund as prerequisite.
§ 3. Disqualification of contracting officer for interest.

II. Initiating, forming and executing contract.
§ 4. In general; preliminary estimates, plans and specifications.
§ 5. Advertising, receiving bids and letting contract.
§ 6. Acceptance with modification of specifications or terms.

§ 7. Approval by municipal board or other public body.
§ 8. Remedies of bidders.

III. Necessary and proper provisions; statutes.

§ 9. In general.

IV. Interpretation, validity, and effect; performance and discharge.

§ 10. In general; interpretation and effect of terms.
§ 11. Performance or breach, acceptance of work, and discharge.
§ 12. Changes and deviations.
§ 13. Clause for modification of terms or specifications.
§ 14. Stipulation covering assignments by contractor.
§ 15. Ultra vires agreements.
§ 16. Effect of personal interest in contracting officer.
§ 17. Abandonment, reletting and rights under uncompleted contract.

V. Implied contracts, and rights under invalid executed contracts.

§ 18. In general; implication against public.
§ 19. Liability for services or goods furnished.
§ 20. ——Acceptance or acquiescence with knowledge.
§ 21. Right to recover public money paid under illegal contract.

VI. Actions and suits.

§ 22. Rights of action on the contract.
§ 23. Pleading.
§ 24. Evidence.

VII. Bond, security or indemnity for performance and payment of labor and claims.

§ 25. In general; necessity and requisites of bonds.
§ 26. Duty and liability of contracting city or officers.
§ 27. ——Effect of failure or neglect to require bond.
§ 28. ——Actions against officers.
§ 29. Construction and obligation of bond.
§ 30. ——Irregularities and defects in contract or bond.
§ 31. Persons protected by bond.
§ 32. ——Materialmen or subcontractors.
§ 33. "Labor" covered by bond.
§ 34. Notice by subcontractor of reliance on bond.
§ 35. Rights and recourse of subcontractors, laborers, and materialmen.
§ 36. Measure and amount of recovery.
§ 37. Voluntary bonds and bonds not conforming to statute.
§ 38. Deposits, bonds, and securities collateral to contracts.
§ 39. ——For indemnification against negligence.
§ 40. Bonds under federal statutes for government contracts.
§ 41. Actions on bonds.
§ 42. ——On common-law bonds and bonds not conforming to statute.
§ 43. ——Pleading, issues, and evidence.

I. IN GENERAL; POWER AND AUTHORITY.

§ 1. Contractual power in general.

Appropriation or fund as prerequisite, see post § 2.

Disqualification of contracting officer for interest, see post § 3.

Power to change or modify terms or specifications, see post ¶¶ 37, 38.

Powers and liabilities of incorporated agency of state, see State of Michigan.

Contract powers and liabilities of counties, see also Counties, IV.

Contractual powers of townships, see Townships, III.

Power and functions of school officers, see Schools, III.

Property and fiscal affairs of schools, see Schools, IV.

Contractual power of superintendents of the poor, see Poor Persons § 13.

Duty to know limitations on power of county to contract, see Counties § 22.

Rule of judicial noninterference with municipal discretion respecting contracts, see Municipal Corporations § 34; Injunctions §§ 60, 61.

Purchase of road machinery, see also Highways § 143.

Powers of highway officers to make contracts and manner of making, see also Highways § 143.

Effect of enactment of statute for joint burden of expense of bridge on former contract by which one township assumed entire burden, see Highways ¶ 532.

Authority to complete drain by subsequent contract after the failure of the first contractor, see also Drains § 75, ¶ 223.

Scope of contractual powers of municipalities, see Municipal Corporations § 112 et seq.

Officers authorized to contract for city, see Municipal Corporations § 186.

Disability of officer to promise additional compensation for work, see Municipal Corporations ¶ 824.

Power of cities and villages to contract with individuals for water or lighting supply, see Municipal Corporations § 120.

Disability of city to bargain away its police powers, see Municipal Corporations § 75; see also Contracts, IV, B.

Duty to take notice of limitations on municipal power to contract, see also Municipal Corporations § 113.

Power to ratify unauthorized contract, see also Highways ¶ 511.

Municipal ratification of officer's unauthorized contract, see Municipal Corporations § 188.

Contracts for state printing and reports, see State of Michigan § 8.

Public undertakings to exonerate or indemnify against taxation, see Taxes § 61.

Grants of swamp lands in compensation to contractors for public roads and rights under such grants, see Public Lands § 52 et seq.

Sufficiency of performance of road contract to entitle contractor to patent of swamp lands granted in compensation, see Public Lands § 55.

Prohibition against surrender of power of taxation by contract, see Const. art. X, § 9.

¶ 1. The proper parties to ratify a contract are those only who could lawfully have made it. Thus a municipality may affirm a contract that the law would have permitted it to enter into in the first instance, but not one that it had no original power to make.—Township of Taymouth v. Koehler, 35 Mich. 22; Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429; Davis v. Mayor, Recorder and Aldermen of City of Jackson, 61 Mich. 530; Wrought Iron Bridge Co. v. Township of Jasper, 68 Mich. 441.

¶ 2. Where a board of supervisors had delegated a committee to buy certain furniture and had let the contract to the highest bidder, and the supervisors afterwards ratified the contract, the act of the committee becomes the act of the board, even though the committee originally could not have bought such a large quantity.—Raymond v. McKenna, 147 Mich. 35.

§ 2. Appropriation or fund as prerequisite.

Municipal bonds in general, see Municipal Bonds.

Issuance and sale of municipal bonds, see Municipal Bonds, I, II.

Agreements between townships for allotment of expenses of roads and bridges, see Highways § 151.

Incurring debts after annual appropriations are made, see Municipal Corporations ¶¶ 596-598.

Estoppel of city to plead that contract created debt beyond limit, see also Municipal Corporations ¶ 500.

¶ 3. In the absence of statutory restrictions, a municipal contract for electric lighting is not invalidated by the fact that the city has no money on hand, at the time the contract is made, which can lawfully be applied to such purpose.—Mitchell v. City of Negaunee, 113 Mich. 359.

¶ 4. A provision in a city charter prohibiting the letting of contracts before the money proposed to be expended is in the treasury does not prevent the city from accepting a bequest for a drinking fountain where the fund is held by trustees who are under duty to pay it over as the necessities of the work demand.—Hosmer v. City of Detroit, 175 Mich. 267.

¶ 5. Under section 240 of the 1904 Compilation of the Charter of the city of Detroit, contracts for the removal and disposition of garbage are exempted from the provision that a tax assessment must be laid to pay the expenses in advance of a contract, and a

claim that an appropriation made by the common council under such a contract is inadequate is not entitled to weight, where it is not made a prerequisite to entering into the contract that the fund with which to meet the demands growing out of it shall be on hand.—Detroit Reduction Co. v. Blades, 143 Mich. 591.

¶ 6. Under the Detroit charter of 1857 the city has no power to make itself responsible for any public work; and such work can only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose.—Goodrich v. City of Detroit, 12 Mich. 279.

¶ 7. To sustain a contract with highway commissioners to build a bridge, there must be proper written evidence on file or of record showing that the statutory preliminaries to a legal meeting of the electors to vote money for the purpose have been complied with, and that such a meeting has been held, and what proceedings were taken; but such proceedings should be liberally construed, and all proper intendments made in favor of their regularity.—Taymouth Township v. Koehler, 35 Mich. 22.

§ 3. Disqualification of contracting officer for interest.

Effect of personal interest of contracting officer on validity of contract, see post § 16.
Interest or relationship affecting right of councilman to vote for contract, see Municipal Corporations § 41.
Employment of member of health board as its physician, see Health § 6.
Disqualification of members of legislature to have interest in contract, see Const. art. V, § 7.
Disability of county officers having interest in contracts, see Comp. L. 1915, § 2355.
Disability of city officers to have interest in contract, see Comp. L. 1915, § 2993.
Disability of village officers to have interest in contract, see Comp. L. 1915, § 2624.
Disability of officers of public institution having interest in contract, see Comp. L. 1915, §§ 15102, 15103.

¶ 8. The provisions of a city charter forbidding city officials or officers to be interested in any contract with the city should not be narrowed by judicial construction.—Ferle v. City of Lansing, 189 Mich. 501.

¶ 9. A member of a city council of the city of Grand Rapids who enters into a contract with one who had contracted with the city to make certain street improvements for the furnishing of material for use in such improvements is not interested directly or indirectly in a contract between the contractor and the city within the prohibition of the city charter Revision 1905, § 498, providing that no "officer shall be a party to or directly or indirectly interested in, * * * any work, contract, purchase or sale with any contractor in relation to any work, contract * * * in, with, or to the city, * * * or in any work, contract, purchase or sale in which the city has a direct or pecuniary interest," and making such contracts void, where he entered into his contract subsequently to the making of the contract between the principal contractor and the city and he had no talk, and made no agreement with such contractor, before making the contract with the city, that the contractor should buy material from him. —People v. Southern Surety Co., 199 Mich. 30.

II. INITIATING, FORMING AND EXECUTING CONTRACT.

§ 4. In general; preliminary estimates, plans and specifications.

Advertising, receiving bids and letting contract, see post § 5.
Acceptance with modification of specifications or terms, see post § 6.
Approval by municipal board or other public body, see post § 7.
Remedies of bidders, see post § 8.
Mode of letting contract for prison labor, see Prisons § 3.
Mode of contracting for health and quarantine facilities, see also Health ¶ 22.
Mode of contracting by or with city or village, see also Municipal Corporations §§ 114, 115.
Mode and manner of signing contract for city, see also Municipal Corporations § 194.

¶ 10. Detroit Charter, Compilation of 1904, § 378, being § 12 of the Board of Public Works Act, and requiring a preliminary estimate of cost to sustain the making of a contract, applies to public works and improvements, and hence does not require such an estimate before a contract for the collection and disposal of garbage may be made, such a contract being expressly covered by §§ 234 and 240 of the Compilation.—Detroit Reduction Co. v. Blades, 143 Mich. 591.

¶ 11. Under a charter provision requiring the board of public works to prepare "so far as necessary, plans and specifications" for a public improvement, where the board has exercised its best judgment in the matter and prepared plans and specifications which the bidders can understand, the action of the board will not be reviewed by the court.—Kundinger v. City of Saginaw, 132 Mich. 395.

¶ 12. Where a city charter does not require that contracts for public improvements be let to the lowest bidder, the council may advertise for bids for the construction of a bridge under plans to be submitted by the bidder.—Kundinger v. City of Saginaw, 132 Mich. 395.

¶ 13. Under a charter provision that certain contracts shall be let to the lowest responsible bidder, specifications for lighting bids are sufficiently definite if they state the

candle power required for each light without naming any particular system of lighting.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

§ 5. Advertising, receiving bids and letting contract.

See also post ¶ 89.
Necessity of conformity of acceptance to proposal in general, see Contracts, III, B.
Applicability to water and lighting contracts of requirement of competitive bidding, see Municipal Corporations § 114.
Letting contracts for state supplies, see Comp. L. 1915, §§ 802-819.
Several instruments as single contract, see also Contracts § 150.
Proposals and bids for purchase of bonds, see Municipal Bonds § 8.
Estoppel of city by lapse of time to question regularity in making proper contract, see also Municipal Corporations ¶ 484.
Advertising, bidding and letting contracts for drains, see Drains § 52.
Necessity of bids for materials for drains under statutory authority to contract for construction, see Drains § 52, ¶ 163.
Mandamus to compel performance of public duty pertaining to making, letting, or performance, see Mandamus § 99.

¶ 14. A charter provision that certain public work shall be let to the lowest responsible bidder, after advertising for bids, requires that such information shall be put within the reach of bidders as will enable them to bid intelligently and will enable the city to know whose bid is lowest.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 15. Where a public lighting commission of a city advertises for and receives bids for the contract of furnishing certain machinery, and, pursuant to the statute requiring such proceeding, are about to award the contract to the lowest responsible bidder, they cannot legally receive and accept a supplemental bid from one of the unsuccessful bidders, and award the contract to such bidder; for to allow such action would vitiate the whole system of competitive bidding.—Attorney General ex rel. Allis-Chambers Co. v. Public Lighting Commission of City of Detroit, 155 Mich. 207.

¶ 16. In the absence of any fraud, or any violation of the law, in respect to letting the contract to the lowest responsible bidder, the common council of the city of Detroit has the right to reject a contract for the construction of a public work, and to refuse to go on with the work, which is practically a rejection of all bids.—Grant v. Common Council of City of Detroit, 91 Mich. 274.

¶ 17. A charter provision requiring the board of public works to advertise for proposals for public improvements, and to require all bidders to furnish security for performance, and that all bids be publicly opened and reported to the council with the board's recommendation in respect thereto, and that no contract shall be let until authorized by the common council, does not require that the contract be let to the lowest bidder.—Kundinger v. City of Saginaw, 132 Mich. 395.

¶ 18. The fact that a contract to purchase furniture to remodel a courthouse was let by a committee representing the supervisors to the highest bidder does not make it presumptively fraudulent.—Raymond v. McKenna, 147 Mich. 35.

¶ 19. Where a common council rejected the lowest bid for a paving contract and accepted a higher one, and the lowest bidders took no steps to compel the city to enter into a contract with them, but suffered the award to stand and heavy expenditures to be made in reliance upon it, such bidders are estopped from setting up any claim.—Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263.

¶ 19a. Where a statute authorizing a public agent to let contracts prescribes the mode—e. g., giving notice in a newspaper for sealed proposals—such mode of exercise of the power is not directory merely, but must be followed or the contract is void.—State Prison Agent v. Lathrop, 1 Mich. 438.

§ 6. Acceptance with modification of specifications or terms.

Change or modification of terms or specifications during performance of contract, see post § 12.
Interpretation and effect of clause in contract providing for changes and modifications in terms or specifications, see post § 18.
Extra work, see generally Building Contracts, V.
Certifying changes or extra work, see Building Contracts § 36.

¶ 20. Where a proposition made to a municipal corporation as to matters within the scope of its powers is accepted with modifications which the proponent assents to, he is as much bound by them as if they had been in his original proposition.—Long v. City of Battle Creek, 39 Mich. 323.

§ 7. Approval by municipal board or other public body.

Vote of county board to let contract for county buildings, necessity of two-thirds, see Counties § 19.

¶ 21. Under the charter of the city of Detroit, the approval by the common council of contracts for the construction of any public work is not a mere matter of form, but a necessary requisite to the validity of the contract.—Grant v. Common Council of City of Detroit, 91 Mich. 274.

§ 8. Remedies of bidders.

Actions and suits on contract, see post VI.
Actions against officers, see post § 28.
Actions on bonds, see post §§ 41-43.
Injunctions against improper public contracts and letting thereof, see Injunctions § 60.

¶ 22. One whose bid has been accepted by a municipality and to whom a contract has been awarded has an action at law for breach of contract and is not entitled to an injunction against the city's making a contract with another party covering the same subject-matter.—Riker v. Oakland Circuit Judge, 138 Mich. 181.

¶ 23. A bidder on a contract for a local improvement awarded to another has no standing in a suit to enjoin the city from entering into the proposed contract.—City of Detroit v. Wayne Circuit Judge, 128 Mich. 438.

¶ 24. The lowest but unsuccessful bidder for work for city whose charter requires contract to be let to lowest responsible bidder has not a right of action at law against the city to recover profits he might have made had his bid been accepted.—Talbot Paving Co. v. City of Detroit, 109 Mich. 657.

¶ 25. In assumpsit to recover the amount of a deposit accompanying a bid to furnish steel conduit pipe to a city, the defense that the plaintiff failed to perform the contract and by reason of its default the defendant lost more than the amount of the deposit in damages is not sustained by evidence showing that the plaintiff submitted bids on several sizes of pipe, the city council never approved the action of the water commissioners as to the exact size of pipe to be used as provided in Local Acts 1899, No. 353, and the plaintiffs never accepted or acquiesced in the resolution of the commissioners.—Chicago Bridge & Iron Co. v. City of West Bay City, 129 Mich. 65.

III. NECESSARY AND PROPER PROVISIONS; STATUTES.

§ 9. In general.

Interpretation, validity and effect of provisions of contract, see post IV.

Necessity for provision for bond, see post VII.

¶ 26. A provision may legally be inserted in a contract for erection of a county building that payments to the contractors shall not be made so long as any claims for work or materials stand against them.—Knapp v. Swaney, 56 Mich. 345.

¶ 27. A city has no power to insert in a contract for public work, a clause requiring the contractor to employ union labor exclusively.—Lewis v. Board of Education of City of Detroit, 139 Mich. 306.

IV. INTERPRETATION, VALIDITY, AND EFFECT; PERFORMANCE AND DISCHARGE.

§ 10. In general; interpretation and effect of terms.

Performance or breach, acceptance of work and discharge, see post § 11.

Changes and deviations, see post § 12.

Clause for modification of terms or specifications, see post § 13.

Stipulation covering assignments by contractor, see post § 14.

Ultra vires agreements, see post § 15.

Effect of personal interest in contracting officer, see post § 16.

Abandonment, reletting and rights under uncompleted contract, see post § 17.

Implication against public in general, see post § 18.

Construction of bond, see post § 29.

Necessary, proper or statutory provisions, see ante III.

Actions and suits on contract, see post VI.

Defect in contract as affecting obligation of bond, see post § 30.

Valid and sufficient contract as basis for local improvement and assessment, see Local Improvements §§ 34-86.

Inhibition against extra compensation, see Constitutional Law § 278.

Inhibition of impairment by law, see Constitutional Law, VI.

Municipal contracts for public facilities and supply or for the right of use or connection, see Municipal Corporations §§ 118-120.

Public policy as to contracts looking to illegality in contracts with the public, see Contracts §§ 55-57.

Invalidity of agreement to charge excessive price to contractor with intent to enhance price to public, see Contracts § 49, ¶ 208.

Validity when made before adverse legislation, see also Contracts § 43.

Public policy as to provisions for withholding part of price of work, see Contracts § 47, ¶ 201.

Exclusive contract with public as a "combination," see Combinations § 5.

Propriety of construction of county roads by contract, see Highways § 105.

Contract of city to protect street as relieving contractor from liability for negligence, see Negligence ¶ 24.

Presumption that both parties know the law governing contract, see also Evidence § 47, ¶ 256.

Time provisions and delay, and waiver or extension, see Building Contracts, III.

Contract with owner of patent right for patented pavement, see also Patents ¶ 22.

¶ 28. All persons contracting with a public officer for public work are bound to take notice of the provisions of the statute under which the work is let.—Mackenzie v. Baraga Township Treasurer, 39 Mich. 554.

¶ 29. A contract made by village trustees, as such, for the building of abutments to a public bridge does not bind the trustees personally for payment, but is apparently binding on the village.—Lyon v. Irish, 58 Mich. 518.

¶ 30. Whether a contract by the board of supervisors for the removal of sunken logs

and obstructions to navigation, attempted to be made under Comp. L. 1897, § 2494, by which contract the other party was to have as part of the compensation the right to all salvage of such logs, was invalid as essaying to transfer title to the logs without due process of law from the owners to the contractors, quære.—Gainer v. Nelson, 147 Mich. 113.

¶ 31. Laws 1865, Act No. 338, providing for the construction of a state road with a proviso that the state shall not be chargeable with any except certain expenses, and appropriating swamp lands for the purpose of aiding in the construction, and also that the contract should be let in accordance with provisions of the Laws 1859, No. 117, which provide that the contractor might elect to take his pay in money or in lands at $1.25 per acre, makes the contract one for remuneration in land only, and is in no sense a contract for money.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

§ 11. Performance or breach, acceptance of work, and discharge.

Implied contracts and rights under invalid executed contracts, see post V.

Questions of performance or breach of provisions of contracts for works of construction for the public, not dependent on the public character of the contracting party, see Building Contracts; Contracts, VII.

Right to set up breach of contract by way of set-off and recoupment, see Set-off.

Power of legislature to break contract and disability of courts to interfere, see Constitutional Law § 42.

Liquidated damages for breach or delay, see Damages § 186.

Constraint enforcing payment of penalty for delay as duress, see Duress ¶ 20.

Effect of impossibility of supplying thing of grade called for, excuse for nondelivery, see also Contracts ¶ 976.

¶ 32. Acceptance of work and settlements for same by public officials have not usually the force of judicial determinations, but are mere adjustments of rights subject to reconsideration and do not bar a defense of improper performance subsequently discovered. —Van Akin v. Dunn, 117 Mich. 421.

¶ 33. Where a contract for a municipal improvement did not make the city engineer's decision final and conclusive as to the sufficiency of the work performed, the correctness of his determination that materials used did not comply with the specifications, may be determined by the court in an action against the city to recover for work which the engineer refused to approve.—Algate v. City of Lansing, 180 Mich. 484.

¶ 34. A contract for a smoke preventer made by a proposal to the common council of the city of Grand Rapids, followed by a reference to the board of public works, and by it in turn to its committee "with power to make a trial as set forth in" the proposal, which proposal was to install and remove "at our own expense if found unsatisfactory by you," creates no liability where the record of the proceedings of the board of public works shows that thereafter the committee verbally reported that after careful tests they would recommend that the bill for the appliances in question be not paid and that the proposing company be requested to remove said apparatus, and that the board adopted such report; since under the law requiring the board to keep a record of its proceedings and determinations (Local Acts 1897, No. 374) no other evidence of the action of the board can be considered and the record shows that the device was not "satisfactory" as proposed.—Graham v. City of Grand Rapids, 141 Mich. 612.

¶ 35. A contract to install a smoke preventer in a city pumping plant with a warranty that it would prevent smoke, etc., and accomplish certain other results cannot be said to have been made in sole reliance on the warranty, where it was proposed with an offer to "install and remove at our expense, if found unsatisfactory by" the city council, and where the council through the board of public works and its committee accepted the proposal on trial "as set forth in" the proposal; and hence recovery cannot be had on proof that the preventer performed its functions according to the terms of the warranty. —Graham v. City of Grand Rapids, 141 Mich. 612.

¶ 36. It would seem that an unauthorized attempt to collect a certified check deposited with a village as an evidence of good faith in the securing of a gas franchise may be regarded as evidence of an intention to forfeit to the village.—Griggs v. Village of Red Jacket, 171 Mich. 142.

§ 12. Changes and deviations.

Clause for modification of terms or specifications, see post § 13.

Want of consideration for promise of additional compensation, see Contracts § 126.

Alteration in the contract as discharging guarantors, see Guaranty § 18.

Demanding reconstruction where fault is due to city engineer's requirements, see Building Contracts § 9.

¶ 37. Under a charter provision that after a public building has been authorized by the council, the board of public works shall prepare plans and specifications, and after advertising for bids shall submit them to the council which alone can authorize a contract to be made, the board of public works has no power to change the specifications after the contract has been made so as to use a different material at an increased cost.—Chittenden v. City of Lansing, 120 Mich. 539.

¶ 38. A city charter provided that no contract should be made for any public work

unless it shall have been approved by the council, and that all contracts should be entered into with the lowest responsible bidder. The board of public works, when the construction of a sewer should have been ordered, was required to advertise for proposals to execute the work according to plans and specifications, and was authorized to contract with the lowest bidder, and to supervise the work of construction. Held, that the board had no authority to make any substantial deviation from the terms of an existing sewer contract, and that, therefore, the contractor could not recover extra compensation from the city because of a variation from the plan of the work, made by direction of the board. —Campau v. City of Detroit, 106 Mich. 414.

§ 13. Clause for modification of terms or specifications.

Changes and deviations in general, see ante § 12.

¶ 39. Under a city charter providing that whenever the council shall order public work, the board of public works shall proceed to estimate the cost and may cause surveys, plans and specifications to be made and report the same to the council; a contract for constructing a sewer providing that if the amount of excavation should vary from the plans, specifications or estimates referred to in and made part of the contract, the contractor should be paid pro rata; the only estimates which the council was bound to or could notice, were those reported by the board of public works, and the contractor was not entitled to recover for extra work furnished on estimates furnished by the city surveyor. —Fox v. City of Bay City, 122 Mich. 499.

¶ 40. Where, by the terms of a contract for the improvement of a street, it was agreed that the city surveyor should estimate and decide the additions and deductions to be made to or taken from the contract price in consequence of any changes, additions or deductions, which duty was performed, and the amount fixed and reported to and approved by the board of public works, the contractor is bound by such determination, in the absence of fraud or unfair dealing on the part of the surveyor.—Rens v. City of Grand Rapids, 73 Mich. 237.

¶ 41. A contract for construction of a sewer provided that "the work embraced in this contract shall be prosecuted in such order and at such places as the board of public works may direct"; that "the excavations should be made of such widths and in such direction as may be necessary"; that "any work which might be required to be done, but which was not specified in the contract, should be performed in accordance with the directions of the board, and should be paid for at their valuation"; and that the contractor should "perform the contract as specified, but should make any alterations in the form, dimensions, or materials that might be directed in writing by the board." Held, that no authority was conferred upon the board to make any material change in the plans as to the course or location of the sewer.—Campau v. City of Detroit, 106 Mich. 414.

§ 14. Stipulation covering assignments by contractor.

Nonestoppel of city by resolution of council rescinded before action on it which preferred assignee of contractor to claims of materialmen, see Estoppel ¶ 212.

¶ 42. A contract between a city and a contractor which contains a provision that an assignment or order by the contractor shall hold good only as against the net sum reported by the city engineer as due the contractor after adjustment of all claims by the common council after withholding claims for labor and materials, affects the rights of assignees as between themselves and the original contractor; and such a provision must be held not to be solely for the benefit of the city.—Carlisle v. Spain, 147 Mich. 158.

¶ 43. Where a paving contract contained the provision that any assignment or order by the contractor shall hold good only as against the net sum reported by the city engineer as due the contractor after adjustment of all claims by the common council or other accounts as authorized by the contract, an assignee of the contractor is postponed in his claim to a materialman, even though the money received by the assignee was applied in payment of labor and materials.—Carlisle v. Spain, 147 Mich. 158.

§ 15. Ultra vires agreements.

See also post ¶ 63.

Invalidity of bonus to road contractor payable in swamp lands, see Highways ¶ 365.

¶ 44. The fact that a part of the consideration for a grant of land to a city as an agreement by the city to do something which is ultra vires, but neither malum prohibitum nor malum in se, will not relieve the city from liability as to the remainder of the consideration.—Coit v. City of Grand Rapids, 115 Mich. 493.

¶ 45. A city cannot retain the benefits of an agreement, ultra vires only in part, which has been fully performed by the other party, and at the same time deny the validity of the contract for defects in the execution thereof.—Coit v. City of Grand Rapids, 115 Mich. 493.

§ 16. Effect of personal interest in contracting officer.

See also ante ¶ 9.

Disqualification of contracting officer for interest, see ante § 3.

Interpretation of provision of city charter as to prohibition against officer having interest in contract, see also ante ¶ 8.

Interest or relationship affecting right of councilman to vote for contract, see Municipal Corporations § 41.
Employment of member of health board as its physician, see Health § 6.
Prohibition against officers of public institution having interest in contract, see Comp. L. 1915, §§ 15102, 15108.
Prohibition against member of legislature having interest in public contract, see Const. art. V, § 7.

¶ 46. A contract taken by a part of the same public officers or agents appointed by law to let it, and who, as such officers, participated in letting it, is void.—People ex rel. Plugger v. Overyssel Township Board, 11 Mich. 222.

¶ 47. Act No. 107, Pub. Acts 1873, provides that no officer having charge of any educational, charitable, etc., public institution of the state shall be personally, directly or indirectly, interested in any contract of sale made with such institution, and that all contracts made in such a case shall be null and void. Plaintiff, a foreign corporation, sold coal to defendant trustees of the Michigan Employment Institution for the Blind. A member of the board of trustees of said institution was a stockholder in plaintiff at the time of entering into the contract of sale. In a suit for the purchase price of the coal, held, the contract was void and plaintiff could not recover.—Consolidated Coal Co. v. Michigan Employment Inst. for the Blind, 164 Mich. 235.

¶ 48. Under section 53 of the charter of the City of Lansing, providing that no member of the city council nor any person holding any elective or appointive office under the city government shall be interested in any contract with the city, and providing a penalty for violation thereof, every contract with a city is made void when a member of the council or any officer of the city has any interest in it, whether such member of the council or city official has, or has not, himself, been guilty of procuring the contract, or whether or not he had any knowledge of it.—Ferle v. City of Lansing, 189 Mich. 501.

¶ 49. Under the charter of the city of Grand Rapids, Revision 1905, § 498, providing that no officer shall be a party to or directly or indirectly interested in any work or contract with any contractor in relation to work or contract with the city, and that any such contract with the city shall be void, as against the city, only the city can complain of a contract of a member of the council to furnish materials to a street improvement contractor.—People v. Southern Surety Co., 199 Mich. 30.

¶ 50. A contract by a member of a law firm with a city, of the council of which another member of the firm is a member, for the performance of legal services is merely voidable, and at the instance of the city only when deemed best for the public interests, under a city charter providing that no officer of a city shall be a party to or directly or indirectly interested in, or be the beneficiary of, any work or contract with the city, and that any contract made in violation of its provisions shall be absolutely void and of no effect "against the city, or any board or department thereof, including the board of education," and that every member of a partnership shall be considered as interested, since, by the specification of those against whom the contract should be void it was not intended to make them void as against any other party.—Schurtz v. City of Grand Rapids, 199 Mich. 20.

§ 17. Abandonment, reletting and rights under uncompleted contract.

Rights under invalid executed contract, see post VI.

¶ 51. The amount saved by a municipal corporation, in letting a new contract to complete work unfinished under a former one that has been forfeited, is not the test of the amount equitably due to the prior contractor for work done and materials furnished.—People ex rel. Michigan Paving Co. v. Detroit Common Council, 34 Mich. 201.

V. IMPLIED CONTRACTS, AND RIGHTS UNDER INVALID EXECUTED CONTRACTS.

§ 18. In general; implication against public.

See also ante ¶ 25.
Liability for services or goods furnished, see post §§ 19, 20.
Right to recover public money paid under illegal contract, see post § 21.
Abandonment, reletting and rights under uncompleted contract, see ante § 17.
Interpretation, validity and effect of contract in general, see ante IV.
Implied contract against county for money or property received and used, see also Counties § 29.
Provisions of the constitution relating to contracts and indebtedness by the public, see Constitutional Law, XV.
Measure of quantum meruit on implied contracts, see Implied Contracts §§ 22-24.

¶ 52. An action upon the quantum meruit may lie against a city where the charter does not prohibit it.—City of Detroit v. Michigan Paving Co., 36 Mich. 335.

¶ 53. The city of Detroit, being incapable of contracting in regard to public improvements except by express contract, conforming to the charter conditions, and let under supervision, cannot be held upon an implied contract.—City of Detroit v. Michigan Paving Co., 36 Mich. 335.

¶ 54. Where there is no valid contract a township cannot be held on an implied con-

tract or be estopped by the acts of its officers; persons dealing with public corporations are not protected unless they make their contracts according to law; so held where bidder for construction of bridge failed to give security.—Mackey v. Township of Columbus, 71 Mich. 227.

¶ 55. A village cannot be impliedly liable where there can be no binding, express contract.—Spitzer v. Village of Blanchard, 82 Mich. 234.

¶ 56. A promise will not be implied as against a municipal corporation where it cannot contract expressly; where a city charter forbids the execution of public works except under contract with the lowest bidder, there can be no recovery as upon an implied contract for work done for the city's benefit but not actually contracted for.—City of Detroit v. Robinson, 38 Mich. 108.

¶ 57. One who has constructed a sewer for a city under a contract providing, in accordance with a charter provision that he will depend entirely on special assessments for his compensation, cannot recover a judgment against the city upon an implied assumpsit for the amount of his claim, although a temporary injunction has been issued restraining the city from collecting the assessment, and it has delayed taking steps either to establish the validity of such assessment or to make a new one.—Affeld v. City of Detroit, 112 Mich. 560.

¶ 58. Under the charter of Detroit a paving contract cannot be extended unless work has been actually begun upon it in good faith. —Butler v. City of Detroit, 43 Mich. 552.

¶ 58a. Plaintiffs rendered valuable services to the defendant township as attorneys in a successful litigation. They were drawn into service through conferences with the township attorney and with leading citizens interested in the lawsuit. The township did not, however, have knowledge that such service was being rendered, though the plaintiffs acted in good faith in the mistaken belief that they were retained under an express contract. Held, they could not recover the reasonable value of their services on an implied contract.—Clark v. Township of West Bloomfield, 154 Mich. 249.

§ 19. Liability for services or goods furnished.

Acceptance or acquiescence with knowledge, see post § 20.

Liability for public money paid under illegal contract, see post § 21.

Liability of county, city or township to pay for services or expenses rendered to board of health, see Health § 12.

Making use of materials as a conversion, and liability of city in tort, see Municipal Corporations ¶ 569.

¶ 59. There is no difficulty in bringing actions for quantum meruit against corporations any more than against individuals, so far as they are not guarded by charter against them. Where a city has had money or property belonging to others it may doubtless be compelled to answer.—City of Detroit v. Michigan Paving Co., 36 Mich. 335.

¶ 60. A city being incapable of contracting except by express contract cannot be held upon an implied contract but its liability for appropriating material not incorporated in a pavement for which it has contracted may be enforced in assumpsit.—City of Detroit v. Michigan Paving Co., 36 Mich. 335; and see City of Detroit v. Michigan Paving Co., 38 Mich. 358.

¶ 61. A paving company that had forfeited its contract left a quantity of sand in the street which it had agreed to pave, and another contractor used the sand in finishing the job. The company sued the city in assumpsit, resting on the tortious conversion of the sand. Held, that the company should have removed the sand, and as it neither did so nor made any demand for it, neither the city nor the later contractor committed any tort in removing it; that it was therefore not converted unless the city sold it; and if the city did not sell the sand it was not answerable for the use made of it by the contractor, as he was not a municipal agent.—City of Detroit v. Michigan Paving Co., 38 Mich. 358.

¶ 62. Where the specification of a public improvement fully describes the work to be done, and a bid in writing is made to do such work and is accepted and entered of record, although the written contract provided for in terms in the charter of a city is not executed, the neglect to execute the contract will not prevent the recovery of the reasonable value of the materials furnished and used.—Central Bitulithic Paving Co. v. Village of Highland Park, 164 Mich. 223.

¶ 63. A city let a contract for grading streets to the lowest bidder after complying with the charter requirements as to advertising for bids. After letting the contract, it arranged with the accepted bidder to do some extra grading not provided for in the specifications, without observing formalities. Held, the city was liable for the additional work despite its plea that the contract for the extras was ultra vires.—Peterson v. City of Ionia, 152 Mich. 678.

¶ 64. A city is liable for materials furnished it and used by it in the repair of its streets where the street commissioner under instruction of the street committee of the city council contracted therefor, although he had no authority to create a liability against the city; the claim being based upon the admitted appropriation and use of plaintiff's property by defendant without compensation. —Central Bitulithic Paving Co. v. City of Mt. Clemens, 148 Mich. 259.

¶ 65. A village newspaper cannot recover for printing the local ordinances unless the printing was ordered by the legislative body of the village.—Thornton v. Village of Sturgis, 38 Mich. 639.

¶ 66. A city is not liable to a paving contractor for labor and materials furnished by him under a contract which he has failed to complete, merely because what he has done may appear to be beneficial to the city; nor is it bound to tear up and return his materials.—City of Detroit v. Michigan Paving Co., 36 Mich. 335.

¶ 67. The fact that an electric light company continues to furnish light to a city after the expiration of its yearly contract does not necessarily cause a renewal of the contract for another year where circumstances show that such renewal was not intended.—Howell Electric Light & Power Co. v. Village of Howell, 132 Mich. 117.

¶ 68. Under an ordinance providing that an electric light company should erect and maintain such lights as the council might from time to time order, the city to pay the contract price agreed upon for lights so furnished, with a further provision that the council had power to amend or change the ordinance, and the company had the right to abandon its rights upon six months' notice, the city is not bound to accept and pay at the old contract price for all lights which have been ordered installed, after its contract has expired and it has failed to agree with the company upon any new contract.—Alpena Elec. Light Co. v. City of Alpena, 130 Mich. 413.

¶ 69. Where, before entering into contracts with a village for erecting an electric light plant and water works the contractors had notice that the propositions for such contracts had not received the necessary part of the electors' votes, held, that the president and the inhabitants of the village were not, by allowing the work to be done, estopped from disputing the liability of the village.—Daniels v. Long, 111 Mich. 562.

¶ 70. A judgment taken by default against the city of Grand Rapids for labor performed and materials furnished, the proceedings being under the mechanics' lien law of 1887, but the plaintiff declaring also upon all of the common counts in assumpsit, was valid as to the personal judgment upon the common counts; even though execution directed against the premises upon which the lien was established, was declared void and of no effect, on the ground that subsequent to the taking of such judgment, such mechanics' lien law was declared unconstitutional.—Koepke v. Dyer, 80 Mich. 311.

¶ 71. Where a school district made a contract for school desks and other articles without any formal authorization, and at the annual meeting following, the contract was brought before the voters and no objection made, and where thereafter payments were made and an interest-bearing warrant for the balance was issued and subsequently the entire principal was paid, and the payment reported to the district approved and adopted, but the interest was not paid; the district, having recognized the contract to be valid as to the principal, and accepted and used the furniture, could not repudiate it as to the interest.—Haney School Furniture Co. v. Crystal Lake T'p School Dist. No. 1, 133 Mich. 241.

§ 20. ——Acceptance or acquiescence with knowledge.

¶ 72. A municipal corporation may be held liable on an implied assumpsit for the reasonable value of services actually accepted with full knowledge of all the facts.—Davis v. School Dist. No. 1, 81 Mich. 214.

¶ 73. Comp. L. 1897, § 2908, authorizing villages to contract for street lighting does not restrict a village as to the manner in which it shall contract and hence it may be held to a contract upon any evidence showing service rendered for an expected compensation and accepted with an expectation of paying therefor.—Howell Elec. Light & Power Co. v. Village of Howell, 132 Mich. 117.

¶ 74. Where the board of sewer commissioners is authorized to purchase sewer-pipe for the use of the city, and receives bids under a proper advertisement, and awards the contract to the lowest bidder, who, after such award, and prior to the preparation by the city attorney of a contract which the charter requires him to draw on being furnished by the board with the necessary plans and specifications, which is to be approved and executed by the board, furnishes material in accordance with the bid and award to the sewer board, and the board receives it, and places it in the sewer, it is estopped from setting up as a defense, in a suit to recover for such material, its neglect to procure the drafting of the contract, or that any officer for the city has neglected to perform the clerical or ministerial work devolving upon him by the charter, and it is bound to pay whatever such material is reasonably worth.—Carey v. City of East Saginaw, 79 Mich. 73.

¶ 75. Knowledge on the part of a township that a bridge is being constructed under an unauthorized contract made in its behalf does not impose liability.—Wrought Iron Bridge Co. of Canton, Ohio v. Township of Jasper, 68 Mich. 441.

¶ 76. The use of a bridge by the people of a township when traveling upon a public highway cannot be construed as an act of acceptance of the work done in building the bridge.—Taymouth Township v. Koehler, 35 Mich. 22; Wrought Iron Bridge Co. of Canton, Ohio v. Township of Jasper, 68 Mich. 441.

§ 21. Right to recover public money paid under illegal contract.

Nonliability for money illegally borrowed by officers, see also Highways ¶ 522.

¶ 77. A village is not prevented from following funds expended ultra vires by its authorities in giving a bonus to a manufacturing plant, on the theory that the making of the ultra vires agreement prevents it from coming into equity with clean hands.—Village of Reed City v. Reed City Veneer & Panel Works, 165 Mich. 599.

¶ 78. Two members of the finance committee of complainant village executed a contract by which the village agreed to advance $10,000 to defendant manufacturing corporation in consideration that the latter would erect and run its plant for five years, employing forty men, with a wage expenditure of $20,000 annually. The village authorities advanced $6,000, which was used to construct a building which was burned. Held, the contract being beyond the powers of the village, it might maintain its bill to follow the insurance money and to recover the difference between the amount of the insurance money and the sum advanced.—Village of Reed City v. Reed City Veneer & Panel Works, 165 Mich. 599.

VI. ACTIONS AND SUITS.

§ 22. Rights of action on the contract.

Pleading, see post § 23.

Evidence, see post § 24.

Actions on bonds, see post §§ 41-43.

Interpretation, validity and effect of contract, see ante IV.

Remedies of bidders, see ante § 8.

Injunction suit by unsuccessful bidder to prohibit letting of contract to another, see ante ¶¶ 22, 23.

Omission of security as defense in suit by contractor for material furnished, see post ¶ 89.

Actions by and against townships, see Townships, VIII.

Right to set up breach of contract by way of set-off and recoupment, see Set-off.

Rule of judicial noninterference with municipal discretion respecting contracts, see Municipal Corporations § 34; Injunctions §§ 60, 61.

Propriety of suit to set aside contract for irregularity in resolution or ordinance forming it, see also Municipal Corporations ¶ 319.

Suits by attorney general against municipality to avoid contract, see also Municipal Corporations ¶ 913.

Necessity of statement of amounts due or of clearing up liens as prerequisite of action on construction contract, see Building Contracts, IX.

Right of trustee of contractor in bankruptcy to compel payment of money, where he also represents subcontractors and all others in fund, see Bankruptcy § 18.

Necessity of joining contractors as parties defendant in suit for relief from drain proceedings, see Drains § 108.

Action against county drain commissioner on contract for drain construction, see Drains § 94.

¶ 79. A contractor cannot recover against the contracting municipality for damages for being delayed in performance of a grading contract where such delay was caused by the service of an injunction restraining the grading of the street, because the embankment must necessarily rest partially upon the land of abutting owners, at the suit of one of whom the writ was issued.—Mathewson v. City of Grand Rapids, 88 Mich. 558.

¶ 80. Defendant is not rendered liable for delay in the performance of a grading contract occasioned by the service of an injunction restraining him by the fact that its board of public works requested the contractor to stop work in front of land of other abutting owners than the one at whose instance the injunction was issued, such request by the board being ultra vires and void.—Mathewson v. City of Grand Rapids, 88 Mich. 558.

§ 23. Pleading.

Pleading in actions on bonds, see post § 43.

General law of pleading, see Pleading.

Interpleader of materialmen and claimants by public, see also Interpleader § 2, ¶ 12.

Matters of procedure and practice under general law of contract actions, see Contracts, X.

¶ 81. On demurrer to a declaration upon a contract it was held that the averment in the declaration that "the said plaintiff and the said defendant entered into their certain contract in writing, which said contract, sealed by the said plaintiff and by the said defendant, by its agents and servants, the president and trustees of the village of Kalamazoo, executing the same, and having full power and authority so to do and to bind the defendant thereby, is in the words and figures following" (setting it forth verbatim), was sufficient to embrace whatever was essential to confer upon the president and trustees the proper authority to make the contract on behalf of the village.—Gale v. Village of Kalamazoo, 23 Mich. 344.

§ 24. Evidence.

Evidence in actions on bonds, see post § 43.

General law of evidence, see Evidence.

¶ 82. The charter of Detroit requires that proposals for public work shall be advertised for, and the contract let to the lowest bidder. Held, that if the construction of the contract were questioned, the advertisement and bid would be admissible in evidence.—City of Detroit v. Robinson, 38 Mich. 108.

¶ 83. Where an offer was made to lay paving specified in an official advertisement, and a contract resulted authorizing the municipality to withhold enough to pay a certain royalty upon the pavement used, the advertisement, contract and previous correspondence showing what the parties understood the amount to be withheld would be, were held admissible in an action on the contract.—City of Detroit v. Robinson, 38 Mich. 108.

¶ 84. In an action by an electric light company to recover for lights furnished after the expiration of its yearly contract on the ground that the furnishing of the light and acceptance thereof caused a renewal for another year, evidence of a conference at which the company refused to renew except at the old terms and for five years, and of a resolution of the council passed subsequently and after the contract had expired, refusing such terms, is admissible to show that the parties understood that no renewal had taken place.—Howell Elec. Light & Power Co. v. Village of Howell, 132 Mich. 117.

¶ 85. Where a city, after the taxes for the year had been voted, made a contract to purchase a machine for $2,650, for use in its electric lighting plant, and after having accepted and used the machine and paid $650 on the price, refused payment of the balance on the ground that the contract was ultra vires, it was incumbent upon the city in an action for the balance due, to affirmatively show that the obligation arising out of the contract would exceed the amount the common council was authorized to incur an obligation to expend, and where on the contrary it appeared that there was an electric lighting fund of $1,400, and there was nothing to show that there was not sufficient on hand in either the lighting fund or general fund to meet the obligation, the defense was not sustained.—Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491.

¶ 86. Where the specification of a public improvement fully describes the work to be done, and a bid in writing is made to do such work and is accepted and entered of record, sufficient evidence of a contract exists to satisfy the statute of frauds.—Central Bitulithic Paving Co. v. Village of Highland Park, 164 Mich. 223.

VII. BOND, SECURITY OR INDEMNITY FOR PERFORMANCE AND PAYMENT OF LABOR AND CLAIMS.

§ 25. In general; necessity and requisites of bonds.

Duty and liability of contracting city or officers, see post §§ 26-28.

Construction and obligation of bond, see post §§ 29, 30.

Persons protected by bond, see post §§ 31, 32.

"Labor" covered by bond, see post § 33.

Notice by subcontractor of reliance on bond, see post § 34.

Rights and recourse of subcontractors, laborers and materialmen, see post § 35.

Measure and amount of recovery, see post § 36.

Voluntary bonds and bonds not conforming to statute, see post § 37.

Deposits, bonds and securities collateral to contracts, see post §§ 38, 39.

Bonds under federal statutes for government contracts, see post § 40.

Actions on bonds, see post §§ 41-43.

General law of mechanics' liens as applied to public contracts, see Mechanics' Liens.

¶ 87. A township cannot be held liable for a bridge built by a bidder to whom the contract therefor had been awarded but who failed to give the security required by How. St. § 1414 for the performance of the work, such bridge not having been accepted or used by the township.—Mackey v. Township of Columbus, 71 Mich. 227.

¶ 88. A contract let by a highway commissioner for building a bridge at a cost of more than $50, without taking security as required by How. St. § 1414, is invalid.—Mackey v. Township of Columbus, 71 Mich. 227.

¶ 89. Under a charter providing that contracts for furnishing material to the board of sewer commissioners of a city shall be awarded to the lowest bidder who will give good and sufficient security, as required by said board, for the performance of the contract, the board, in not requiring security in a given case, exercises a discretion vested in it by the charter; and the fact of such security not being given is no defense in a suit by the contractor to recover for material furnished.—Carey v. City of East Saginaw, 79 Mich. 73.

¶ 90. Where a contractor contracted to furnish limestone dust to the city for paving purposes, it was held that the case did not come within the provisions of Comp. L. 1897, § 10743, which requires a contractor for public buildings or other public works or improvements to give bond, for the protection of laborers and materialmen, for the payment of all labor performed or materials furnished.—People ex rel. Houghten v. Newberry, 152 Mich. 292.

¶ 91. A bond given to the board of education by a contractor for the construction of a schoolhouse, conditioned for the payment by such contractor and his subcontractors of all claims for labor performed or materials furnished in the erection of the building, is a valid bond under How. St. §§ 8411a-8411c, and laborers and materialmen are entitled to their remedy therein, although the bond contains an additional undertaking to pay all judgments and decrees rendered for such labor and materials, and to save the board harmless from all liability incurred in connection with the defense of such claims.—

Detroit Board of Education v. Grant, 107 Mich. 151.

§ 26. Duty and liability of contracting city or officers.

Effect of failure or neglect to require bond, see post § 27.

Actions against officers, see post § 28.

¶ 92. The officers of a municipality are bound in contracting for a public work to see that a bond for the protection of materialmen is furnished, as required by Comp. L. 1897, § 10743.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

§ 27. ——Effect of failure or neglect to require bond.

Actions to enforce liability of officers who require no bond, see post ¶ 106.

Applicability to University of Michigan of provisions as to taking bonds from public contractors and liability of officers personally for neglecting it, see University of Michigan.

¶ 93. If officers contracting for the erection of a public building fail to take bond from the contractor, they will be personally liable to materialmen and laborers injured by such neglect.—Owen v. Hill, 67 Mich. 43 (where court was equally divided); Plummer v. Kennedy, 72 Mich. 295; Wells v. Board of Education of West Bay City, 78 Mich. 260.

¶ 94. Laws 1883, Act No. 94 requires public officers, in contracting for the building of public works, to take a bond from the contractor for payment of all materials supplied, wherever a lien would attach if the work was done by an individual. Held, that a city cannot be held liable because such a bond was not taken in a case where a lien would not have thus attached; and whether under the statute the city would be liable for failure to require a bond in a proper case, quære.—Eaton v. City of Monroe, 63 Mich. 525.

¶ 95. The omission by a city council to require and take a bond from a contractor erecting a public building is contrary to Comp. L. 1897, § 10743, and makes the members of the council liable to the materialmen for damages.—Smith v. Hubbell, 142 Mich. 637.

¶ 96. While the failure of village trustees to require the bond required by Comp. L. 1897, sections 10743-10745 is a violation of duty, a right of action does not accrue for failure to exact the bond until after labor has been done or materials furnished; up to that time there has been no wrong to any particular person. If the neglect be a wrong without an injury there can be no recovery. —Michaels v. McRoy, 148 Mich. 577.

¶ 97. A subcontractor, not entitled to have [illegible]tory bond taken for payment of labor and material claims on a public building, is bound to take notice of a clause in the main contract absolving the county and its building committee from liability for labor and materials, and cannot look to the committee for having failed to exact a bond that would have protected him.—Avery v. Ionia County Sup'rs, 71 Mich. 538.

¶ 98. Members of a board of supervisors appointed by the board to act as a committee in conjunction with the superintendent of the poor to let a contract for rebuilding a county poor-house, and who let such contract in behalf of the county, are "agents" of the board, and may be held liable under How. St. § 8411a (§ 1 of act 45 of 1885), for neglecting to require a bond from the contractor for the protection of laborers and materialmen.—Plummer v. Kennedy, 72 Mich. 295.

¶ 99. A resolution by the board of supervisors to save the building committee harmless from all suits growing out of the erection of a county building does not create a right of action against the board for the committee's failure to require a bond from the contractor which would protect subcontractors.—Avery v. Ionia County Sup'rs, 71 Mich. 538.

¶ 100. The defendants, trustees of a village, failed to take a bond from a contractor as required by Comp. L. 1897, §§ 10743-10745, for the protection of laborers and materialmen. Held, they were liable to plaintiffs, despite the fact that the latter furnished material in ignorance of the statute and in mistaken reliance on a supposed lien.—Michaels v. McRoy, 158 Mich. 605.

¶ 101. The defendants, trustees of a village, failed to take a bond from a contractor as required by Comp. L. 1897, §§ 10743-10745, for the protection of laborers and materialmen. After delivering a portion of the material, the plaintiffs learned that no bond had been filed, and were assured by the defendants that the village would pay. Held, that in the absence of evidence that the plaintiffs relied on the contractor for their pay they could recover of defendants for material supplied after notice that no bond had been filed. —Michaels v. McRoy, 158 Mich. 605.

¶ 102. Where the officers of a city fail to take a bond of a contractor, as required by Comp. L. 1897, § 10743, for the protection of materialmen, they become liable as individuals for losses sustained by the latter. —City of Alpena ex rel. Zess v. Title Guaranty & Surety Co., 158 Mich. 678.

¶ 103. Where the trustees of a village fail to require a bond as required by Comp. L. 1897, §§ 10743-10745, for the protection of materialmen on contract for construction of a village hall, the trustees are liable to the latter despite the fact that the village owes an obligation to pay.—Michaels v. McRoy, 158 Mich. 605.

¶ 104. The defendants, trustees of a village, failed to take a bond from a contractor as required by Comp. L. 1897, §§ 10743-10745, for the protection of laborers and materialmen on contract for construction of village hall. Held, the plaintiffs, who supplied materials, were not required to exhaust their legal remedies against the contractor before proceeding against the defendants, but could do so after making demand on the contractor and discovering his inability to pay.—Michaels v. McRoy, 158 Mich. 605.

¶ 105. Where, at the time of contracting for the construction of a school building, neither officers nor contractor knew of the statute requiring from the contractor a bond against claims for labor and materials, and where the contractor refused to give bond subsequently demanded, in his suit against the officers to recover the balance due under the contract defendants should be credited with what they had paid or were bound to pay for labor and materials for which plaintiff was legally liable.—Wells v. Board of Education of West Bay City, 78 Mich. 260.

§ 28. ——Actions against officers.

Limitation of actions for neglect to take bond for protection of subcontractors and laborers, see Limitations § 70.

¶ 106. Materialmen who had furnished the materials to the builders of a village hall which had been erected without requiring from the builders the bond required by the statute (Comp. L. 1897, §§ 10743, 10744) cannot recover against the individuals constituting the board of trustees for failure to require the bond unless the declaration alleges that the plaintiff's claim cannot be collected from the builders.—Michaels v. McRoy, 148 Mich. 577.

§ 29. Construction and obligation of bond.

Irregularities and defects in contract or bond, see post § 30.

Bonds of public officers generally, see Officers, VII.

¶ 107. Bondsmen of a paving contractor are not liable for material purchased which is rejected and sold to other parties.—People, for use of Holmes v. Sheehan, 118 Mich. 539.

¶ 108. A contracting firm made a contract to erect a crib for the city of Alpena, and to provide at its own cost all labor and materials. Defendant was surety on the bond given for the protection of laborers and materialmen under Comp. L. 1897, § 10743, the conditions of which were that the contractor should perform the terms of the contract and save the city and its officers harmless from all claims of materialmen and laborers. Held, the defendant was liable on this bond upon failure of the contractor to pay, and was not entitled to wait until the officers of the city were actually damnified.—City of Alpena ex rel. Zess v. Title Guaranty & Surety Co., 158 Mich. 678.

§ 30. ——Irregularities and defects in contract or bond.

Rights of holders of illegal or defective public bonds, see Municipal Bonds, III.

Estoppel and ratification as curing illegal bonds, see Municipal Bonds § 17.

¶ 109. A contractor submitted a proposal to construct a sewer and, under Comp. L. 1897, § 10743, furnished a bond to protect materialmen. The contract was never signed, but was connected by reference to the proposal and the bond, and the contractor did the work. In a suit by a materialman on the bond, held, the contract was sufficiently executed to hold the surety.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

¶ 110. In an action on a statutory bond, given for the benefit of materialmen and laborers, in compliance with Act No. 187, Pub. Acts 1905, the sureties cannot avoid liability by showing the failure of the municipal authorities to approve the bond.—People ex rel. J. E. Bartlett Co. v. Carroll, 151 Mich. 233.

§ 31. Persons protected by bond.

Materialmen or subcontractors, see post § 32.

"Labor" covered by bond, see post § 33.

Notice by subcontractor of reliance on bond, see post § 34.

Rights and recourse of subcontractors, laborers and materialmen, see post § 35.

¶ 111. No right of action exists in favor of a subcontractor, upon a bond given by a contractor for a public building, under Comp. L. 1897, §§ 10743-10745, to secure laborers and materialmen.—People ex rel. Davis v. Campfield, 150 Mich. 675.

¶ 112. One who agrees to furnish a contractor with cut stone for a county building according to the specifications of the original contract is a subcontractor, and as such is not one of the persons sought to be protected by Pub. Acts 1883, No. 94, § 1 (How. St. §§ 8411a, 8411b), which requires a bond from contractors to secure the payment of claims for labor and materials furnished in the erection of public buildings.—Avery v. Ionia County Sup'rs, 71 Mich. 538.

¶ 113. A company which agreed with the contractor for a school building to do all the terra cotta work required on the building according to certain plans and specifications, for a lump sum to be paid on completion of the contract, was a subcontractor and was not entitled to recover upon the statutory bond required by How. St. § 8411a, for the protection of laborers and materialmen. —People, use of Winkle Terra Cotta Co. v. Cotteral, 119 Mich. 27.

§ 32. ——Materialmen or subcontractors.

¶ 114. A subcontractor as distinguished from a materialman is an undercontractor—

one who takes under the original contract, and is to perform in accordance with the original contract.—People v. Valley Mantel & Tile Co., 200 Mich. 554.

¶ 115. The question whether one who furnishes material to a contractor for a public building is a subcontractor or a materialman is to be decided with reference to whether he agreed that the materials furnished by him should be in conformity with the provisions of the original contract or with those of the contract between him and the contractor.—People ex rel. Davis v. Campfield, 150 Mich. 675.

¶ 116. One who furnishes material to a contractor for a public building, under an agreement that the material furnished shall conform to a certain standard set up in the agreement between them, nothing being said about the standard set in the original contract for such material, is a materialman and not a subcontractor, because he is fulfilling the "subcontract," and not the original one, and the fact that their requirements are the same is, so far as he is concerned, a mere incident.—People ex rel. Davis v. Campfield, 150 Mich. 675.

¶ 117. Where a plaintiff supplies materials to a contractor to be used by the latter in the construction of a high school building, and does so under a special agreement with him containing specifications not found in the original contract with the board of education, plaintiff is a materialman and not a subcontractor, and is entitled to recover on the contractor's statutory bond prescribed by Comp. L. 1897, §§ 10743-10745.—People ex rel. Kroenke v. Title Guaranty & Trust Co., 154 Mich. 614.

¶ 118. A manufacturer of brick who supplies in quantities needed at a price per thousand to a contractor, who has agreed to furnish the materials and erect a public building at an agreed price, cannot be classed as a subcontractor, so as to deprive him of the protection of How. St. § 8411a, which makes it the duty of public officers to require from a contractor for the erection of a public building a bond for the payment of all labor and material claims.—Staffon v. Lyon, 104 Mich. 249.

¶ 119. One who furnishes for use in a school building being erected slate of standard stock sizes for blackboards built into the building on the order of the subcontractor is a materialman and not a subcontractor; and may recover on the statutory bond given by the contractor.—People for use of Emack v. Thompson, 119 Mich. 21.

¶ 120. One who furnished slate blackboards from his ordinary stock to a contractor for a school building pursuant to prices quoted at so much per square foot, upon an order which made no reference to the plans or specifications, was a materialman and not a subcontractor, and was entitled to maintain an action upon the contractor's statutory bond.—People for use of Emack v. Thompson, 119 Mich. 21.

¶ 121. One contracting to build a public sewer for a municipality furnished certain molds to the plaintiffs and the latter agreed to mold and supply the concrete blocks required for the sewer at a stipulated price per block. Held, the plaintiffs were materialmen, not subcontractors, and were entitled to recover on the bond given for their protection under Comp. L. 1897, § 10743.—People for use of Kuenzel v. National Const. Co., 159 Mich. 133.

¶ 122. Where a plaintiff agrees with a contractor undertaking to build an engine house for a city to furnish hardware trimmings according to the plan and specification of the original contract, he is a subcontractor, not a materialman, and, in order to recover on the contractor's statutory bond, must comply with the notice prescribed by statute to be given by subcontractors.—People ex rel. Buhl Sons Co. v. Finn, 162 Mich. 481.

¶ 123. The fact that curbstone is furnished to a paving contractor for a "lump sum," rather than for an agreed price per foot or yard, does not render the person furnishing them a subcontractor, instead of a materialman, thereby excluding him from the protection of the bond given by the contractor under How. St. § 8411b, for the payment of all labor and material claims.—People v. Powers, 108 Mich. 339.

¶ 124. Persons who agree to furnish all the interior trimmings and shopwork required for a building according to the plans and specifications become subcontractors, particularly where they are also to be paid in accordance with the principal contract and are not within the contractor's statutory bond.—People ex rel. Reynolds v. Banhagel, 151 Mich. 40.

¶ 125. A person is a subcontractor and not materialman where he agrees to and does manufacture the interior finish for a public building in conformity with the plans and specifications of the architects.—People v. Connell, 195 Mich. 77.

¶ 126. Persons furnishing material to be used in the erection of a school building are materialmen and not subcontractors under Pub. Acts 1905, No. 187, How. 2nd Ed., § 13839 et seq., relating to security for payment for work and material in constructing public buildings, where the original contract provided that the contractor should make no subcontract except with parties satisfactory to the architect and the architect claims that there are no subcontractors, even though some of such persons, at the time they made their bids in a lump sum for the materials constituting their claims had before them the specifications and plans.—People v. Valley Mantel & Tile Co., 200 Mich. 554.

¶ 127. Plaintiffs entered into subcontract with a paving contractor by which they agreed to excavate, according to grades and approval of engineer, certain parts of the roadway; to unload and place in the roadway, by means of tracks and cars, a specified quantity of crushed stone; and to unload and place in the roadway all the curbstone to be used on the work, according to the orders of the foreman in charge. In addition to the services rendered under the written contract, plaintiffs, pursuant to an oral agreement, furnished to the contractor a car load of crushed stone, and drew and unloaded a quantity of crushed stone in wagons. Held, that, with respect to the services performed and materials furnished outside of the written contract, plaintiffs were laborers and materialmen within How. St. §§ 8411a-8411c, and entitled as such to enforce their claim against the sureties on the contractor's bond. —People v. Collins, 112 Mich. 605.

¶ 128. A use plaintiff supplied labor and materials to repair the machinery of a contractor engaged in constructing a water works crib for a city. Held, the use plaintiff could not recover against the surety on the statutory bond given under Comp. L. 1897, § 10743, for the protection of laborers and materialmen.—City of Alpena v. Title Guaranty & Surety Co., 159 Mich. 329.

¶ 129. Where, in connection with a contract for the construction of waterworks for a city the contractor furnishes the bond of a surety company indemnifying the city against claims for labor performed or material furnished, and made for the benefit of laborers and materialmen, one who furnishes coal to operate a dredge used in digging a trench for an intake pipe connected with said waterworks, is not entitled to recovery against said surety company on said bond.—City of Alpena ex rel. Gilchrist v. Title Guaranty & Surety Co., 168 Mich. 350.

§ 33. "Labor" covered by bond.

¶ 130. For labor in carting lumber, coal, and other supplies to and from a dredge employed by a contractor in building a public work for a city, the use plaintiff cannot recover on a bond given under Comp. L. 1897, § 10743, for the protection of laborers and materialmen.—City of Alpena v. Murray Co., 159 Mich. 336.

¶ 131. For labor expended in operating a dredge used by a contractor in constructing a public work for a city, recovery may be had against the surety on the bond given under Comp. L. 1897, § 10743, for the protection of laborers and materialmen.—City of Alpena v. Title Guaranty & Surety Co., 159 Mich. 334.

¶ 132. For labor expended in raising a dredge of a contractor engaged in a public work for a city in construction of waterworks crib, recovery cannot be had against the surety on the bond given under Comp. L. 1897, § 10743, for the protection of laborers and materialmen.—City of Alpena v. Title Guaranty & Surety Co., 159 Mich. 334, 335.

§ 34. Notice by subcontractor of reliance on bond.

¶ 133. A letter written by a subcontractor to a board of education, just prior to the modification of a contract for the erection of a school building whereby payment is to be made direct to the subcontractors and materialmen, in which the board is notified that the contractor owes the subcontractor a balance of a certain sum on the contract of the subcontractor with the contractor to furnish material as enumerated on the inclosed copy of the contract and asking for advice as to further shipments, constitutes a substantial compliance with Pub. Acts 1905, No. 187, § 2, How. 2nd Ed., § 13840, providing that a subcontractor shall give notice in writing before payment is made for the work or materials furnished by him to the board of officers or agents that he is a subcontractor for the doing of some part of such work, which shall be specified in the notice, and that he relies upon the security of the bond required to be given by the contractor, and shall also notify the contractor that notice has been given to the officials, compliance with the two latter requirements being unnecessary because of the assumption of the control of disbursements by the board.—People v. Connell, 195 Mich. 77.

¶ 134. A surety on a bond given by a contractor performing work on a public school building under Pub. Acts 1905, No. 187, How. 2nd Ed., § 13840 et seq., cannot complain of the insufficiency of a notice by a subcontractor to the board of education of his claim where such surety has not been injured thereby.—People v. Connell, 195 Mich. 77.

¶ 134a. Laborers and materialmen are not required to give notice to the surety upon a public construction bond given under the provisions of Act No. 187, Pub. Acts 1905, How. St., 2nd Ed., §§ 13839-13842, before payment is made, as to reliance upon the security of the bond.—People v. Traves, 188 Mich. 415.

¶ 134b. A corporate surety for hire upon a public construction bond given under Act No. 187, Pub. Acts, 1905, How. St., 2nd Ed., §§ 13839-13842, cannot avail itself of an alleged violation of the contract by a subcontractor in failing to give timely notice that he relies upon the security of the bond where the surety has neither alleged or proved any actual injury resulting to it from the failure of the subcontractor to strictly comply with the alleged requirements of the statute as to notice.—People v. Traves, 188 Mich. 415.

¶ 134c. Statutes requiring notice of claims on a bond against a surety should be liberally construed where no injury results from the

want of notice.—People v. Traves, 188 Mich. 415.

¶ 134d. Statutory notice sufficient to comply with the provisions of Act No. 187, Pub. Acts 1905, § 2, How. St., 2nd Ed., § 13840, is given when the subcontractor gives notice to the surety that he relies upon the security of the bond at a time when payments on all contracts have been made except a certain percentage to be retained until final payment, as per contract, and the entire sum retained is sufficient to satisfy the subcontractor's claim.—People v. Traves, 188 Mich. 415.

§ 35. Rights and recourse of subcontractors, laborers, and materialmen.

¶ 135. The creditors of a contractor claiming as subcontractors and laborers for materials furnished and work and labor done in the performance of a contract for work upon a public building, have no lien upon the building.—Ford v. State Board of Education, 166 Mich. 658.

§ 36. Measure and amount of recovery.

Liability of surety on bond of unlicensed foreign corporate contractor, see Foreign Corporations ¶ 26.

Liability on bond of plumber performing services for city, see Indemnity § 2.

¶ 136. In assumpsit upon the bond required by statute of contractors for protection of laborers upon, and persons supplying materials for public buildings, recovery may be had for the actual amount due to the laborers and materialmen.—People, use of Holmes v. Cotteral, 115 Mich. 43.

§ 37. Voluntary bonds and bonds not conforming to statute.

Actions on bonds not conforming to statute, see post § 42.

¶ 137. Defendants were sureties on the bond of a company which had contracted to sell limestone dust for paving purposes to a city. The case was not within the terms of Comp. L. 1897, § 10743, which required a contractor for public buildings or other public works to give bond for the payment of all labor performed or materials furnished. Held, that the defendants were nevertheless liable on common-law grounds, on the bond, although it was not required by the statute. —People ex rel. Houghten v. Newberry, 152 Mich. 292. (Ostrander, Hooker and McAlvay, JJ., dissenting.)

¶ 138. Where a bond is given by a contractor doing work for a city, as required under § 10743, Comp. L. 1897, for the protection of laborers and materialmen, it is valid although not in exact statutory form, and although made payable to the city instead of to the People of Michigan.—City of Alpena ex rel. Zess v. Title Guaranty & Surety Co., 158 Mich. 678.

¶ 139. Where the bond given under Comp. L. 1897, § 10743, for the protection of laborers and materialmen is made payable to the city instead of the people, it is not invalidated by this variation from the form prescribed by the statute.—City of Alpena v. Title Guaranty & Surety Co., 159 Mich. 329.

¶ 140. Where a city erroneously took a contractor's bond in its own name instead of in the name of the people of Michigan, as required by How. St. § 8411b, but the bond was good as a common law obligation, it was the duty of a materialman suing aldermen for damages for the violation of their duty to take a proper bond, to have minimized their damages by suing on the bond, first requesting the city for permission to do so, and, if such request was refused, to show such fact.—Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114.

¶ 141. The fact that a city contractor's bond for the benefit of subcontractors and materialmen runs to the city and not to the people of Michigan, as required by How. St. § 8411b, invalidates it as a statutory bond, but such bond is valid as a common-law obligation.—Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114.

§ 38. Deposits, bonds, and securities collateral to contracts.

For indemnification against negligence, see post § 39.

¶ 142. Conceding that a certified check deposited with a village as an evidence of good faith in the securing of a gas franchise was accepted by it in lieu of a bond, such check cannot be regarded as forfeited to the village upon failure to comply with the terms of the franchise, without formal action by the village council to that effect.—Griggs v. Village of Red Jacket, 171 Mich. 142.

§ 39. ——For indemnification against negligence.

¶ 143. Where a contractor executes a bond to a city to indemnify any person against injury from his negligence in paving a street, a pedestrian injured by his negligence may sue upon the bond, she being one of the persons for whose benefit the bond was given.—Cox v. Fidelity & Deposit Co. of Maryland, 157 Mich. 59.

¶ 144. Defendant executed a bond to indemnify any person against injury caused by the neglect of a contractor in laying cement walks in a city, in conformity with the regulations of the city board of public works requiring the contractor to properly guard and light the walks during construction. Held, that an injury to a pedestrian from the negligence of the contractor in failing to properly guard and light a walk not yet completed, was within the terms of the bond.—Cox v. Fidelity & Deposit Co. of Maryland, 157 Mich. 59.

¶ 145. A city and its officers holding a check of the principal contractor to cover the possible judgment for injuries to one who was injured by falling into an unlighted and unguarded excavation will not be required to pay over the check, representing the balance due on the contract, to the subcontractor through whose fault lights and guards were missing; since the failure to guard and protect the travel on the street was a breach of contract duty and the balance due on the contract is not recoverable from the city until full performance.—Anderson v. City of Detroit, 124 Mich. 471.

§ 40. Bonds under federal statutes for government contracts.

¶ 146. The Act of Congress approved August 13, 1894, providing as an additional obligation that persons entering into formal contracts with the United States for the construction of any public building, etc., shall give bond to make prompt payment to all persons supplying them with labor and material (28 U. S. Stat. chap. 280, p. 278) applies to subcontractors.—United States, use of Croll v. Jack, 124 Mich. 210.

¶ 147. Under Act of Congress approved August 13, 1894, providing that persons entering into contracts with the United States for the construction of any public building, etc., shall give bond to make prompt payment to all persons supplying them with labor and material (28 U. S. Stat. chap. 280, p. 278) a subcontractor is entitled to recover the value of material furnished for the prosecution of such work, which was seized under a writ against the contractor, notwithstanding that the contract provides for final payment after the work and material are accepted by the supervising architect.—United States, use of Croll v. Jack, 124 Mich. 210.

§ 41. Actions on bonds.

On common law bonds and bonds not conforming to statute, see post § 42.
Pleading, issues and evidence, see post § 43.
Measure and amount of recovery, see ante § 36.
Actions on contracts generally, see ante VI.
Actions against contracting officers who require no bond, see ante ¶ 106.
Actions to enforce personal liability of contracting officer, see ante § 28.
Remedies and procedure to enforce bonds of cities and villages, see Municipal Bonds, VI.

¶ 148. Assumpsit lies on the bond.—People, use of Holmes v. Cotteral, 115 Mich. 43.

¶ 149. Bondsmen upon three contracts for paving should not be joined in one action for the entire balance of the account there being no joint liability between the sureties upon different bonds.—People for use of Homes v. Sheehan, 118 Mich. 539.

¶ 150. Where a bond is given to a city by a contractor and his surety, as required under Comp. L. 1897, § 10743, for the protection of laborers and materialmen, a materialman may maintain an action on the same in the name of the city.—City of Alpena ex rel. Zess v. Title Guaranty & Surety Co., 158 Mich. 678.

¶ 151. When a municipality charged with the duty of taking a contractor's bond for the benefit of subcontractors and materialmen in the name of the people of Michigan under How. St. § 8411b, takes it in its own name, it does, by legal intendment, consent to the use of its corporate name as plaintiff by anyone beneficially interested in the bond thus taken, and no express authority of law is needed to authorize the use of the name of the city as plaintiff under such circumstances.—Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114.

§ 42. ——On common-law bonds and bonds not conforming to statute.

Voluntary bonds and bonds not conforming to statute generally, see ante § 37.
General law of pleading, see Pleading.
Bond as good common-law obligation though not according to statute, see also Bonds ¶ 21.

¶ 152. Action on a bond given by a paving contractor to a city, ostensibly as required by How. St. § 8411b to protect parties furnishing labor and material, must be brought in the name of the city where the bond runs to the city instead of to the people of the state as provided by the statute, since § 8411c authorizing action to be brought by those entitled, in the name of the people, applies only to action on such bond as is prescribed by the statute.—People for use of Higley v. Laidlaw, 120 Mich. 358.

¶ 153. A contractor executed a bond running to a city, providing that recovery might be had thereon by any person injured by reason of any default in any of the conditions of the bond. Held, that a person injured by the default could sue upon it without an assignment to him of the bond.—Cox v. Fidelity & Deposit Co. of Maryland, 157 Mich. 59.

§ 43. ——Pleading, issues, and evidence.

General law of evidence, see Evidence.
Burden of proof in action on public contractor's bond before justice of the peace, see also Justices of the Peace ¶ 535.

¶ 154. A declaration in an action on a bond against the sureties alone is sufficient if it avers that the bond was delivered by the defendants themselves, for if they delivered it to the obligee without the signatures of the principals, they would be held to have waived such signatures unless there was an understanding that the signatures were to be procured before the bond should be valid, which would be matter of proof.—People ex rel. J. E. Bartlett Co. v. Carroll, 151 Mich. 233.

¶ 155. Where a declaration in an action on a bond given to secure the payment of materialmen alleges the execution of the contract and the bond at the same time, and that the bond was given to secure the faithful performance of the contract, the identity of the contract with the one mentioned in the bond is matter of proof.—People ex rel. J. E. Bartlett Co. v. Carroll, 151 Mich. 233.

¶ 156. Plaintiff sued on a statutory bond given to protect materialmen for material supplied in building a public work. Plaintiff in delivering gravel had his foreman make slips of the goods delivered, and from these slips made up his accounts. The accounts were admitted in evidence without testimony by plaintiff's teamsters that they had delivered the goods. Held, that in view of other circumstantial evidence strongly confirming the correctness of the accounts, they were properly admitted.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

¶ 157. Where a suit by a subcontractor on a statutory bond is tried on the theory that the bond was given, the plaintiff cannot, in order to avoid the obligation that he gave insufficient notice of his claims, raise the point that the bond was not filed in compliance with the statute.—People ex rel. Buhl Sons Co. v. Finn, 162 Mich. 481.

¶ 158. There is no error, in an action for the use of materialmen on a bond furnished by a contractor for the construction of a school building under Pub. Acts 1905, No. 187, How. 2nd Ed., § 13839 et seq., relating to security for payment for work and material in constructing public buildings, in admitting any testimony, on the ground that the exact liability cannot be fixed, owing to the fact that the contractor is a bankrupt and his estate has not been settled, where there is no question as to the amounts due the respective claimants and credit has been given for dividends already paid by the trustee in bankruptcy, since the sureties, on payment of any judgment against them, will be entitled to be subrogated to the rights of the several claimants as against the estate of the contractor and receive whatever further dividends may be paid.—People v. Valley Mantel & Tile Co., 200 Mich. 554.

¶ 159. In an action on the bond of the contractor the delivery of suitable material at the place of performing a building contract raises a presumption of its use for that purpose in the absence of proof to the contrary.—People v. Traves, 188 Mich. 345.

¶ 160. In an action by a materialman against a contractor and his surety on a public construction bond given pursuant to Act No. 187, Public Acts 1905, How. St., 2nd Ed., §§ 13839-13842, in which the defense of the contractor was that the material furnished was not in accordance with plans and specifications made by the architects as provided by contract with the plaintiff, evidence is admissible to show a general trade custom known to the contractor relative to the preparation of detailed drawings and working plans by materialmen subject to approval by the architect, and thus to explain the contract.—People v. Traves, 188 Mich. 415.

¶ 161. In an action by the people, for the use of a subcontractor, a member of a city council, against the surety on the bond given by the principal contractor to the city conditioned upon the faithful performance of the contract, including the payment of claims of laborers, materialmen, and subcontractors, evidence held sufficient to sustain a finding that prior to the making of the contract there had been no talk, agreement or contract between plaintiff and the principal contractor that the contractor would purchase any material from plaintiff for use in the contract with the city.—People v. Southern Surety Co., 199 Mich. 30.

¶ 161a. In an action upon a contractor's bond by men who furnished materials for a certain public building, testimony by one of the plaintiffs that they furnished the material used in said building upon the contractor's telephoned order, and that the goods were delivered at the building, is, in the absence of contradicting testimony, sufficient evidence of sale and delivery.—People, use of Holmes v. Cotteral, 115 Mich. 43.

PUBLIC CONVENIENCE to PUBLIC INTEREST.

Cross-References.

Public Convenience and Necessity—
See Eminent Domain; Highways, II.
Public Corporations—
See Counties; Municipal Corporations; Townships; Schools.
Public Debt—
Constitutional limitations, see Constitutional Law, XV.
Creation, evidences, and limitations on municipal powers, see Counties, IV; Municipal Corporations, XI; Townships, III; Municipal Bonds; Public Contracts.
State debts, see State of Michigan.
Mandamus to enforce duties respecting, see Mandamus, III.
Injunctions against creation, see Injunctions §§ 21, 54 et seq.
Public Documents—
Judicial notice and admissibility in evidence, see Evidence §§ 18, 528 et seq.; Indictment § 282 et seq.
Best and secondary evidence, see Evidence §§ 121, 149; Indictment §§ 185, 189.
Public Domain—
See Public Lands.
Right of eminent domain, see Eminent Domain.

Public Duties—
In the sense of duties owing by municipalities to the public or to private persons, see Counties; Municipal Corporations; Townships; and see Highways, XII (duty to make safe).
In the sense of official duties, see Officers, VI; Sheriffs; and specific topics treating of the duty or its subject.
In the sense of duties of persons or corporations to the public, see specific topics, especially Carriers; Electricity; Gas; Railroads; Street Railways; Public Service.
Mandamus to compel performance, see Mandamus.
Public Easements—
See Highways; Navigable Waters, II.
Public Employees—
See Officers and Public Employees; Municipal Corporations, XV.
Public Funds and Fiscal Affairs—
See Counties, V; Municipal Corporations, XIII; Townships, VI; and see Taxes.
See also ante Public Debt.
Mandamus to compel performance of duties respecting public funds, see Mandamus § 88.
Public Improvements—
See Local Improvements and Assessments.
Internal improvements, constitutional limitations, see Constitutional Law, § 281 et seq.
Public Indebtedness—
See ante Public Debt.
Public Interest or Concern—
Ground for entertaining suit or question, see Injunctions, I; Mandamus, I; Constitutional Law §§ 28-31; Appeal § 263; Certiorari.
Ground for awarding or denying costs, see Costs §§ 12, 37, 42, 91.
As ground for admitting hearsay, see Evidence § 321.

PUBLIC LANDS.

TREATS of the public domain of the state and nation in unsettled lands and of the disposal of such public lands by the nation or the state. It excludes publicly owned lands which are not of the public domain but are in city, county, township, or state use (see Counties, III; Municipal Corporations, X; Townships, III; Schools, IV; State of Michigan, II), and lands owned by the public by virtue of sale or forfeiture for taxes (see Taxes).

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IX. Early settlements and claims originating before American sovereignty.

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[Note.—All public land questions which in any way involve the passing of the title from the United States to the state of Michigan or to any corporation or private person will require a careful examination of the United States statutes. A reference to them other than such citations as are contained in the paragraphs is impossible. Consult the compilations of such statutes and the published books of statutes.]

I. IN GENERAL.

§ 1. Public ownership and rights in general.

Effect of the Ordinance of 1787, see post § 2.
Nontaxability of public lands by state, see Taxes, II, A.
Claim under tax deeds as admission that land is no longer public, see Evidence ¶ 2081.
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Early settlements and confirmatory patents to settlers and their heirs and grantees, see post IX.
State tax lands and disposal thereof, see Taxes, XI, A.
Listing lands unsold for delinquent taxes as state tax homestead or abandoned lands, and mode of disposing of same, see Taxes §§ 376-378.

¶ 1. Under U. S. Const. art. IV, § 3, and act of June 15, 1836, § 4, admitting Michigan into the Union, all powers preliminary to and connected with the sale and disposition of all vacant and unsold public lands of the United States in Michigan are vested in the federal government exclusively, until the issue of the patent consummates the sale, divests the title of the United States, and makes the land for the first time subject in all respects to the local laws of the state.—People ex rel. Brewer v. Kidd, 23 Mich. 440.

§ 2. Ordinance of 1787.

¶ 2. Lands subject to patent which have been sold by the United States to a nonresident purchaser, who has received merely a certificate, pending issuance of the patent, are not lands of the United States so as to be within the prohibition of the Ordinance of 1787 as a "tax on lands of the United States," and are subject to taxation under the act of April 22, 1833, of the Territory of Michigan in the state.—Carroll v. Safford, 3 How. 441, 11 L. ed. 671.

¶ 3. The mere fact that on some certificates to land in a state subject to patent may not be issued by the United States does not render a state tax on unpatented land, a certificate for which has been received, an interference "with the primary disposition of the land," within the prohibition of the

Ordinance of 1787.—Carroll v. Safford, 3 How. 441, 11 L. ed. 671.

§ 3. Surveys and divisions.

Resurveys, see post § 4.
Extent and boundaries of land entered or patented, see post § 32.
Effect and conclusiveness of evidence of government survey in boundary questions, see Boundaries § 34.
Admissibility of land office plats, surveys and maps, see Evidence §§ 504, 541.
Certified copies of land office records as evidence under statute, see Evidence § 552, 558.
Mode of retracing and relocating boundaries and corners, see Boundaries.
Conclusiveness of government survey as to lines, see Boundaries ¶ 170.
Original monuments as controlling field notes of surveyors, see Boundaries ¶ 85.
Number of government townships required for legal county, see Counties § 1.

¶ 4. All subdivision lines of a section of land according to government survey must run straight from a point in one exterior line of the section to the corresponding point in the opposite boundary.—Wilson v. Hoffman, 54 Mich. 246.

¶ 5. Under the acts of congress of Feb. 11, 1805, and April 24, 1820, the surveyor-general had no authority to extend a south fraction north of the east and west quarter-line of the section, and if he did so such action would be void.—Keyser v. Sutherland, 59 Mich. 455.

¶ 6. In government surveys, lines actually run and marked on the ground prevail over any theoretical or paper platting, and small excesses or diminutions are disregarded.—Sanborn v. Vance, 69 Mich. 224.

¶ 7. "Quarter-posts" fixed by the original United States surveys are to be accepted as fixed and established monuments, controlling courses and distances, and not liable to be changed for errors in the surveys.—Britton v. Ferry, 14 Mich. 53.

¶ 8. The quarter-post on the east side of section 36 must be identical with that on the west side of section 31, it being a township line.—Thompson Township Highway Com'r, v. Beebe, 61 Mich. 1.

¶ 9. The meander lines run by a government surveyor have no significance as boundaries, and are run simply to afford a means of computing the area for which the government requires payment; and where a patent calls for a fractional quarter section containing 16 75/100 acres on the shore of a lake, the patentee's title extends to all the land in the quarter section, and is not limited by the meander line on the lake's border; but cannot claim a segment of the lake within lines run to its center from where his quarter section lines intersect the meander line.—Palmer v. Dodd, 64 Mich. 474.

¶ 10. Section corners and the lines connecting them fixed by the original survey cannot be changed by any later one made for the purpose of dividing the sections.—Palmer v. Montgomery, 59 Mich. 338.

¶ 11. The burden of proof is upon one who disputes a line run by the government surveyor.—Smith v. Rich, 37 Mich. 549.

§ 4. Resurveys.

See also ante ¶ 10.

¶ 12. Lands constantly submerged cannot be surveyed by the commissioner of the general land office as "islands" omitted from former surveys, and therefore subject to sale as public lands (Act of Cong., May 30, 1862, § 10).—Webber v. Pere Marquette Boom Co., 62 Mich. 626.

¶ 13. An act of congress directed a resurvey of certain townships, and stated that they had never been properly surveyed. Prior to the passage of the act, certain swamp lands in one of the townships had been selected by the state under a congressional grant, and had been sold and patented by the state according to the alleged imperfect survey. Held, that the purchaser had acquired vested rights according to said survey, which could not be disturbed by the act of congress ordering the resurvey, and that said act is no evidence that the original survey was improper.—Burt v. Busch, 82 Mich. 506.

§ 5. Subaqueous lands and islands.

Resurvey of omitted islands, see also ante ¶ 12.
Effect of grant or patent to carry bed of stream, see post § 32.
Islands and aqueous lands within Swamp Land Grant, see post § 42.
Invalidity of patent under subsequent survey against patentee of mainland, see post ¶ 106.
Estoppel by nonclaim to assert title to island on riparian front, see Estoppel ¶ 154.
Estoppel to claim title to unsurveyed island by application for survey and sale of it, see also Estoppel ¶ 99.
Effect of state law to carry with patent of riparian lands the title of submerged lands under navigable waters, see Navigable Waters ¶ 51.
Public and private proprietary titles and rights in lands under navigable waters, see Navigable Waters §§ 7, 8.
Title to land under navigable waters as dependent on condition of submergence at time of admission of state to Union, see Navigable Waters ¶ 53.

¶ 14. Title to lands which were a part of the submerged bed of Lake St. Clair at the time of the admission of this state to the Union, passed to the state by virtue of such

admission, and were not thereafter a proper subject of grants by congress.—Olds v. Commissioner State Land Office, 150 Mich. 134.

¶ 15. A marshy island in one of the Great Lakes, not in existence at the time of the Swamp Land Grant by congress to the state in 1850, belongs to the state, by virtue of its ownership of the soil beneath the waters of the lakes.—People v. Warner, 116 Mich. 228.

II. ENTRIES AND DISPOSAL BY THE PUBLIC.

§ 6. In general.

Relative federal and state powers of disposal, see post § 7.
Lands opened to settlement or entry, see post § 8.
Various kinds of entries, see post §§ 9-11.
Right of way grants, see post § 12.
Town site acts and disposal or confirmation thereunder, see post §§ 13-18.
Sales of state lands, see post § 19.
Certificates of entry, patents, and grants, see post §§ 20-23.
Presumptions and evidence as to entry or patent, see post § 24.
Disposal of swamp lands by the state, see post § 46 et seq.
Disposal of school and agricultural college lands by the state, see post § 58 et seq.
Disposal of Indian reservation lands, see post VII.
Disposal by state of timber cut from its lands, see post ¶ 284.
Declination on mandamus to compel issuance of patent to adjudicate conflicting claims to public lands affecting third persons, see Mandamus ¶ 899a.

¶ 16. Lands may be granted by act of congress, or by treaty, as well as by patent.—Stockton v. Williams, W. 120; Stockton v. Williams, 1 D. 546.

¶ 17. A sovereignty making title to its own lands has a right to determine for itself upon the sufficiency of whatever goes to entitle the claimant to a conveyance.—Clark v. Hall, 19 Mich. 356.

¶ 18. The state, while acting under the constitution, can impose its own conditions on its own grants.—Rogers v. Port Huron & L. M. R. Co., 45 Mich. 460.

§ 7. Federal and state powers.

Restrictions by Ordinance of 1787 on interference by state, see ante § 2.
State disposal of swamp lands, see post § 46 et seq.
Nullity of state statute confirming railroad grant where federal right to forfeit for breach of condition remains, see post ¶ 264.
State decisions on titles as presenting federal question supporting error to United States Supreme Court, see Courts § 91.
Time at which public land granted to individuals or to state for corporations becomes taxable, see also Taxes, II, A.

¶ 19. While the proceedings to a land sale by the federal government remain in fieri, no power outside of that of said government may interfere with such proceedings, or adjudicate upon their validity, for the mere purpose of controlling or restraining them in relation to the subject-matter of the sale.—People ex rel. Brewer v. Kidd, 23 Mich. 440.

¶ 20. The state cannot prescribe rules for officers of the general government, as by requiring that a certificate of the cancellation of a patent must be signed by a particular officer.—Davis v. Filer, 40 Mich. 310.

§ 8. Lands subject to entry or disposal.

Necessity of first offering state lands at public sale, see post § 19.
Presumptions as to reservation from sale, see post ¶ 88.
Power to sell or dispose of lands entered or settled but not yet patented, see post ¶ 90.
Swamp lands prior to selection, see also post ¶ 162.
Effect of school grant to withdraw 16th sections from entry, see post ¶ 229.
Indian reservations, see post § 72 et seq.

¶ 21. There is no act of congress allowing undivided interests to be patented either to homesteaders or pre-emptioners.—Bernier v. Bernier, 72 Mich. 43. Reversed in 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

¶ 22. Where, under a grant in præsenti by congress to a state in aid of a certain railroad, the map of definite location was filed, thus identifying the particular tracts, the title to the lands became vested in the state, to be disposed of by it in aid of the construction of the roads, and the lands were withdrawn from the public domain, so that they were no longer open to settlement by individuals for pre-emption or other purposes.—Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. G. Rep. 103; affirming 44 Fed. 587.

¶ 23. The Indian reservation at the Sault Ste. Marie was not extinguished until 1855, when the Chippewa Indians surrendered to the United States the fishing and encampment rights secured to them by previous treaty; and hence lands in such reservation were not liable to entry in 1859 under the pre-emption law of 1841 which provided that no "Indian reservations to which the title has been extinguished by the United States at any time during the operation of this act * * * shall be liable to entry under * * * this act."—Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; affirming 84 Mich. 140.

¶ 24. Under the pre-emption law of 1841, the Indian reserve at Sault Ste. Marie, in

which the Chippewa Indians under the treaty of June 16, 1820, and subsequent survey, etc., secured perpetual and exclusive rights, was not subject to pre-emption in 1859, although in 1852, in an act of congress granting the right of way to the state of Michigan for a canal, this land was termed and treated as a military reserve, and although the Indians relinquished their rights to the United States in 1855.—Spalding v. Chandler, 84 Mich. 140, affirmed in 160 U. S. 87, 40 L. ed. 85.

§ 9. Land warrant or scrip entries.

Rights in the scrip or warrant and assignments of same, see post § 10.
Swamp land scrip entries and purchases, see post § 46 et seq.
Construction of statutes for purchase with scrip, see post ¶ 59.
Cancellation of entries under warrants, see post § 38.

¶ 25. The holder of a land warrant has an absolute right to locate land with it, and to receive a patent therefor.—Merrill v. Hartwell, 11 Mich. 200.

§ 10. Rights in scrip or warrants and transfer of rights.

Entries under scrip or warrants, see ante § 9.
Swamp land scrip, see post § 56.
Rights of assignee of cancelled entry to buy swamp lands, see post ¶ 193.
Right of state to assignment of bounty land warrants taken for swamp lands by federal government, see post ¶ 184.

¶ 26. A soldier may validly assign his right under a certificate entitling him to enter an additional homestead.—Clark v. Welch, 154 Mich. 537.

¶ 27. Where a soldier owning a homestead right of entry gives powers of attorney enabling a transferee purchasing the same to locate the land and also to sell it, the powers are not revoked by the soldier's death.—Clark v. Welch, 154 Mich. 537.

¶ 28. A prior irrevocable assignment of a soldier's additional homestead certificate is sufficiently shown by land office records showing ownership by the soldier in 1878 and the issuance to him then of a certificate, by the presumption that he then gave powers in blank to the attorney who procured the certificate, as was the custom, though all record evidence of any such powers was lacking, and by the fact that during the remainder of his lifetime, twenty-six years, the soldier made no further effort to locate the land or to dispose of his certificate.—Clark v. Welch, 154 Mich. 537.

¶ 29. Whether a guaranty "in all respects" accompanying a sale of a land warrant enables its holder to enforce it for any liability except title and genuineness, quære.—Merrill v. Hartwell, 11 Mich. 200.

¶ 30. It is not necessary that the assignment of a land office certificate for the purchase of lands, filed in the office of the commissioner of the general land office, should be acknowledged in order to pass title of the assignor.—Clark v. Hall, 19 Mich. 356.

§ 11. Pre-emption entries.

Rights under pre-emption entry, see post § 25.
Cancellation of entries under warrants, see post § 38.

¶ 31. One of foreign birth, who is otherwise duly qualified, and has in due form declared his intention of becoming a citizen, is entitled, under the pre-emption laws, to file and maintain a pre-emption claim before becoming fully naturalized.—Boyce v. Danz, 29 Mich. 146.

¶ 32. The "settlement" of a pre-emptioner under the Act of Congress of Sept. 4, 1841, § 15 (Brightley's Digest, p. 474, § 88), must be that of a qualified person, and one is not qualified until he has filed his pre-emption claim, and, if a foreigner, has declared his intention of becoming a citizen. The law requires the proofs and payment within twelve months of settlement; and if the pre-emptioner has stated in his claim that he "settled and improved" the land at a date which was, in fact, earlier than his qualification, and more than twelve months before payment, he is still not estopped from afterward dating the settlement as of the time when he actually qualified.—Boyce v. Danz, 29 Mich. 146.

§ 12. Right of way grants.

Effect of description of lands in right of way grant to fix their character as lands open to settlement, see ante ¶ 24.
Grants of land in aid of railroads within place limits parallel to line of road, see post VI.
Railroad right of way over public lands, see Railroads, III.

¶ 33. Under U. S. Rev. Stat., ¶ 2477, granting to highways the right of way across the public lands, a patent is not necessary; the offer and its acceptance by the construction of the road are equivalent to a grant that is good as against the government, and also as against a subsequent patentee, unless the latter's patent antedates the grant by relation, or unless his equities preclude the acquisition of adverse rights.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

§ 13. Town site acts and Detroit land board act.

Donation grants under the acts, see post § 14.
Confirmatory and ratifying grants, see post § 15.
Construction and effect of grants, see post § 16.
Titles and conflicting claims, see post § 17.
Procedure for settlement of claims, see post § 18.

Confirmation of early settlements, see also post § 78.
Power of the board in fixing and altering street plans, see also Municipal Corporations § 101.
Patent and statute enabling judge to sell town site lots as dedication, see Dedication ¶ 153.

¶ 34. Notwithstanding the previous organization of the state government, the governor and judges of the territory of Michigan remained in office and competent to execute the powers conferred upon them by the act of congress entitled "An act to provide for the adjustment of titles of land in the town of Detroit and territory of Michigan, and for other purposes," approved April 21, 1806, until July 1, 1836.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error dismissed, 5 How. 343, 12 L. ed. 181.

¶ 35. Where several persons are empowered by law to execute a public trust or power by deed or grant and, in the execution thereof, all are present to deliberate, the act of a majority will be valid.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error dismissed, 5 How. 343, 12 L. ed. 181.

¶ 36. The land board constituted by the act of congress of April 21, 1806, did not consist of two integral parts—the governor and the judges; but of four persons designated by their names of office, any three of whom were authorized to execute any of the powers conferred by the act. Therefore a deed of bargain and sale executed by the judges only is valid.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error dismissed, 5 How. 343, 12 L. ed. 181.

¶ 37. The governor and judges constituting the land board will all be presumed to have been present, and to have deliberated upon an act done by the majority, unless the contrary expressly appears.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error dismissed, 5 How. 343, 12 L. ed. 181.

¶ 38. The power of the governor and judges to convey lots in the town of Detroit was not confined to a conveyance of lots in such forms and dimensions as they should delineate upon their plan. The claims to be adjusted by them were such as any person might have, legal and equitable; and when satisfactory proof had been made, they had no right to deprive a claimant of any portion of that land actually belonging to him under the acts of congress, whether it interfered with any projected plan or not. And the courts cannot go behind their conveyances while they acted within their jurisdiction. —People v. Jones, 6 Mich. 176.

¶ 39. The plan of the city of Detroit, when made, was liable to modification by interfering claims and reserves, and the land board had power to adapt it to contingencies when necessary.—People v. Jones, 6 Mich. 176.

¶ 40. The act of congress "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," approved May 23, 1844, was intended to apply exclusively to actual and existing towns, and not to such lands as may have been selected by nonresident claimants as the site for a prospective town.—In re Selby, 6 Mich. 193.

¶ 41. The act of congress of May 23, 1844, was intended for the protection of citizens of villages and cities that had grown up or might grow up on government lands, and to secure to them severally, at the minimum price, all lands actually occupied by them respectively for village or city purposes; and to them collectively, for the use of the village or city, such other lands as might be embraced in the government subdivisions within its limits.—In re Selby, 6 Mich. 193.

¶ 42. The rules and regulations to be prescribed by state legislation under the act of 1844 are to relate to the determination of claims to possession, and the extent of possession that may fairly be considered as falling within an occupancy for town purposes, as well as to the disposition of the part of the land not actually occupied for town purposes by individuals.—In re Selby, 6 Mich. 193.

¶ 43. The act of the legislature of Michigan relative to Ontonagon, approved Feb. 29, 1853, was held void under act of congress of 1844: First, because undertaking to dispose of the whole trust to the person named therein, and his grantees, and authorizing no one else to be considered or receive any relief; and second, because not prescribing any rules and regulations for the execution of the trust.—In re Selby, 6 Mich. 193.

¶ 44. The object of the act of congress of May 23, 1844, U. S. Rev. Stat., § 2387, for the relief of settlers of towns upon lands of the United States, and of Mich. Laws 1861, Act No. 204, authorizing the district judge to convey certain lands held in trust under said act of congress, was to protect the rights of actual occupants, and a dedication of streets to public use was not thereby effected, although such occupants might be entitled to have streets kept open for their use.—Diamond Match Co. v. Village of Ontonagon, 72 Mich. 249.

§ 14. ——Donation grants.
Confirmatory grants, see post § 15.

¶ 45. The powers conferred upon the governor and judges of Michigan territory to grant donation lots in Detroit are not to be construed with the technical strictness applicable to those of an ordinary attorney or donee of a power; but they were vested with a large discretion, and their acts are entitled to liberal intendments in their support. —Ready v. Kearsley, 14 Mich. 215.

¶ 46. Until the land board has made a donation of a lot to the person entitled effectual, it cannot be said to have exhausted its powers. The mere allotment of a piece of land as a donation lot, not followed by a deed, could not confer title either legal or equitable.—Ready v. Kearsley, 14 Mich. 215.

¶ 46a. The land-board in Detroit had power to grant a donation lot by conveyance in trust.—Ready v. Kearsley, 14 Mich. 215.

¶ 47. The conveyance by the governor and judges of certain lands in Detroit to the trustees of the University of Michigan, held valid.—Regents of University of Michigan v. Detroit Board of Education, 4 Mich. 213.

§ 15. ——Confirmatory or ratifying grants.

Title and rights under confirmatory patents in general, see post § 31.

¶ 48. Where the governor and judges deeded a lot in Detroit, in 1816, in exchange by the grantee of another lot in the United States, and the United States took possession of the last mentioned lot, and occupied it for fourteen years and more, it was held that this ratified and made valid the deed by the governor and judges even if originally invalid.—Farmers' & Mechanics' Bank of Michigan v. City of Detroit, 12 Mich. 445.

¶ 49. Where the board conveyed a lot in Detroit to A., and afterwards by mistake gave a deed of the same lot to B., and A. took possession of another lot on the supposition that it was the one granted to him, and the board afterwards, assuming that A. had lost the title to the first-mentioned lot, gave him a deed of the one of which he had taken possession, it was held that the board had not exhausted its power to grant a donation lot to A. by giving the first deed, and that the second deed to him was valid.—Ready v. Kearsley, 14 Mich. 215.

§ 16. ——Construction and effect of grants.

Construction of grants in general, see post § 21.

Construction of deeds in general, see Deeds, III.

¶ 50. Where a lot was conveyed by the land board to one Hall in trust for the rightful owners, "who may claim the same by mesne conveyances from the original grantee or otherwise," and there was no showing that any person other than Hall had any claim to the land, legal or equitable, at the date of the deed, it was held that the construction of the deed must be the same as if it had been to Hall, habendum to the use of himself and those who should claim under him by conveyance or otherwise.—Tregent v. Whiting, 14 Mich. 77.

¶ 51. A deed by the land board "in trust to and for the use and rightful benefit of the owners of the premises hereinafter mentioned, claiming the same by virtue of mesne conveyances from the original grantee or otherwise howsoever," is not void for uncertainty, and was within the powers of the land board.—Ready v. Kearsley, 14 Mich. 215.

§ 17. ——Titles and conflicting claims.

Right of claimant to appear and be heard, see also post ¶ 56.

¶ 52. Congress having authorized the governor and judges of the territory of Michigan, for the time being, to convey certain lands, the fee of which was in the United States, and having, by acts of legislation, recognized the persons who assumed to convey such lands, by virtue of such authority, as incumbents of those offices, and the offices as being in existence at and subsequent to the time when such conveyances were made, a mere stranger will not be permitted to controvert the title under such a conveyance, on the ground that the grantors were not at the time of the grant such governor and judges, and that there were then no such offices.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119. Writ of error denied, 5 How. 343, 12 L. ed. 181.

¶ 53. A third person is not at liberty to question the validity of a clause inserted in a deed given to the land board, by which the grantee was to hold "in trust for the rightful owners," etc.—Ready v. Kearsley, 14 Mich. 215.

¶ 54. No presumption can be indulged against the lawful character of the conveyances of the governor and judges of Michigan Territory.—Cicotte v. Anciaux, 53 Mich. 227.

§ 18. ——Procedure to settle claims.

¶ 55. A claimant under Act of Congress of May 23, 1844, whose petition shows that the land claimed had not been actually occupied at the time the state legislation designed to carry out the act was adopted, and that it was afterwards occupied only as a farm, does not come within the provisions of said act, and is entitled to no relief.—In re Selby, 6 Mich. 193.

¶ 56. Where land has been entered by the county judge under said act of congress, and the trustee is proceeding to adjudicate upon a claim made to a portion thereof, a person who sets up a right to such portion as a pre-emptioner for agricultural purposes, and claims that the same was never occupied for town purposes, and was not legitimately entered by the trustee, has a right to appear before the trustee and be heard.—In re Selby, 6 Mich. 193.

¶ 57. On the hearing by the county judge of a claim under said act of congress, a citizen and tax-payer of the town, who objects that the claimant is not entitled to the land claimed, but that it is a part of the common

fund, to be disposed of for the benefit of the town, is entitled to appear and be heard.—In re Selby, 6 Mich. 193.

§ 19. Sale of state lands and offers for sale.

Of swamp lands, see post § 46 et seq.
Of school lands, see post § 58 et seq.
Issuance of certificates of purchase, see post § 20.
Presumptions as to grant from state, see post § 24.
Mandamus to compel proper disposal or sale or patenting of state and public lands, see Mandamus § 100.

¶ 58. A patent based on a sale by private entry at the state land office and conveying "indemnity lands" of the state, which had never been offered for sale at public auction, is held void. These lands, if not to be considered as included by intendment in the general designation of swamp lands, so as to be subject to the state regulations as to the sales of such lands, were not subject to sale at all, for want of any legislation providing for it.—Attorney General v. Thomas, 31 Mich. 365.

¶ 59. Laws 1873, Act No. 21 (How. St. §§ 5249-5253) providing that lands reverting to the state by reason of failure to make payment, or by reason of a failure to comply with the conditions of any license or homestead act, shall not be subject to private entry or purchase either with cash or scrip until public notice of the restoration of such lands to market shall have been given in the manner set out in the act was intended to enable a person who had unfortunately failed to complete his purchase under a license to appear at the time and place of sale and bid thereon, and expressly denies the right of private entry or purchase with scrip or with cash, and is not impliedly repealed by Laws 1883, Act No. 130, appropriating to Livingston county 10,000 acres of swamp land in the Lower Peninsula "not otherwise appropriated."—Wait v. Commissioner of State Land Office, 87 Mich. 353.

¶ 60. The provision of Laws 1863, Act No. 145, p. 277, How. St. § 5355, that swamp and primary school lands in the mineral range of the Upper Peninsula, theretofore withheld from market as mineral lands, should, with certain exceptions, be reoffered and sold in the same manner as other swamp and primary school lands, contemplates an offering at public auction before they are subject to private entry at the land office.—Attorney General v. Smith, 31 Mich. 359.

¶ 61. It had been the settled policy of Michigan before the passage of Laws 1863, Act No. 145, p. 277 (How. St. §§ 5355-58), that while none of the swamp and primary school lands of the mineral range of the Upper Peninsula should be disposed of at less than a fixed minimum price, an opportunity should be made for obtaining the highest price that competition could bring on offering them at public sale, after due notice, before they were to be entered on the books of the land office as subject to sale on private application; and an intent will not be lightly inferred, from any mere equivocal words, to depart from this settled policy, especially in the case of lands which had been supposed exceptionally valuable and reserved for that reason from the previous public offerings.—Attorney General v. Smith, 31 Mich. 359.

¶ 62. It is the general policy of the land laws of Michigan that there shall be no private sales of state lands until they shall have been offered at public sale.—Potter v. State Land Office Com'r, 55 Mich. 485.

¶ 63. Laws 1883, Act No. 197, in fixing the minimum price for certain lands, does not authorize their sale, but merely prohibits sales below that price, and it presumptively means that a higher price may in some cases be demanded.—Potter v. State Land Office Com'r, 55 Mich. 485.

¶ 64. Lands left undisposed of after public sale cannot be entered at the state land office until the land commissioner has had an opportunity to receive and enter the returns from the public sales, and to fix the minimum price and the time for future entries. And the previous deposit of money, which the commissioner has no right to receive officially, cannot give the depositor precedence as a purchaser.—Potter v. State Land Office Com'r, 55 Mich. 485.

¶ 65. Whether the precedence of one person over another in a simultaneous struggle to enter land at the land office can be determined by the fact that his application is first in the hands of the official conducting the sale, quære.—Potter v. State Land Office Com'r, 55 Mich. 485.

¶ 66. If the commissioner of the state land office receives a draft as money in payment for lands, individuals cannot treat this as no payment and demand the right to purchase the same lands afterwards—there being no showing that the draft was not as good as money.—People ex rel. Estabrook v. Pritchard, 19 Mich. 470.

¶ 67. A person applying to purchase lands and making only part payment, where the commissioner's rule requires the whole, has no right to rely upon the assurance of a clerk in the office that such payment will secure the land for him, if on notice he should secure or pay the balance.—People ex rel. Estabrook v. Pritchard, 19 Mich. 470.

¶ 68. After application to purchase state lands and payment of part of the price another person applied for the same lands, tendering payment. Thereupon the first purchaser was notified that he could select of the lands so much as the money paid in by him would pay for, and he did so, claiming the whole, however, and offering to pay in

full. Held, that the second applicant was entitled to the balance of the lands.—People ex rel. Estabrook v. Pritchard, 19 Mich. 470.

¶ 69. Where lands subject to private entry are applied for and payment tendered, the commissioner has no authority to withhold them from sale for the accommodation of other parties who had made application previously but were not ready to make payment.—People ex rel. Parkhurst v. Pritchard, 17 Mich. 338.

§ 20. Certificates, patents, and grants.

Proper officer to issue patents, see also Mandamus ¶ 516.
Judicial notice of land office practices in issuing patents, see Evidence § 22.
Sufficiency of signature of certificate for school lands, see post ¶ 231.
Right to patent for swamp lands from state for building roads, see post § 55.
Patent to the state for swamp lands, see post § 43.
Necessity of patent to transfer swamp lands when selected, see post ¶ 164.
Validity and conclusiveness of certificates and patents, see post § 34 et seq.
Presumptions and evidence as to entry or patent, see post § 24.
Necessity of patent to pass title under legislative grant, see also post ¶ 83.
Right of way grant as effectual without patent on acceptance, see ante ¶ 33.

¶ 70. When title to land passed from the United States to an individual, a delivery of the land certificate to a third person for that individual was held equivalent in law to a delivery to the person himself, and the fact that it was not really delivered to him by such third person was unimportant.—Weare v. Linnell, 29 Mich. 224.

¶ 71. The commissioner of the state land office has authority to replace a certificate of purchase covering several parcels of land with certificates for each, if he is satisfied that the public trust fund will not thereby be injured. Held, that he is only expected to protect the state's interest; he has no concern with those of individuals, for his acts cannot determine their rights.—Allen v. Cadwell, 55 Mich. 8.

¶ 72. Mandamus will not lie to compel the secretary of state to issue patents to state lands; that is the governor's duty (Comp. L., § 3824; How. St. § 5269).—Crane v. Secretary of State, 51 Mich. 195.

§ 21. Construction of grants in general.

Of congressional and legislative grants, see post § 22.
Of grants by governor and judges or other town site board, see ante § 16.
Title under patent, and conclusiveness, validity and effect of certificate and patent, see post §§ 28-37.
Subjection of title by swamp land patent to taxes accrued during settlement, see post ¶ 101.
Construction of private deeds, see Deeds, III.

¶ 73. Public grants are to be construed strictly; nothing passes under them by implication.—La Plaisance Bay Harbor Co. v. City of Monroe, W. 155; Kiefer v. German-American Seminary, 46 Mich. 636.

¶ 74. The maxim that all grants are to be construed most strongly against the grantors applies to governmental grants.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246. Affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 75. The grant of a sovereignty must have operation according to its intent; it may operate immediately, or from time to time, if such appears to be its purpose.—Ballou v. O'Brien, 20 Mich. 304.

¶ 76. Where a grant was by the United States, it is presumed that the title had not been previously conveyed.—Tregent v. Whiting, 14 Mich. 77.

¶ 77. Any grant by the United States must be inoperative as against another which by construction of law antedates it.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 78. The state, through its legislature, may grant lands; but its grant, like that of any other grantor, conveys only the title which the state actually possessed in the premises.—Byrne v. Beeson, 1 D. 179.

¶ 79. A condition in a grant is to be construed strictly against the state; and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made.—Kiefer v. German-American Seminary, 46 Mich. 636.

¶ 80. General terms in a subsequent grant are always held not to include lands embraced within the terms of the prior grant. Even a patent may be declared void if issued for lands theretofore reserved from sale.—Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

§ 22. ——Of congressional and legislative grants.

Rule as to technical construction, see also post ¶ 132.
Of confirmatory act in favor of bona fide settlers, see post ¶ 97.
Of railroad and canal grants, see post § 63.
Of reservation clauses in Indian treaties, see post §§ 72, 73.
Confirmatory grants to early settlers, see post § 78.
Effect of forfeiting provisions in granting statute, see post ¶ 255.

¶ 81. When the government conveys by act of congress, that which constitutes the deed also constitutes the law which defines the right or estate. No court may subject these sovereign legislative grants, which are more like treaty cessions than they are like individual bargaining, to the definitions and refinements which the rules of municipal law apply to conveyances between man and man. They need not be capable of falling under any of the definitions given to estates by common law. While the government deals with its own, the right or estate granted, whether anomalous, or unprecedented or otherwise, will be entitled to recognition and effect for just what it appears and was intended to be. —Johnson v. Ballou, 28 Mich. 379.

¶ 82. A legislative grant differs from a grant of a private person in that it is both a grant and a law; and, as such, the intent of the law is to be kept in view, and its purpose effectuated whenever the subject-matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the legislature, however such construction may conflict with the principles of the common law, or prevent the attaching of equities which would spring from transactions with private parties.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 83. Wherever the granting act specifically provides for the issue of a patent the rule is that the legal title remains in the government until the issue of the patent; and, while so remaining, the grant is in process of administration, and the jurisdiction of the land department is not lost.—Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; affirming 68 Fed. 155.

§ 23. Revocation and forfeiture of grants.

See also ante ¶ 83.

Of the Swamp Land Grant of 1850, see post § 41.

Of the school and agricultural college grants, see post § 57.

Of the railroad and canal grants, see post § 63.

Construction of forfeiting conditions, see ante ¶ 79.

Construction of confirmatory exceptions in forfeiting statutes, see post ¶¶ 257, 258.

¶ 84. A grant by congress to a state is no more subject to be recalled at the will of congress than a grant to an individual.—Busch v. Donohue, 31 Mich. 481.

¶ 85. Where lands or franchises are held under legislative grants, reserving the right of forfeiture for nonperformance of conditions subsequent, no judicial decree of forfeiture is necessary.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

§ 24. Presumptions and evidence as to entry or patent.

Conclusiveness of certificates and patents, see post §§ 34-36.

As to title under confirmatory patent or grant, see post § 31.

Presumption as to fraud, see also post ¶ 125.

Presumption against previous public grant, see also ante ¶ 76.

Presumptions as to proper selection of railroad lands, see post ¶ 251.

Presumption as to grant from Great Britain before American sovereignty, see post § 79.

Evidence as to assignment of land warrants, see ante § 10.

Evidence in ejectment against claimant of aqueous lands, see post ¶ 287.

Immateriality of patent and record thereof when title is made out by adverse possession, see Adverse Possession § 41.

Burden of proof of showing irregularity in government survey lines, see Boundaries § 26.

¶ 86. In proceedings for the alienation of public lands, the findings of the officers of the federal land department upon matters of fact must, in the absence of fraud or imposition, be taken as conclusive.—Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; reversing 47 Mich. 52.

¶ 87. A grant of lands may be presumed against the state from facts and circumstances of long possession and claiming under successive conveyances where the original grant cannot be produced and there is no record thereof.—State v. Dickinson, 129 Mich. 221.

¶ 88. Where an order headed "Michigan State Land Office, Dec. 1, 1859," purporting to be a reservation from sale of certain lands specified, and to be signed by the commissioner of the land office, though in the handwriting of one of the office clerks, has been pasted in that book of the office in which advertised offerings are kept, and the commissioner in his annual report for the following year officially reports said lands as reserved, it is a reasonable inference, although the commissioner's order reserving the land is not found in any other shape in the office, that the order in the clerk's handwriting is a copy of an original since lost or destroyed, and this would be sufficient evidence that this land had been withheld from sale.—Attorney General v. Smith, 31 Mich. 359.

III. TITLE UNDER PATENT OR ENTRY, AND TRANSFER OF TITLE.

Rights under lease of mineral land from federal government, see Mines ¶ 14.

§ 25. Pre-emptor's, homesteader's, or settler's rights.

Entries by pre-emptors, see ante § 11.

Rights of scrip or warrant holders, see ante § 10.

Issuance and delivery of certificates and patents, see ante § 20.
Priority of applications to purchase state lands, see also ante § 19.
Validity and effect of contract to sell or deliver possession in future, see post § 26.
Bona fide settlers' rights where land is within land grant and not open to settlement, see post § 27.
Preferential right of settler under invalidated entry to purchase swamp lands, see post § 47.
Cancellation of entries, see post § 88.
Title by relation of patent to date of entry, see post § 28.
Rights of grantee of entryman as against other persons, see post § 33.
Recording of assignments in land office records, see post § 36.
Presumptions and evidence as to entry or patent, see ante § 24.
Evidence as to fraudulent timber cutting on homestead, see post § 77.
Relinquishment of entry rights as consideration for contract, see Contracts § 114.
Dower right in land under patent or entry, see Dower § 10.
Priority in right between assignee of entry certificate for security and dowress of entryman, see Dower ¶ 91.

¶ 89. Until a pre-emptioner pays for his land the government may dispose of it.—Busch v. Donohue, 31 Mich. 481.

¶ 90. Under the United States system of public land sales, the action of the register and receiver of a local land office in making or refusing a sale is not conclusive upon the purchaser or the government, and the official action necessary for a completed sale must be regarded as in fieri, and only in process towards completion, until consummated by the issuing of a patent, which exhausts the federal government's power of sale.—People ex rel. Brewer v. Kidd, 23 Mich. 440.

¶ 91. A homestead entry vests no title, but gives a right of possession which may be perfected by continued occupancy and improvement; and if not so perfected reverts to the government.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 92. Where, under a homestead entry not made in good faith, a patent was obtained for the supposed excess above 640 acres in a tract that had been officially surveyed, and confirmed to complainant's grantors under the Act of Congress of April 25, 1808, and thereafter possessed by them or complainant; since under said act a tract of more than 640 acres might be confirmed, complainants were entitled to all the land within the survey lines and monuments, and any paper descriptions contained in the patent or in plats made from the survey must yield so far as they differ.—Sanborn v. Vance, 69 Mich. 224.

¶ 93. The rights of a decedent whose homestead entry has not been completed by patent are not under U. S. Rev. Stat., § 2291, heritable, but the estate goes by designation of persons. Under section 2292 minor children surviving both parents take the entire estate to the exclusion of adult children.—Bernier v. Bernier, 72 Mich. 43. Reversed in 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

§ 26. Executory contracts by homesteaders or settlers.

Public policy of agreements among land claimants or with entrymen, see Contracts § 49.

¶ 94. A contract by one who is about to enter land under the federal homestead law to sell part of the land for flowage purposes to another and to convey to him when title is acquired, the vendee to have possession meanwhile, is contrary to public policy, and cannot be enforced; since it contemplates perjury and fraud on the homestead law.—Carley v. Gitchell, 105 Mich. 38.

¶ 95. Occupancy for less time than is required to create title by prescription, of land sold by a homestead entryman and making, with the entryman's knowledge, improvements contemplated by the contract, will not create a contract to use the land irrevocable so long as the improvements are maintained. —Carley v. Gitchell, 105 Mich. 38.

§ 27. Bona fide entries on land grant lands.

Rights and relief of settlers on railroad grants, see post § 71.

¶ 96. Although a person knows that a tract of land is within the limits of an old railroad grant, yet if he enters under the honest belief and expectation that such grant, if not technically extinguished by lapse of time, has remained so long unappropriated by any beneficiary that congress will shortly resume it, and in that belief determines to make for himself a home thereon under the land laws of the United States, when the forfeiture shall finally be declared, he is a bona fide claimant of a homestead within a confirmatory act.—Lake Superior Ship Canal Ry. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

¶ 97. Where an act of congress confirms "homestead claims" which on a certain date were "asserted by actual occupation under color of the laws of the United States," it includes the case of a person who on the date named was in the actual occupation of the land with a view of making a homestead, although he did not grant formal application until after that date.—Lake Superior Ship Canal Ry. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

§ 28. Title under patents; relation back to entry.

See also ante ¶¶ 97, 102.

Issuance and construction of patents, see ante §§ 20, 21.
Validity and conclusiveness of patents, see post §§ 34-36.
Invalidity of patent to lands reserved from settlement, see also ante ¶ 80.
Rights under entry before patent issues, see ante § 25.
Subjection of patent to grants and rights antedating entry, see post § 29.
Subjection to equities outstanding, see post § 30.
Under confirmatory patents, see post § 31.
Extent and boundaries of entry and patent, see post § 32.
Title of patentee's or entryman's grantee, see post § 33.
Vesting of title in præsenti under congressional grants, see post §§ 41, 57, 63.
Direct patents to Indian reserves, see post § 73.
Suits by patentee or other owner to obtain relief from sale or deed for taxes, see Taxes, XII, C.

¶ 98. A patent to public lands relates back to the time when they were purchased, and gives the patentee title as of that date.—Fisher v. Hallock, 50 Mich. 463.

¶ 99. The principle that a government patent when issued relates back to the original entry applies with equal force to a patent issued to the assignee of the original purchaser.—Clark v. Hall, 19 Mich. 356.

¶ 100. A patent for lands embraced in a grant for the use of a railroad company was held, as against trespassers, to relate back at least to the time when the lands were earned. —Johnson v. Ballou, 28 Mich. 379.

¶ 101. A purchaser of state swamp lands bought when the conditions entitling him to a deed were that he should pay one-fourth down, and the rest, with interest, at any time thereafter. A subsequent statute added the condition to such sales that the taxes should also be paid. The purchaser afterwards assigned his certificates of purchase; and the assignee, after paying the rest of the purchase price and the interest, demanded from the commissioner of the land office a certificate entitling him to his deed. The commissioner refused because the taxes had not been paid. Mandamus was granted to compel him to issue the certificate; but it was also held that the state did not release any tax lien on the land by giving a deed, and that this would not govern a case where the certificate of purchase had been issued after the passage of the statute.—Robertson v. State Land Office Com'r, 44 Mich. 274.

§ 29. ——Prior and conflicting entries and grants.

Outstanding claims and equities, see post § 30.
Under grants from governor and judges, see ante § 17.
Rights of conflicting entries and patents under United States and state to swamp lands, see post §§ 44, 45, 47.
Conflicting disposals of swamp lands for roads and to settlers, see post ¶ 216.
Priority of equities to transfer of land grant rights to corporate successor of railroad, see post ¶ 265.
Persons entitled to question patent, see post § 37.
Presumption against prior grant, see ante ¶ 76.
Inoperativeness of later public grant of same land, see also ante ¶ 77.

¶ 102. One who has perfected his homestead entry is entitled to a patent which relates back to the time when the entry was made, and takes date with it; but such relation does not operate to defeat a railroad company's right of way perfected under U. S. Rev. Stat., § 2477.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 103. Persons holding land under a patent which was issued as if upon sale in the open market were compelled to release to one who claimed under a patent of later date, which was issued in confirmation of a settler's license that antedated the adverse title.—Hedley v. Leonard, 35 Mich. 71.

¶ 104. Where the United States had canceled patents to swamp lands on the ground that they were covered by a grant to the state, Laws 1855, Act No. 166, How. St. § 5386 gave the patentees or their heirs the right to enter these lands at any time before they were put up for sale. A claim for certain lands was entered accordingly at the state land office, but before the transfer from the United States to the state had been completed the claimant died. Immediately upon the completion of the transfer certain other parties, who knew of the claimant's equities and had obtained quitclaims from some of his heirs, took patents to themselves, claiming under the act. Held, that those who had notice of the claimant's rights took the title in trust for themselves and their cotenants, the remaining heirs, and it was decreed that they convey to the latter an unencumbered title to their proportion.—Davis v. Filer, 40 Mich. 310.

¶ 105. Where a locator of swamp lands comes within the provisions of the act of congress of March 2, 1855, giving relief to those who had made entries prior to the issue of patents to the state, a person deriving title subsequently from the state holds his apparent title in trust for such locator and those holding under him.—Huggett v. Case, 61 Mich. 480.

¶ 106. Title to an unsurveyed island in an unmeandered lake having previously passed out of the government by a sale of land adjoining the lake, the purchaser at a subsequent government sale of such island ac-

quired no title as against the earlier patentees.—Church v. Case, 122 Mich. 554.

¶ 106a. A lot bordering upon an inland lake was conveyed by the United States by patent. Afterwards a submerged shallow area in the lake with aquatic vegetation growing above the water and within the limits of the patentee's riparian ownership was surveyed as an island under instructions from the federal land office, and was conveyed by patent to another. Held, that the later patent gave no title; since the land was not an "island" subject to be so surveyed and patented.—Webber v. Pere Marquette Boom Co., 62 Mich. 626.

§ 30. ——Outstanding claims and equities.

See also ante ¶ 104.

Rights of persons taking by deed from patentee or entryman, see post § 33.

Sufficiency of equity to entitle claimant to question patent, see post § 37.

Impressment of trust in favor of superior equity, see post §§ 39, 40.

¶ 107. A state patent to school lands is evidence of legal title, but it cannot cut off private rights, the holders whereof may assert them in equity. But a bona fide purchaser or encumbrancer of the patented land will be protected.—Allen v. Cadwell, 55 Mich. 8.

¶ 108. One who knew, before the issuing by the state to his grantor, of a patent for the lands he claims, that the state authorities claimed that the lands covered by the patent were reserved from sale, and who also knew of ineffectual attempts to purchase them from the state, had sufficient notice to put him on inquiry, and subject him to any equities growing out of any mistake or fraud under which the patent had been issued, and he is not entitled to any consideration as a bona fide purchaser.—Attorney General v. Smith, 31 Mich. 359.

¶ 108a. Equity may adjudge the patentee of lands to be a trustee for one having greater equities.—Boyce v. Danz, 29 Mich. 146; Hedley v. Leonard, 35 Mich. 71; Gibbs v. Diekma, 131 U. S. clxxxvi, appx.; 26 L. ed. 177.

§ 31. ——Under confirmatory patents.

See also ante ¶ 103.

Confirmatory grants of town lots by governor and judges, see ante § 15.

¶ 109. The equitable title of one who has made an entry of public land is, when confirmed by act of congress, the highest evidence of title until otherwise adjudged by a court of last resort.—Ives v. Ely, 57 Mich. 569.

¶ 110. The effect of a patent issued to a claimant before commissioners under the act of congress of March 3, 1807 (relating to lands in Michigan territory), and based upon the claimant's actual possession of the premises, is to release the title of the government and to confirm that under which the claimant held; and it does not exclude the right of dower of the widow of the claimant's grantor.—May v. Specht, 1 Mich. 187.

¶ 111. A bill to restrain an action of ejectment was properly dismissed where plaintiff in ejectment held a federal confirmatory patent to swamp land that had been granted him on the strength of equities arising out of his having entered it thirty-one years previously and twenty-one before the defendant in the action and complainant in the bill had gone upon the land, though the latter had continued in possession in spite of notice that it was not open to entry.—Ives v. Ely, 57 Mich. 569.

¶ 112. After confirmation of a claim to land by the board of land commissioners under the act of congress of May 11, 1820, and after patent issued, if it be competent for a court of equity to go behind a patent to settle conflicting claims, it should only be done upon the clearest and most irrefragable proofs.—Bernard v. Bougard's Heirs, H. 130.

¶ 113. A land patent from the state is presumed valid, except as against such persons as are distinctly authorized to assail it, unless the state itself brings proceedings to avoid it; and if the state has confirmed by a patent a settler's license which it issued previously, all inquiry into the facts of settlement and occupancy is precluded thereby except by those who have the statutory right to inquire into them.—Hedley v. Leonard, 35 Mich. 71.

§ 32. Extent and boundaries of entry or patent.

See also ante ¶ 92.

Mode of surveying and dividing lands, see ante § 3.

Title to unsurveyed island, see ante ¶ 106.

Of state grant of swamp lands "not otherwise appropriated," see post ¶ 191.

Adjustment of boundaries in cases of shortage or surplus of area, see Boundaries § 23.

¶ 114. No grantee by a patent from the United States granting a legal subdivision of land can derive title to land upon another legal subdivision.—Palmer v. Dodd, 64 Mich. 474.

¶ 115. When the United States grant by patent land described by a legal subdivision, the grantee is entitled to all the land within such subdivision, and is not limited by the number of acres specified in the patent or upon the government plat.—Palmer v. Dodd, 64 Mich. 474.

¶ 116. Under the act of congress of April 24, 1820, enacting that in surveying public

lands fractional quarter sections containing less than 160 acres should not be subdivided but should be sold entire, the surveyor general returned entire a parcel of 117 acres, being such part of the section as lay southeast of a meandered stream, and this was patented as "the southeast fractional quarter according to the official plat of the surveyor general." Held, that the whole of this phrase referring to the plat constituted a part of the description of the premises conveyed, and that a declaration in ejectment describing the land claimed as "a portion of the southeast fractional quarter," etc., was good, although such portion lay outside of the line ordinarily limiting the quarter section.—Wilson v. Hoffman, 70 Mich. 552.

¶ 117. A grant by the government of a meandered fractional quarter section of land does not give the grantee any right as a riparian owner to lands in an adjoining section, where the land granted does not border upon any lake or stream.—Stark v. Miller, 113 Mich. 465.

¶ 118. A patent of riparian land conveys, where there is no reservation, the land over which the stream flows as far as the middle line of the stream, and covers unsurveyed islands between this line and the bank; and the riparian's title will not be divested by a subsequent survey and grant of such islands. —Butler v. Grand Rapids & I. R. Co., 85 Mich. 246. Affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 119. A patent to land adjoining an unmeandered lake passes title to an unsurveyed island in the lake, in the absence of anything indicating to purchasers any intention of reserving the island from the conveyance.—Church v. Case, 122 Mich. 554.

§ 33. Rights and title of grantee from entryman or patentee.

Of grantee of school land certificate, see post § 62.

Patent to ancestor as color of title to land in adverse possession of stranger, see Adverse Possession ¶ 137.

Subsequently patented lands as passing by deed by doctrine of estoppel, see Estoppel §§ 18-22.

Title by patent as inuring to previous grantee from patentee, see Estoppel § 21.

Quit claim deed as carrying title completed except for patent, see Estoppel ¶ 44.

¶ 120. The bona fide holder of a land office certificate has an equitable interest which is subject to any priorities that may be held by a previous purchaser of the land itself.—Warner v. Hall, 53 Mich. 371.

¶ 121. A bona fide purchaser under a patent from the state is entitled to protection.—Austin v. Dean, 40 Mich. 386; Holcomb v. Mosher, 50 Mich. 252.

¶ 122. One who knew of a dispute as to the genuineness of an assignment of a land certificate, but who bought under a patent taken out by the holder of the certificate, was held not to be a purchaser in good faith without notice.—Austin v. Dean, 40 Mich. 386.

¶ 123. Those who have no reason to question a patentee's rights may rely on his title as valid.—Warner v. Hall, 53 Mich. 371.

¶ 124. One who has procured a patent having notice of another's right in the land cannot against a bill in equity filed by the latter, raise the defense that complainant's act in quitclaiming the right to reserve the timber was a fraud on the state. The state is protected from waste by the stipulations in its certificate.—Holcomb v. Mosher, 50 Mich. 252.

¶ 125. Where one knowingly and by collusion with the deputy commissioner of the land office obtained from the state a patent for lands not subject to sale, and on the next day made sale of them at a distant place to another person who had never seen the lands but who had paid for them almost double their valuation, it was held that a strong showing would be required to establish the good faith of such a purchase.—Attorney General v. Thomas, 31 Mich. 365.

§ 34. Validity and conclusiveness of certificates and patents.

See also ante ¶ 86.

Of patent not recorded in county records of title, see post § 35.

Conclusiveness and effect of land office records, see post § 36.

Patent to the state for swamp lands, see post § 43.

Of patents to lands within Swamp Land Grant but not yet selected as such, see post § 44.

State deed or patent to swamp lands, see also post § 49.

Persons entitled to question patents, see post § 37.

Estoppel by deed of lands subsequently certified to state and then granted to successor of original grantor, see Estoppel ¶ 21.

Deed by governor and judges to Detroit lots as basis for estoppel, see Estoppel ¶ 12.

Statements and recitals in grants as admissions against interest of parties, see Evidence § 383.

Patent as evidence of title, see also Evidence ¶ 2584.

Sufficiency of prematurely issued patent to support ejectment, see Ejectment ¶ 28.

¶ 126. A patent for land, given as upon an ordinary sale, is of no validity unless the authorities issuing it had jurisdiction to do so; and it is beyond their jurisdiction when the land is under a prior reservation from sale, which remains in force.—Hedley v. Leonard, 35 Mich. 71.

¶ 127. The action of the register and receiver of the United States land office in accepting the proofs furnished by a pre-emptioner as satisfactory, and receiving his money and issuing to him the usual duplicate, is a judicial determination of his rights, which is conclusive in all collateral proceedings. Whether or not the commissioner of the land office can reverse their action where there is no adverse claim under the pre-emption laws, it is held that his action in doing so, without notice to the party concerned, thus overturning a formal adjudication without the privilege of a hearing, was wrong.—Boyce v. Danz, 29 Mich. 146.

¶ 128. A patent of lands from the United States or the state cannot be impeached in an action at law.—Bruckner's Lessee v. Lawrence, 1 D. 19; Romain v. Lewis, 39 Mich. 233; Carpenter v. Ingersoll, 43 Mich. 433.

¶ 129. A patent of land from the United States or a state, if issued without jurisdiction, can be impeached in an action at law.—Webber v. Pere Marquette Boom Co., 62 Mich. 626.

¶ 130. A United States patent is never conclusive, in any forum, in a case where it appears that the department from which it issued had at the time no jurisdiction to issue it; and such want of jurisdiction may be shown in an action of ejectment.—Crapo v. Township of Troy, 98 Mich. 635.

¶ 131. A government patent may be impeached collaterally in any action, and its operation as a conveyance defeated, by showing a prior transfer of the land assumed to be conveyed.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246. Affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 132. All reasonable inferences of construction are against a position that rests upon mere technicalities to defeat a grant.—Johnson v. Ballou, 28 Mich. 379.

¶ 132a. Taxation by the state of lands which have not been patented, but for which patent certificates have been issued by the United States land office, is not "an interference with the primary disposition of the soil by congress," nor "a tax on the lands of the United States," as prohibited by the ordinance of 1787.—Carroll v. Safford, 3 How. (44 U. S.) 441, 11 L. ed. 671.

§ 35. ——Unrecorded patents.

Necessity for recordation of United States patents or "deeds from governor and judges," see Notice and Record of Title ¶¶ 292, 293.

¶ 133. The validity or operation of a government patent is not impaired by neglecting to record it in the registry of the county where the land lies.—Sands v. Davis, 40 Mich. 14.

§ 36. ——Land office records.

Record of illegal patent proceedings as evidence, see Former Adjudication ¶ 26.

¶ 134. An assignment of a certificate of purchase of public lands is properly of record in the land office at Washington.—Clark v. Hall, 19 Mich. 356.

¶ 135. The record of a United States patent in the government office at Washington has the same force as the patent.—Sands v. Davis, 40 Mich. 14.

§ 37. Persons entitled to question patents.

Effect of land office cancellation to bar settlers from suing to charge patentee as trustee, see post ¶ 145.

Right to question authority or office of governor and judges to make grants of Detroit town lots, see ante § 17.

Right to question state's disposal of swamp lands, see post ¶ 161.

Right to urge fraud in purchase of school lands, see also post ¶ 233.

Right of equitable owner to ejectment against holder of land patent, see Ejectment ¶ 36.

¶ 136. When a patent has been issued, a third person, not in privity with the title, is not to be heard to allege that it has issued improvidently.—Clark v. Hall, 19 Mich. 356.

¶ 137. The question whether a government patent is not void for excess is one that cannot be raised by third persons if the excess patented was public land subject to sale.—Webber v. Pere Marquette Boom Co., 62 Mich. 626.

¶ 138. A title derived from a conveyance by one who held under a certificate of purchase but who subsequently assigned the certificate to another who obtained a patent is not sufficient to enable the equitable owner to attack the patent in ejectment.—Nowlen v. Hall, 128 Mich. 274.

§ 38. Cancellation of entries.

See also ante ¶ 20.

Of swamp land entry under the state before perfection of title in the state, see post ¶ 183.

Cancellation of state license to enter and drain swamp lands, see post § 51.

Forfeitures and redemptions of school land sales, see post § 60.

Sufficiency of certificate of cancellation to entitle settler to preference as swamp land purchaser, see post ¶ 192.

Suits to vacate and annul or to impress trust upon patents, see post §§ 39, 40.

¶ 139. The commissioner of the state land office has no power to adjudge void and cancel a certificate of purchase of swamp land issued through mistake, fraud, etc.; and he cannot resell the land unless the certificate is voluntarily returned, or is adjudged void by

the proper court.—People ex rel. Commings v. State Treasurer, 7 Mich. 366.

¶ 140. The commissioner of the land office cannot legally cancel an entry of land as a homestead and return the money without notice to the owner.—Ives v. Ely, 57 Mich. 569.

¶ 141. Where the commissioner of the state land office assumed to cancel the location of lands and tendered back the warrants on which the land had been located, the act of the holder in receiving back the warrants without objection and in using them to locate other lands amounted to such an acquiescence in the cancellation as would preclude him or his assignee from thereafter relying on the original location as a step in the proceedings necessary to entitle them to a certificate of the purchase of the land first selected.—Ely v. State Land Office Commissioner, 49 Mich. 17.

¶ 142. The surrender to the federal government on demand of a certificate of entry upon the cancellation of a land sale because it was swamp land cannot estop the holder from asserting his equities in the land under a federal patent granted to him as a bona fide settler thereafter; nor can it be relied upon by a stranger claiming adversely to him who had taken possession in the meantime attempting to acquire a federal homestead.—Ives v. Ely, 57 Mich. 569.

¶ 143. While, as a general rule, in contested matters before the federal land department, the decision should be confined to the questions raised by the allegations of the respective parties, yet if it appears that the claim of the moving party is against public policy or the law, it should be disregarded, whatever be the nature or extent of the testimony upon the point at issue.—Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; reversing 47 Mich. 52.

¶ 144. Where, in a proceeding before the general land department involving only the question of the abandonment of a homestead entry, it appeared from the evidence returned on appeal to the secretary of the interior that the claimant was not a bona fide homestead claimant, the secretary did not exceed his jurisdiction in directing a cancellation of the entry.—Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; reversing 47 Mich. 52.

¶ 145. Notice to a homesteader of proceedings against him under the homestead act covers such matters only as are alleged in the complaint, and under such notice these are the only questions that can be passed on by the register of the United States land office, or, on appeal from him, by the commissioner of the general land office and the secretary of the interior. And if a final ruling on a point not raised by the complaint shall have the effect of ousting the homesteader, he can file a bill in equity to compel a subsequent patentee, with notice, to convey to him.—Johnson v. Lee, 47 Mich. 52. Reversed in 116 U. S. 48; 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

¶ 146. Where plaintiff located land with a warrant which had been sold to him with a guaranty, and was afterwards notified from the land office that the entry was suspended because the commissioner of pensions had cancelled the warrant on the allegation that it was issued on forged papers, and plaintiff then brought suit on the guaranty, it was held that this ex parte and extra-judicial proceeding of the commissioner could not conclude private rights, and that evidence of this action did not show plaintiffs entitled to recover.—Merrill v. Hartwell, 11 Mich. 200.

§ 39. Suits to vacate or correct or to impress trusts upon patents.

See also ante ¶ 80.
Disability of state courts to control or coerce land officers, see also ante § 7.
Impeachability of patents on law side of the court, see ante § 34.
Limitation on suit to enforce trust in title to land by public grant, see Limitations ¶ 274.
Trust suits in general, see Trusts, XII.

¶ 147. The courts of the state have no authority to restrain, by injunction, the receiver and register of the United States land office, acting under instructions of the commissioner of the land office, from proceeding to sell, at public sale, lands of the United States for which patents have never issued, notwithstanding such lands were subject to private entry, and all the steps towards a purchase of them at private sale, except the issue of the patent, had been taken, and the purchase money paid.—People ex rel. Brewer v. Kidd, 23 Mich. 440.

¶ 148. If under a mistake of law the officers of the land department issue a patent to one not entitled to it, a court of equity can correct the error and compel the transfer of the legal title to the true owner.—Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; reversing 47 Mich. 52; and see Romain v. Lewis, 39 Mich. 233.

¶ 149. Equity may in a proper case adjudge a patentee to hold title in trust for one having greater equities.—Boyce v. Danz, 29 Mich. 146.

¶ 150. A court of equity may, in a proper case, adjudge a patentee to hold as trustee for one having greater equities; but it will not relieve against a patent unless complainant shows that those under whom he claims had a better right to the land than defendant, and such as entitled them to a patent.—Bangs v. Stephenson, 63 Mich. 661.

¶ 151. A bill to establish a trust in lands wrongfully patented was maintained with costs of both courts against the patentee and

defendants claiming under him with notice, but dismissed as to purchasers in good faith with costs to them.—Austin v. Dean, 40 Mich. 386.

¶ 152. The owner of a certificate of purchase of state swamp lands assigned and delivered it to a purchaser, leaving a blank in which the purchaser was authorized to insert the name of his vendee as assignee, who without filling in such blank conveyed the timber on the land to a corporation for a valuable consideration. Such deed was duly recorded, after which the purchaser handed the certificate with the assignment still in blank to his brother, who delivered the same to the defendant, but without any agreement that he was to become the absolute owner or any authority to fill in the blank in the assignment from anyone, and said defendant, with knowledge of the equitable rights of said corporation, filled in his own name in the blank and procured a patent from the state of the land. Held, that equity would confirm the corporation's title to the timber.—Mason Lumber Co. v. Collier, 74 Mich. 241.

¶ 153. Where an information to vacate a patent issued by the commissioner of the state land office avers that the lands in question had been selected and reserved by the governor under Laws 1863, p. 277, How. St. § 5355, so as to except them from its operation, and also that they were never offered for sale subsequent to that act or to their reservation thereunder, the information is sufficient to warrant relief from the patent on the ground that it was invalid for the want of such a reoffering of the lands in accordance with the requirements of the act as to make them subject, under its provisions, to a valid private entry.—Attorney General v. Smith, 31 Mich. 359.

¶ 154. Under an information to vacate a patent collusively obtained, and which treated the purchase from the state as made for cash, and asked no relief on any other basis, a decree that the purchase price be refunded in scrip was held unwarranted.—Attorney General v. Thomas, 31 Mich. 365.

§ 40. ——Conflicting patents or grants.

See also ante ¶ 103.

Suits for relief of bona fide settlers on railroad grants, see post § 71.

¶ 155. A bill in equity by parties in possession under grant and confirmation from the United States lies to compel the release of a title held under an apparently legal grant from the United States which operates as a fraud on complainant's title.—Sanborn v. Vance, 69 Mich. 224.

¶ 156. A bill in equity filed by a settler on swamp land to enforce a right under the Swamp Land Acts of 1859 and 1861 (How. St. §§ 5436-41) must show a substantial compliance with every provision of the act on which the right depends.—Remeau v. Mills, 24 Mich. 15.

¶ 157. The holders of a certificate of purchase of swamp land cannot have relief in equity against a patentee unless they aver and prove substantial compliance with every condition of the statute governing the issue of such certificate.—Bangs v. Stephenson, 63 Mich. 661.

¶ 158. A bill by the holders of a certificate of purchase of swamp land against a patentee must aver settlement and cultivation within one year after its issue by the purchaser or his assigns; and, if it does not, such bill is bad for laches.—Bangs v. Stephenson, 63 Mich. 661.

IV. SWAMP LAND GRANT OF 1850.

§ 41. In general; operation and effect of the granting statute.

Construction of grants in general, see ante §§ 21, 22.

Lands included in the grant, see post § 42.

Survey, selection and patent to perfect title in the state, see post § 43.

Conflicting and prior federal grants, see post §§ 44, 45.

Provision for payment of proceeds in lieu of land, see post § 45.

Entries under and purchases from the state, and rights and titles under the state, see post §§ 46-56.

Effect of conflicting grant or patent subsequent to the act but prior to selection and patent, see post §§ 44, 45.

Irrevocability of grants by congress, see ante ¶ 84.

Evidence of state's title in ejectment against claimant, see post ¶ 287.

¶ 159. The Federal Act of September 28, 1850 (9 Stat. at L., 519), providing that certain swamp lands "shall be and are hereby granted" to certain states, is a grant in præsenti, needing only the identification of the lands to make it effective, and is sufficient to give title even without a patent, which is only evidence of title. Even if the patent were necessary it would cut off intervening claimants by relating back to the time when the right to it became perfected. The listing of these lands by the secretary of the interior is held sufficient identification.—Busch v. Donohue, 31 Mich. 481.

¶ 160. The statutes of the state accepting the Swamp Land Grant from the general government and providing for the sale of such land cannot be construed as creating a contract on the part of the state to assume the burden of drainage or to relieve the purchasers therefrom.—A. P. Cook Co. v. Aplin, Auditor-General, 79 Mich. 100.

¶ 161. The power of the legislature over the disposition of the swamp lands granted

by the act of Congress of September 28, 1850 is plenary, and no one can call their acts into question except the Congress of the United States.—McRae v. Schaffer, 89 Mich. 463.

¶ 162. The Swamp Land Grant was a grant in præsenti, conveying to the state the title to such lands as came within its terms, but suspending the right of entry until the lands covered thereby should either be determined by the secretary of the interior, or he should refuse to act.—People v. Warner, 116 Mich. 228.

¶ 163. The Swamp Land Act of 150 (act Cong. Sept. 28, 1850) passed the title to the lands thereafter identified as answering to its terms as of the date of its passage.—Sherman v. A. P. Cook Co., 98 Mich. 61.

¶ 164. Although the act of Congress of September 28, 1850, was a grant in præsenti of swamp lands to the several states whereby title passed to all lands that at that date were swamp lands, yet the determination of what were such lands was intrusted to the secretary of the interior, and the statute contemplated the issue of patents to transfer the legal title.—Michigan Land & Lumber Co. v. Rust, 168 U. S. 589; 42 L. ed. 591, 18 Sup. Ct. Rep. 208; affirming 68 Fed. 155.

¶ 165. Title to swamp land held not to have accrued to the State until the approval by the State of a survey made by its agent less than 20 years before.—State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580.

§ 42. Lands included in the grant.

Swamp lands open to private sale by state, necessity of previous offer for public sale, see ante § 19.
Effect of federal grant or patent to others before selection and patent as swamp lands, see post §§ 44, 45.
Presumptions as to reservation from sale, see ante ¶ 88.
Effect of precedent decision that lands are "swamp," see Courts ¶ 39.

¶ 166. The Swamp Land Grant of 1850 covered all swamp and overflowed lands, and not those alone which were susceptible of profitable reclamation by drains and levees.—People v. Warner, 116 Mich. 228.

[Note. The terms of the grant are that all swamp and overflowed lands thereby rendered "unfit for cultivation" go to the states. Consult the statute, Act of Cong., Sep. 28, 1850, cited in 168 U. S. 589. Editor.]

¶ 167. Lands received by the state as "marsh and overflowed lands" under the act of Congress of Sept. 28, 1850, vested at that date, and hence could be conveyed by it in 1882 under the swamp-land legislation, although they had meantime become submerged and the water over them navigable and though an attempted reservation was made in 1852.—Sterling v. Jackson, 69 Mich. 488.

¶ 168. A marshy island in one of the Great Lakes, existing as unsurveyed land at the time of the certification by the secretary of the interior of the list of swamp lands covered by the grant, will not, because of its being omitted from such list, be deemed to have been determined by the secretary not to be within the grant, unless there is evidence tending to show that the question as to such land was actually considered and passed upon.—People v. Warner, 116 Mich. 228.

¶ 169. The strip of land extending south from Harsen's Island at the mouth of the St. Clair river along the west bank of the South Channel rising a few inches above the surface of the lake in some places and submerged a few inches in others is swamp or overflowed land within the meaning of the Swamp Land Act of 1850 (Act Cong. Sept. 28, 1850), and hence belongs to the state.—State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580.

¶ 170. Submerged land situate on the St. Clair Flats, and within the meander lines of Lake St. Clair, is not within the contemplation of the swamp land act and hence not owned by, and open to, grant by the State.—Olds v. Commissioner of State Land Office, 134 Mich. 442, per Hooker, J.

¶ 171. The state is not estopped from setting up that lands in question were, in the year 1850, submerged lands, and not swamp lands, by the act of a former state land commissioner in attempting, in 1887 to induce the federal authorities to approve of a survey which designated such lands as swamp lands.—Olds v. Commissioner State Land Office, 150 Mich. 134.

¶ 172. The fact that the state maintained an action of ejectment against "squatters" on certain lands, on the ground that the lands were state swamp lands, does not estop the state from setting up the claim that other lands of like character are not swamp lands, but are a part of the bed of one of the Great Lakes, and therefore not subject to location by means of swamp land scrip, where it appears that the holders of the scrip were not parties to the ejectment suit, and at the time they earned the scrip did not think that they could use it in locating the lands in question.—Olds v. Commissioner State Land office, 150 Mich. 134.

¶ 173. It is clear that when the legislature passed the Survey and Sale Act of 1899 (Act No. 175, Pub. Acts 1899), designating certain lands as swamp or overflowed lands, they did not intend that the low lands at

the delta of the St. Clair River should be subject to location by means of swamp land scrip; therefore, in a petition by a holder of such scrip for mandamus to compel the commissioner of the state land office to permit such location of such lands, it cannot be said that the Survey and Sale Act operates so as to estop the state from denying that the lands are swamp lands.—Olds v. Commissioner State Land Office, 150 Mich. 134.

§ 43. Survey, selection, and patent to the state.

Effect of mere selection and listing as against federal patentee, see post ¶ 181.
Effect of prior conflicting grant or patent to others, see post §§ 44, 45.
Selection by road contractors of lands in compensation for building roads, see post § 53.

¶ 174. Where the secretary of the interior refuses to make the determination as to particular unsurveyed lands claimed by the state under the terms of the Swamp Land Grant, the state may cause a survey to be made and have the matter adjudicated in the courts.—People v. Warner, 116 Mich. 228.

¶ 175. As to the acceptance by the state of resurveys so as to render them final and conclusive as a basis for an adjustment of the Swamp Land Grant of Congress of 1850, and as to the authority of the federal land department to correct, in accordance with the new surveys, lists of lands previously forwarded to the governor, see Michigan Land & Lumber Co. v. Rust, 168 U. S. 589; 42 L. ed. 591, 18 Sup. Ct. Rep. 208; affirming 68 Fed. 155.

¶ 176. A patent to swamp lands from the United States to the State of Michigan under the Act of Congress, Sept. 28, 1850, is simply evidence of the grant and not of the date when it took effect.—Sterling v. Jackson, 69 Mich. 488.

§ 44. Federal grants, entries, and patents prior to selection and patent to state.

Statutory right of state to proceeds received by federal government in lieu of the land, see post § 45.
Preferential right of settler under invalid federal entry to purchase swamp lands from state, see post § 47.

¶ 177. A grant by the United States of land covered by the Swamp Land Act of 1850 (Act Cong. Sept. 28, 1850), made after the passage of said act and before the certification of the land to the state as required by the act, is a nullity.—Sherman v. A. P. Cook Co., 98 Mich. 61.

¶ 178. A land patent, issued by the United States under the Swamp Land Act of 1850 after the approval by the secretary of the interior of the selection of said lands by a railroad company under a railroad land grant, and their exclusion from the list of lands designated as swamp lands and approved by that officer, is a nullity.—Crapo v. Township of Troy, 98 Mich. 635.

¶ 179. The claim of the state to certain lands under the swamp land grant of September 28, 1850, as against defendants' claim that title to such lands had passed to the Flint & P. M. R. Co., under the act of congress of June 3, 1856, and under the act of the legislature of February 14, 1857, was held to have become stale, the state being estopped from asserting title in itself to said lands.—State v. Flint & P. M. R. Co., 89 Mich. 481. Writ of error dismissed 152 U. S. 363, 38 L. ed. 478, 14 Sup. Ct. Rep. 586.

¶ 180. Purchasers of swamp lands from the general government after the passage of the act granting them to the state, but before full title had vested, are protected against subsequent purchasers from the state, though patents have issued to the latter.—Dale v. Turner, 34 Mich. 405.

¶ 181. A mere listing of swamp lands under the act of congress granting such lands to the state of Michigan, and the approval of such list by the secretary of the interior, was only an act of identification, which could not extinguish any rights previously acquired by individuals by purchasing any of the lands from the United States with cash or land warrants.—Dale v. Turner, 34 Mich. 405.

¶ 182. How. St. §§ 5384-5, authorizing the state treasurer to receive from the general government the proceeds of swamp lands sold by it after the grant of all such lands to the state in 1850, amounted to a waiver of the state's claim to all such lands as against such intermediate buyers.—Ives v. Ely, 57 Mich. 569.

¶ 183. An entry of swamp land in good faith, while the title to such lands was in question as between the state and federal governments, was sufficient to give the person making such entry an equitable claim to the land, which the commissioner of the general land office could not extinguish without the claimant's consent or some proceeding against him.—Ives v. Ely, 57 Mich. 569.

§ 45. ——Right of state to receive proceeds.

Enabling statute for reception of proceeds as waiver of state claim to lands, see ante ¶ 182.

¶ 184. How. St. § 5384, which authorized the state treasurer to receive from the general government any moneys which had been received, or which might thereafter be received, for any swamp lands donated to this

state, and the commissioner of the state land office to take an assignment of all bounty land warrants received for any swamp lands sold in this state since the passage of the Swamp Land Act of 1850 (Act Cong. Sept. 28, 1850), and release the interest of the state in any lands sold or entered with said warrants to purchasers or their assigns, did not authorize the federal government to continue to receive land warrants for lands the title to which, under the act, had vested in the state, but, on the contrary, authorized the assignment of such land warrants only as had theretofore been received.—Sherman v. A. P. Cook Co., 98 Mich. 61.

§ 46. Entry and purchase from state.

What are deemed to be swamp lands, see ante § 42.

Conflicting prior patent from United States, see ante § 44.

Suits by settlers to enforce rights against patentee, see ante § 40.

Cancellation of certificate of purchase, see ante § 38.

Impressment of trust on patent wrongfully obtained, see ante §§ 39, 40.

Disposal by license to enter and drain lands, see post § 50.

Grant by state for aid of roads and other internal improvements, see post § 52 et seq.

Lands available for payment of road contractors, see post ¶ 208.

Selection for road building and reservation from general sale, see post §§ 53, 54.

Location or place for easement of way of necessity over submerged granted swamp lands, see Easements ¶ 92.

Times at which easement of necessity over granted submerged swamp land may be used, see Easements ¶ 103.

State statutes relating to swamp lands, see Comp. L. 1915, §§ 663-740.

¶ 185. Laws of 1858, Act No. 31 for the sale of the state swamp lands, made (How. St. § 5398) provision for two distinct classes of purchasers, namely: settlers and occupants of such lands at the time of the passage of such act, who should have been such Dec. 1, 1857, and owners and occupants of adjoining lands who were such Dec. 1, 1857.—People ex rel. Commings v. State Treasurer, 7 Mich. 366.

¶ 186. Occupancy of the adjoining lands, under the Swamp Land Act of 1858 (How. St. § 5398), might consist of cultivation and use, without actual residence, or might be by a tenant.—People ex rel. Commings v. State Treasurer, 7 Mich. 366.

¶ 187. Holders of state swamp-land scrip cannot select for entry lands which have been occupied by an actual settler under a license issued under the provisions of Laws of 1859, Act 229 (How. St. §§ 5436-5441), and which have been forfeited and abandoned, but not publicly restored to market.—Wait v. State Commissioner of State Land Office, 87 Mich. 353.

¶ 188. Fixing a minimum price for state swamp lands implies that a greater price may be asked, and the commissioner of the state land office will not be compelled by mandamus to issue certificates to one offering to purchase at the minimum price lands which are worth more.—McRae v. Shaffer, Commissioner of State Land Office, 89 Mich. 463.

¶ 189. Swamp lands enhanced in value since their withdrawal from the market must be offered to the highest bidder so that the state and not private parties may profit by the increase.—Gustin v. Commissioner of State Land Office, 126 Mich. 269.

¶ 190. Mandamus to compel the State Land Commissioner to convey to the relator certain swamp lands for $1.25 per acre was denied on facts showing that the land was withdrawn from the market by action of the Board of Control although somewhat informally.—Gustin v. Commissioner of State Land Office, 126 Mich. 269.

¶ 191. A grant by the State of any swamp lands not otherwise appropriated, includes lands which have not been patented to the State by the United States, but which have been duly selected so that the title has vested in the State.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

§ 47. ——Preferential right of settler under invalidated federal entry.

Patentee from state as trustee for prior federal settler, see ante § 29.

¶ 192. In providing for the entry of swamp lands on presentation of a certificate of cancellation signed by the register of the federal land office, Laws 1855, Act No. 166, How. St. § 5386 merely provides for official evidence, and does not prescribe who must sign the certificate.—Davis v. Filer, 40 Mich. 310.

¶ 193. Act of September 1850, How. St. § 5386 provides that the "assigns" of any purchaser of United States lands whose purchase has been cancelled on the ground that they were swamp lands can buy them from the state on presenting his certificate of purchase and cancellation before the state has disposed of them. Held, that this means only the "assigns" of the purchaser's ownership or supposed ownership in the land itself, and not of a mere interest incident to the option remaining in the purchaser.—Ely v. State Land Office Commissioner, 49 Mich. 17.

¶ 194. A settler on swamp land cannot enforce a right under the Swamp Land Acts of 1850 and 1861, unless he shows a substantial compliance with every provision

of the act on which the right depends.—Remeau v. Mills, 24 Mich. 15.

¶ 195. A bill asserting the validity of a swamp-land certificate issued under How. St. § 5897, and demanding a full-paid certificate, must show, where a patent has been issued to another person, that the certificate was issued properly and in compliance with the statute; and such a bill must also aver settlement and cultivation within one year. —Bangs v. Stephenson, 63 Mich. 661.

§ 48. Disposal of proceeds by state.
See also post ¶ 205.

¶ 196. The act of 1857 setting apart seventy-five per cent. of the proceeds of swamp lands for the primary school fund does not constitute such an appropriation of the lands to educational purposes as to place them, under § 2, art. 13, of the constitution, beyond legislative control.—People ex rel. Superintendent of Public Instruction v. Auditor General, 12 Mich. 171.

§ 49. Title and rights under the state.
Cancellation of certificates of purchase, see ante § 38.
Lands passed by grant, see also ante ¶ 191.
Effect of patent on accrued taxes during entry and purchase, see ante ¶ 101.
Conflicting federal and state patents, see ante § 44.
Superiority of state's grantee to federal act ordering resurvey, see ante ¶ 13.
Right to patent for lands selected as compensation for road building, see post § 55.
Alteration of terms of land grant or of disposal of lands as impairment of contract, see Constitutional Law § 173.
Sufficiency of possession of swamp lands as against state, see Adverse Possession § 28.
Quieting title to swamp lands, see Quieting Title § 12.
Reassessment of drain taxes on part-paid swamp lands, see Drains § 76.

¶ 197. A deed from the governor for a parcel of swamp lands will confer no title unless given pursuant to some law.—Remeau v. Mills, 24 Mich. 15; Attorney-General v. Smith, 31 Mich. 359.

¶ 198. A purchaser from the state of swamp land granted to it by the general government has no concern with the obligation of the state to reclaim such land.—A. P. Cook Co. v. Aplin, Auditor-General, 79 Mich. 100.

¶ 198a. In a bill for injunction by the People to restrain the removal of timber from lands on part-paid swamp lands delinquent for taxes, with a cross bill asking a patent, a decree holding certain of the taxes to be void and others valid and that the defendant was entitled to receive patents on payment of the price plus certain taxes declared valid, was affirmed. [The real issue was the taxability of part-paid swamp lands pending issuance of patent, but the opinion does not reveal which taxes were invalid or for what reason.]—People ex rel Attorney General v. A. P. Cook Co., 122 Mich. 453.

§ 50. Licenses to settlers to drain and clear lands.
Forfeiture and cancellation of license, see post § 51.
Laches barring certiorari to proceedings for draining swamp lands under act of 1857, see Drains § 117.

¶ 199. Comp. L. 1871, § 3978 et seq., How. St. §§ 5436-5443, which permit licenses to be issued to actual settlers who clear and drain the lands, should not be technically construed for the purpose of defeating their benevolent intent, especially when such construction is not demanded by any grievance. —Hedley v. Leonard, 35 Mich. 71.

¶ 200. An unmarried man who lives with his father on a parcel adjoining the land for which he holds a settler's license may fairly be said to reside on such land, if the two parcels are used and to some extent enclosed together, and if his occupation is honestly designed as home occupation.—Hedley v. Leonard, 35 Mich. 71.

§ 51. ——Forfeiture and cancellation of license.

¶ 201. The commissioner of the state land office has no authority to forfeit the license issued to a settler who, though he does not live upon the land, continues, after taking the proper preliminary steps, to make important improvements by clearing and draining, and keeps up his occupation for that purpose (Comp. L. 1871, § 3990, How. St. § 5443).—Hedley v. Leonard, 35 Mich. 71.

¶ 202. A settler's license cannot be forfeited by the commissioner of the land office unless upon a clear case and a showing of both nonresidence and abandonment (Comp. L. 1871, § 3990, How. St. § 5443); the commissioner must use his judgment on the showing.—Hedley v. Leonard, 35 Mich. 71.

¶ 203. A settler holding a license from the state cannot be deprived of his rights by any ex parte determination made by the commissioner of the land office in conflict with the facts; the commissioner can intervene only when the settler has given up his rights.—Hedley v. Leonard, 35 Mich. 71.

¶ 204. An outstanding settler's license must be avoided by a declaration made by the commissioner of the land office before the land can be sold by the state to anyone else; the avoidance is not to be left to inference.—Hedley v. Leonard, 35 Mich. 71.

§ 52. State grants for roads and other internal improvements.

Validity of land grants in aid of private internal improvements, see Constitutional Law § 283.

Bonus to road contractor who agreed to take pay in swamp lands, see Highways ¶ 365.

Invalidity of agreement to divide bonus swamp lands in consideration of refraining from bidding for road work, see Contracts § 56, ¶ 231.

¶ 205. Since the act of 1857 appropriating part of the proceeds of swamp land sales to the school fund did not make the swamp lands part of the school lands, the subsequent acts, reducing the proportion thus set apart, and appropriating lands to the construction of roads, were therefore not invalid.—People ex rel. Superintendent of Public Instruction v. Auditor General, 12 Mich. 171.

¶ 206. Pub. L. 1883, Act No. 133, appropriating lands to pay the expense of an internal improvement, authorized the imposition of a tax in addition. Held, that the tax provision did not invalidate the appropriation so long as it was not the consideration therefor.—Sparrow v. State Land Office Com'r, 56 Mich. 567.

¶ 207. The state may grant swamp lands to aid in improving the channel of a stream.—Sparrow v. State Land Office Com'r, 56 Mich. 567.

§ 53. ——Selection of lands under road grants.

Maturity of right to patent, see post § 55.

Allowance of selections in lieu of original lands to be taken in payment for work as invalid "extra compensation" of state contractor, see Constitutional Law § 278.

¶ 208. Under the act of 1859, p. 310 (see How. St. § 5414), authorizing contractors for swamp roads to take lands in lieu of money, they can only take such lands as are subject to entry at private sale.—People ex rel. Heather v. Pritchard, 17 Mich. 260.

¶ 209. Under Laws of 1883, Act No. 130 and Laws of 1885, Act No. 84 appropriating certain swamp lands in the Lower Peninsula in Livingston County, and a certain number of acres of similar lands in Shiawassee and Clinton counties, respectively, it was held that a contractor could select swamp lands for which the state had not received patents from the United States and which had not been offered at public auction, but the title of which had passed to the state under the Swamp Land Act of Congress.—State v. Sparrow, 89 Mich. 263.

¶ 210. The state swamp lands on Bois Blanc island are not in the Upper Peninsula of Michigan, so as to entitle a state-road contractor to select the same under a contract limiting such selection to vacant swamp lands in the market, and subject to sale by the commissioner of the state land office, in said Upper Peninsula.—Mays v. Shaffer, 89 Mich. 460.

¶ 211. One who under contract with the state has earned a right to swamp lands is not guilty of fraud if, in making selections, he chooses from lands open to selection those that are the most valuable; nor can inadequacy of consideration be regarded as evidence of fraud in such cases.—State v. Sparrow, 89 Mich. 263.

¶ 212. Under Laws 1863, Act No. 239, § 4 it was held that the time which would govern as to the right of selection of the lands to be withheld from sale would be the time at which the commissioner of the land office was notified that they had been selected.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 213. It was held that the right of selection attached to each parcel of land in the order in which it was described in the list of selected lands sent to the land office, and that if any tract mentioned had been sold before the commissioner was notified of the selection, or was for any other reason to be omitted, the order of the list should be pursued as if such tract had never been included. And there was no right to include in the list any greater amount of land than the act authorized to be selected.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 214. Where a commissioner of the land office, in patenting lands, had himself so departed from a rule restricting the demand for patents to the order of selection as shown in the lists of lands that it was thereafter impracticable to observe such order, it was held that the right to select belonged rather to the applicant for patents than to the commissioner, and that the latter could not withhold patents on the ground that the demand did not conform to the rule.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 215. It was held that Laws 1863, Act No. 239 applied to all swamp lands in the Upper Peninsula of Michigan, "not otherwise appropriated," whether classed as mineral lands or not, and that the term "appropriated" here signified an appropriation by the legislature for some purpose similar to that here intended—a disposition of the lands in some way, by which the state was to part with its title.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 216. The rule restricting the demand for patents to the order of selection would cease

to operate at the expiration of the period for which the lands were to be withheld from sale; and, as former selections no longer bind the state, they would not bind the applicant, who might then select other remaining lands, and demand patents for them, which would be a selection in itself. But any sales made by the state to individuals of previously selected lands, after they ceased to be withheld from sale and prior to a demand applicant would lose all right to the land so sold.—People ex rel. County of Houghton for patents, would be valid, and the original v. State Land Office Com'r, 23 Mich. 270.

§ 54. ——Reservation of selected lands from sale.

Selection by road contractor, see ante § 53.

¶ 217. On application for the reservation of land on a state road contract, an officer of the land office marked the descriptions of land applied for on a plat book of the office. No list of the lands wanted was filed by the applicant, as required by Comp. L. 1871, § 3959, How. St. § 5414, until after the time specified in the contract for the completion of the work. Held insufficient as a reservation.—French v. Christy, 37 Mich. 279.

¶ 218. Lands reserved from sale by a road contractor under a state contract are reserved for the full time specified in the contract for its fulfillment; and if the board of control of state swamp lands extends the time for fulfillment, the reservation is also extended for the same time.—Newcombe v. Chesebrough, 33 Mich. 321.

¶ 219. The renewal by the board of control of state swamp lands of a road contract, the time for which had already expired, does not revive the reservation of lands thereon that have been already forfeited and subsequently acquired by another.—Newcombe v. Chesebrough, 33 Mich. 321.

¶ 220. Lands are not withdrawn from market on a state road contract unless reserved within the time limited for the completion of the work.—French v. Christy, 37 Mich. 279.

¶ 221. The action of the state land commissioner, in withdrawing swamp lands from the market and reporting his action to the board of control which acquiesced in it, is sufficient to constitute a withdrawal by the board of control within the provisions of Pub. Acts 1897, No. 169, requiring them to withdraw swamp lands for the improvement of a specified river.—Gustin v. Commissioner of State Land Office, 126 Mich. 269.

§ 55. ——Right to patent.

¶ 222. Session L. 1879, Act No. 19, amending Session L. 1871, Act No. 481, appropriated swamp lands to pay for the construction of a certain state road, and provided that the lands selected should be reserved from private entry as soon as a list of them should be filed with the commissioner of the state land office. A reservation was accordingly made, which, however, exceeded the amount authorized by from two to three thousand acres. This reservation was not to last more than three years, and on "satisfactory showing to the board of control of state swamp lands by a certificate from the state swamp land commissioner * * * that said road had been constructed in as good and substantial a manner as the board now require," the lands should be patented to the counties engaged in building the road, or to their assigns. After the three-year period expired, a person holding swamp land scrip earned under Pub. L. 1863, Act No. 239, applied to the commissioner of the land office for patents to 320 acres of the lands included in the reservation, and, taking these lands in the order in which they were listed, the lands applied for were among those properly appropriated and not in the surplus. The commissioner refused, and the applicant sought by mandamus to compel him, to issue the patents. Held, unimportant to this case that the county clerks of the counties which built the road did not, as directed by the supervisors, actually execute assignments of the interests of the counties to the road contractor; the rights of the counties and of their assigns vested as soon as the act was complied with, if this took place within the period to which the reservation of the land was limited and if the swamp land commissioner's certificate was duly filed. And none of the lands reserved, taken in the order of their descriptions in the list, were subject to private entry.—Chadbourne v. State Land Office Com'r, 59 Mich. 113.

¶ 223. Under Laws 1879, Act No. 19, providing for the patenting to counties of swamp lands for construction of roads upon a certificate from the state swamp land commissioner "that said road had been constructed in as good and substantial manner as board [swamp land board] now require," the word "now" was not referable to the time of the enactment of the original act (Laws 1871, Act No. 481) but to the time of the act of 1879; and therefore was satisfied by a certificate that the road was constructed as was required "at the time of the passage of the act locating said road."—Chadbourne v. State Land Office Commissioner, 59 Mich. 113.

¶ 224. The counties of Baraga and Ontonagon were entitled under Session L. 1871, Act No. 481, as amended by Session L. 1879, Act No. 19, to receive certain swamp lands on the filing of the certificates of the state swamp land commissioner certifying that the state road had been constructed in as good and substantial manner as was required by the board of control and within the statutory time; and it was not necessary and could not be required that such road should be accepted by the board of control, since that body was only to receive a "satisfactory" showing which showing was to be the swamp land commissioner's certificate.—Chadbourne v.

Commissioner of State Land Office, 59 Mich. 113.

¶ 225. By virtue of Act No. 239, Laws 1863, the state for the purpose of internal improvement, "appropriated to the county of Houghton" certain undesignated lands, knowns as "State Swamp Lands" granted to it by the federal government. The county assigned its rights to the plaintiff, who made selections of land thereunder after many years and seeks to compel the land commissioner to issue him a patent to the lands selected. Held, that the right of selection is not affected by laches or lapse of time although the lands have only recently become valuable and the payment of taxes was avoided for many years.—Robson v. State Land Commissioner, 148 Mich. 12.

§ 56. Scrip rights.

¶ 226. The term "scrip," as used in How. St. §§ 5249-5252, concerning state swamp lands, and applicable to purchase same means the credit upon the books in the state land office of land to which the contractor who has assisted in draining them is entitled, although no certificate or other evidence of the party's right is issued—Wait v. Commissioner of State Land Office, 87 Mich. 353.

¶ 227. "Scrip" for swamp lands as used in How. St. §§ 5249-5252 is assignable, in whole or in part, to other parties, and when the assignees have made the selections of the lands they are chargeable to the assignor upon the books of land office.—Wait v. Commissioner of State Land Office, 87 Mich. 353.

V. SCHOOL AND AGRICULTURAL COLLEGE GRANTS.

Appropriation of proceeds of swamp land sales to school fund, see ante § 48.

§ 57. In general; operation of the grants.

Sale and disposal by the state, see post §§ 58, 59.
Forfeiture of purchase contract and redemptions, see post § 60.
Title and rights under the state, see post § 61.
Rights and titles of persons taking under state's patentee, see post § 62.

¶ 228. The words employed in the proposition relating to school lands in the act of congress for the admission of Michigan to the Union indicate an intent on the part of the United States that the grant should have a continuous operation; and therefore lands reserved for the benefit of Indian tribes by treaties with them prior to the admission of the state will, on the extinguishment of the Indian title, be presumed, as against a trespasser, to be embraced within the proposition aforesaid.—Ballou v. O'Brien, 20 Mich. 304.

¶ 229. By the act providing for the admission of Michigan into the Union (which, when accepted by the state, became an irrevocable compact), section 16 in every township not sold or otherwise disposed of was granted to the state for school purposes. As the government extended its surveys, so that the location of those sections was ascertained, the title of the state became complete and could be sold without the consent of congress; and the act of March 1, 1847 (9 U. S. St. at L. 146) does not authorize the sale by the United States of any lands, mineral or otherwise, which fall within section 16; nor could a lease made by the secretary of war for mining purposes impair the state's title to such lands.—Cooper v. Roberts, 18 How. (59 U. S.) 173, 15 L. ed. 338, reversing 6 McLean 93, Fed. Cas. No. 3201; Minnesota Min. Co. v. National Min. Co., 11 Mich. 186, affirmed 3 Wall. 332, 18 L. ed. 42; Minnesota Min. Co. v. National Min. Co., 3 Wall. (70 U. S.) 332, 18 L. ed. 42, affirming 11 Mich. 186.

§ 58. Sale and disposal by the state.

Necessity of offer for public sale before private entry and sale, see ante § 19.
Frauds in purchase, see post § 59.
Forfeitures and redemptions, see post § 60.
Statutes regulating disposal by the state, see Comp. L. 1915, chap. 31, § 500 et seq.

¶ 230. Where a lot belonging to the primary school lands was conveyed by deed in 1850, and for the following twenty-two years treated as out of the market, the commissioner of the land office will not, upon proof that such deed is void, and that there is no such society as that named as grantee therein, be compelled by mandamus to sell the same now at the price of an appraisal made in 1850; Comp. L. 1857, § 2458, authorizes him to refuse to sell such lands, if, in his opinion, the doing so would be beneficial to the several funds affected thereby.—People ex rel. Chapman v. State Land Office Com'r, 26 Mich. 146.

¶ 231. A certificate of the sale of primary school lands, signed by a clerk in the office of the superintendent of public instruction, was held not well executed under the laws in force in 1841, though he added after his name, "For J. D. P., Superintendent of Public Instruction."—Lee v. Payne, 4 Mich. 106.

¶ 232. The agricultural college land-grant board had the right to determine, or to authorize the land commissioner to determine, what portion of these lands should be sold as timbered lands under the act of 1863, as amended by the act of 1869, provided such action was not the result of fraud on their part.—Attorney General v. Ruggles, 59 Mich. 123.

§ 59. ——Frauds and invalidities in purchase.

See also ante ¶¶ 108, 230, 232.

¶ 233. A bill was filed to compel the reassignment of primary school land certificates wrongfully withheld, and it was claimed in defense that as complainants had obtained these lands from the state by fraud, in filing an affidavit that they were chiefly valuable

for agricultural purposes, when they were really valuable for pine timber, they were not entitled to relief. Held, that defendants could not avail themselves of such an objection; the question of value only concerned the state, which appeared to be abundantly secured.—Spoon v. Gilbert, 44 Mich. 585.

¶ 234. One who is alleged to have procured agricultural college lands to be entered for his benefit in names other than his own need not disprove the charge until some evidence is offered to prove it.—Attorney General v. Ruggles, 59 Mich. 123.

¶ 235. That a purchaser from the state of agricultural college lands does not divulge to the commissioner his knowledge as to the present or prospective value of property as timber land is not actionable fraud.—Attorney General v. Ruggles, 59 Mich. 123.

¶ 236. The purchase of timbered agricultural college land at a figure less than five dollars an acre was fraudulent; where it appeared that much valuable timber was growing on such land, that the purchaser had full knowledge of its worth, and remained silent; that no timber affidavits could be found; that the frauds under the same commissioner are matters of public history; that the purchaser made the entries in the names of other men, and a different man for each parcel; and where it appeared that other lands have been bought in the same way, and to a large extent skinned of their timber by the same purchaser, and then forfeited as to payment of interest and taxes.—Attorney General v. Ruggles, 58 Mich. 123.

¶ 237. Purchases of state agricultural college lands in 1877 cannot in 1881 be invalidated by the fact that the land board, or the commissioner acting under the authority of such board in making such sales, were not as attentive to their duties as they should have been, and not as watchful of the interests of the state as the people had a right to expect of public officers, and that by reason of such laxity sold at a minimum price.—Attorney General v. Ruggles, 59 Mich. 123.

¶ 238. Where agricultural college lands valuable for timber had been bought of the state under circumstances of fraud at an undervaluation, the land-grant board, or the attorney-general and land commissioner acting under their authority, could make a settlement of suits pending between the purchaser and the state which would bind the latter and bar the claim of fraud.—Attorney General v. Ruggles, 59 Mich. 123.

§ 60. Forfeitures and redemptions.

¶ 239. A redemption from a purchase of state forfeited land made by one claiming to hold by assignment from the original locator, and who at the time was likewise guardian of the heirs of such locator, is sufficient to cut off the purchaser's rights, though such assignment be proved to have been a forgery, since, if the assignment were invalid, the redemption may be sustained as made on behalf of the heirs.—Johnston v. Knapp, 35 Mich. 307.

¶ 239a. Whether a redemption when made is not sufficient, in all cases and by whomsoever made, to save the title to the real owner, whoever he may be, quære.—Johnston v. Knapp, 35 Mich. 307.

§ 61. Title and rights under the state.

Sale by the state, frauds therein, and forfeiture back to state, see ante §§ 58-60.
Equities of third persons and rights of bona fide purchasers under state's patentee, see ante ¶ 107.
Disability of trespasser to question title under the state, see post ¶ 286.
Leviability of interest represented by certificate of sale, see Executions § 23.

¶ 240. Under Comp. L. 1897, § 1832, an undivided interest in a part-paid school land certificate which a purchaser had prior to the issuance of the patent by the state is subject to execution.—Foster v. Whelpley, 123 Mich. 350.

§ 62. Assignments and grants by purchasers.

¶ 241. The holder of a part-paid university land certificate mortgaged the land and then sold out and put the purchaser in possession. Afterwards he assigned the certificate to someone who advanced the money to take up the mortgage and pay the balance due the state, so as to get a patent. Held, that the purchaser could maintain a bill against the holder, the mortgagee and the assignee of the certificate to enjoin ejectment and for specific performances.—Rogers v. Odell, 36 Mich. 411.

VI. RAILROAD AND CANAL GRANTS.

§ 63. In general; operation of granting statutes.

See also post ¶¶ 247, 250.
Construction of other congressional grants, see ante §§ 22, 41, 57.
Lands included in grant, see post § 64.
Conditions and terms of the grant, see post § 66.
Selection by railroad within place limits, see post § 65.
Forfeiture or release and reverter to government, see post §§ 67, 68.
Title and rights of railroad, see post § 69.
Transfer of and succession to railroad rights, see post § 70.
Rights of bona fide settlers and relief on invalidity of entry, see post § 71.
Operation of grant coupled with filing of location map to withdraw lands from list open to entry, see ante ¶ 22.
Right of way grants, see ante § 12, and see Railroads, III.
Ministerial or discretionary nature of duty to grant land, see also Mandamus ¶ 526.

¶ 242. The action of the state in accepting, with its conditions, a congressional grant of land for the benefit of a corporation organized to build a canal under the state law, and in granting said land to the corporation on certain conditions,—congress afterward adding more land for the benefit of the corporation according to such conditions,—fixed in the corporation building the canal and fulfilling the imposed conditions a contract right with a right of possession of the lands so granted. —People ex rel. Attorney General v. Lake Superior Ship Canal, Railroad & Iron Co., 32 Mich. 233.

¶ 243. The land grants made by the Acts of Congress of 1865 and 1866 to aid in the construction of the Portage Ship Canal must be assumed to have been made by congress with a knowledge of the provision of the state constitution inhibiting the state from engaging in any work of internal improvement, as well as to comply with the expressed will of the state as contained in the Joint Resolution of Jan. 21, 1865, asking aid for this work; and the acts of congress conferring these grants must be regarded as intended to leave the state full discretion in the choice of agencies, as had before been the case with railroad grants.—People ex rel. Attorney General v. Lake Superior Ship Canal, Railroad & Iron Co., 32 Mich. 233.

§ 64. Lands included in grant.

Lands selected as railroad lands and withdrawn as swamp lands, see also ante ¶ 178.

Selections outside of place limits, see post ¶ 248.

¶ 244. The grant to the state of Michigan of land to locate a canal upon at the falls of the St. Mary extends only to the military reserve, and does not include private property below it.—Ryan v. Brown, 18 Mich. 196.

¶ 245. The act of congress of August 26, 1852, which granted to the state of Michigan the right of locating a canal through the public lands known as the military reservation at the falls at St. Mary's river, and which authorized by such description the location of the canal mainly across and through the Indian reserve, had the effect of extinguishing only so much of the Indian reserve as was embraced in the grant to the state for canal purposes.—Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; affirming 84 Mich. 140.

¶ 246. Where lands granted by congress to a state in aid of a railroad had been identified and separated from the public domain, and had not been declared forfeited to the United States, the state was without power to appropriate them to the construction of a canal, and they would not be regarded as within the scope of any subsequent grant by congress unless in terms made so.—Lake Superior Ship Canal, Railroad & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

§ 65. Selection of lands.

Conflicting selections under railroad and swamp land grants, see also ante § 44.

¶ 247. The act of congress of June 3, 1856 (11 U. S. Stat. at Large, p. 21), granting lands for building a railroad from Amboy, by Hillsdale and Lansing, to some point on or near Traverse Bay, was a present grant of the lands included in its terms. The right of selection vested in the railroad company as soon as it earned them, and a sale by the company of any specific parcels of land, not exceeding the quantity earned and lying within the limits specified in the grant, was, to that extent, an effectual selection.—Johnson v. Ballou, 28 Mich. 379; Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 248. Act of Congress, June 3, 1856 (11 Stat. L. p. 21), required each quantity of 120 sections to be selected from a continuous strip twenty miles in length of the road and from a strip on either side of the road lying within six miles of it, if sufficient land could be found unappropriated therein. A deed by the railroad company for lands outside of the prescribed limits was made at a time when the road had already conveyed more land than it had earned, and was therefore invalid, but the land conveyed in prior deeds, which exhausted the grant earned, also contained land outside those limits. Held, that the selection made by the prior deeds must now stand valid, since none but the United States can now question it; and they probably will not do so, as the purpose of the grant has been accomplished.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 249. Where the location of a line of railroad was to fix the identity of certain lands granted by the government to the use of said road, and lying upon either side of it, the effect of the grant and location was to take out of the body of lands subject to sale by the United States the sections of land covered by the floating title already conveyed; an application to purchase these lands would give no right to go upon them or to cut the timber. Whether or not the land officers of the United States were still charged with the duty of protecting these lands against trespassers, they could not, as against the railroad company, sell off the timber, and thus deprive the company of a portion of the benefit intended by the grant.—Johnson v. Ballou, 28 Mich. 379.

¶ 250. The effect of the Act of Congress of June 3, 1856, granting certain lands to the state of Michigan to aid in the construction of a railroad from Amboy, via Hillsdale and Lansing, to some point on or near Traverse Bay, and of the acceptance of the grant by the state, and of Laws 1857, Act No. 126, granting said lands to the Amboy, Lansing &

Traverse Bay Railroad Company, was to divest the title of the United States to the lands and to permit the railroad company to select any land, when earned, within the prescribed limit of six miles, if not fifteen miles.—Tillotson v. Webber, 96 Mich. 144.

¶ 251. Where the granting statutes did not require that the selection or report of the state agent appointed to select for a railroad company lands granted by congress to the state in aid of the road's construction should be preserved or filed, the list filed by the company with the land commissioner, certified by said commissioner as true and correct, and approved as such by the secretary of the interior, will be presumed to have been properly selected.—Tillotson v. Webber, 96 Mich. 144.

§ 66. Conditions and terms; earning the grant.

Selection of lands by railroad, see ante § 65.
Right to possession, see also ante ¶ 242.
Forfeiture for breach of condition, see post § 67.
Conditional acceptance of grant by railroad, see post ¶ 261.

¶ 252. The board of control created by Mich. Act of Feb. 14, 1857, could not qualify the right of selection under a congressional railroad land grant operating in præsenti as a grant of lands to be selected within place limits, or subject it to any conditions not performed or waived; nor was such board vested with any power over the lands contained in the grant except in cases of nonperformance or of conflict, in which cases the board might declare a forefeiture or adjust the controversy.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 253. The intention of Act of Cong. June 3, 1856 (11 Stat. L. 21), granting railroad bounty lands, was that the bounty, aside from the first 120 sections, should be bestowed as fast as each continuous length of twenty miles was constructed, and no faster; so that neither the state nor a company authorized to build the road could convey or encumber lands not earned by construction; and a conveyance by the state to a railroad of lands in excess of those at that time earned is not a grant subject to forfeiture, but void, even though the road subsequently earned such lands.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 254. Under the act of congress of June 3, 1856, granting to the state of Michigan certain lands to aid in the construction of certain railroads from Grand Haven and Pere Marquette to Flint and thence to Port Huron, and the act of the legislature of Michigan of Feb. 14, 1857 (Laws of 1857, p. 346), accepting said grant and conferring upon the Detroit & Milwaukee Railway Co. so much of said lands as pertain or attach to said route from Grand Haven to Owosso, and upon the Port Huron & Milwaukee Co. so much thereof as pertain or attach to said route from Owosso to Flint and thence to Port Huron, and providing for a board of control to manage and dispose of said lands in aid of said railroads in the manner provided in said act, with authority, in case of failure of either of said companies to accept said lands or perform the conditions of said grant, to declare said lands forfeited to the state, and confer the same upon some other competent party under the general regulations and restrictions of said act, it is held not within the authority of said board of control, upon forfeiture of the grant to the Detroit & Milwaukee Railway Co., to transfer the same to the Port Huron & Milwaukee Company, which was engaged in building a road from Port Huron to Flint, but did not propose to construct a road from Grand Haven to Owosso. The grants were distinct, and the design was to provide for two distinct lines intersecting at Owosso, and to aid each by a grant of the lands lying within the prescribed distance along and near it; and a conveyance to said latter company, for the construction of a portion of the line easterly of Owosso, of lands lying westerly thereof and pertaining to the other line provided for, is held invalid. It is immaterial that the charter of the company authorized it to build a road from Owosso westerly to Grand Haven; for there must be something more than a paper line, and while it remains on paper only, with no intention on the part of the company to actually build the road, there is nothing to which the grant can be applied.—Bowes v. Haywood, 35 Mich. 241.

§ 67. ——Forfeiture for breach.

See also ante ¶¶ 252, 260.
Necessity of judicial decree of forfeiture, see ante ¶ 85.

¶ 255. A provision, in a grant by congress to a state in aid of a certain railroad, that the lands shall be forfeited if the road is not completed within ten years, is a condition subsequent that can be enforced only by the original grantor, the United States; and until, in some appropriate way, the right of forfeiture is asserted, the title remains in the state or in the corporations upon which, from time to time, it confers the benefit of the grant. Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

¶ 256. Prior to legislative or judicial proceedings by the United States looking to a forfeiture of lands granted to a state in aid of a certain railroad, whatever changes were made by the state as to the beneficiary of the grant, and whatever releases were executed by any beneficiary to the state, they did not operate to retransfer the lands to the United States; and a release of such lands by the governor of the state to the United States without legislative authority was in-

operative. Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

¶ 257. Where an act of congress declaring a forfeiture of lands granted to a state in aid of a certain railroad, confirmed the title to such of the lands as had been theretofore "disposed of by the proper officers of the United States or under state selections in Michigan confirmed by the secretary of the interior, under color of the public land laws," provided that "the consideration received therefor is still retained by the government," selections under color of special grants in aid of the construction of a canal were confirmed, where they had been approved by the secretary of the interior; the construction of the canal being the consideration "received" and "still retained." Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

¶ 258. On forfeiting railroad lands for breach of condition with a confirmation of existing sales, if any of the lands had been disposed of by the proper officers of the government to individuals under the homestead laws, it could properly be held that the "consideration received" for such conveyances was still retained by the government, although in fact no money had been paid, the consideration which the government had provided for the conveyance of such lands being the actual occupation by the homesteader for the specified period.—Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; affirming 44 Fed. 587.

§ 68. Release and reverter to government.

Forfeiting statutes and exceptions, see ante § 67.

¶ 259. Where the state of Michigan conferred part of lands which had been granted to it by an act of congress in aid of certain railroads upon the M. R. Co., and another part upon the O. R. Co., the lines of which roads intersected each other, and where the successor of such companies released to the state the grant to the M. R. Co., which grant was then released to the United States by the governor of the state acting under authority from the legislature, and where, further, such successor also executed to the state a release of the grant to the O. R. Co., which grant the governor without authority released to the United States, held, that the lands within the "place" limits of the lines of the two companies at their intersection were not, as to an undivided moiety thereof, released to the United States, but that such moiety still belonged to the state.—Donahue v. Lake Superior Canal, R. & Iron Co., 155 U. S. 386, 39 L. ed. 194, 15 Sup. Ct. Rep. 103; reversing 44 Fed. 587.

§ 69. Title and rights of railroad.

Right of possession, see also ante ¶ 242.
Railroad deed to lands not yet earned, see also ante ¶ 253.
Rights of bona fide settlers claiming under void grant, see post § 71.
Presumptions as to selection, see ante ¶ 251.
Mandamus to governor to compel disposal of public lands under congressional grant in aid of ship canal, see Mandamus ¶ 494.

¶ 260. Railroad companies which accepted the congressional grant of public lands under the provisions of Laws 1857, Act No. 26, acquired rights which could not be destroyed except by their own neglect.—Rogers v. Port Huron & L. M. R. Co., 45 Mich. 460.

¶ 261. Congress, by an act passed June 3, 1856, granted certain lands to the state of Michigan, to be used solely in aid of the construction of railroads. The state, by Laws 1857, Act No. 156, set them apart for the benefit of certain designated roads, on condition that the beneficiaries should accept them subject to the terms of the act. Held, in a case in which the acceptance was qualified, that the company acquired no title, and that a bill would not lie to quiet a title to the lands obtained by execution against the beneficiary intended by the statute.—Rogers v. Port Huron & L. M. R. Co., 45 Mich. 460.

¶ 261a. Though the state cannot tax railroad-grant lands while the title remains in the United States, or while it holds them as trustee of the United States, yet when the state, proceeding in the execution of the trust, has transferred its entire title to the railroad company, and such company has perfected its title and acquired the right to sell, taxation is valid.—Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805.

§ 70. Transfer and succession to rights of railroad.

See also ante ¶ 254.

¶ 262. The arrangement between the A., L. & T. B. R. Co. and the J., L. & S. R. Co., and the legislation following the same, by which the beneficial interest of the former in the land grant was transferred to the latter, could not operate to affect rights previously acquired by third parties.—Johnson v. Ballou, 28 Mich. 379.

¶ 263. The J. R. Co. was, by Michigan act of March 18, 1865, authorized to agree with the A. R. Co. for the location of the J. line on the lines of the A. company, and in such case to receive the congressional land grant of the latter, and to purchase its railroad and property. Oct. 6, 1866, such agreement, location and purchase were made. Subsequently the property of the A. Co. passed on foreclosure sale to the J. Co., which in due time completed the road, and received patents to all the land grant the A. Co. had failed to earn. Held, that the right of the A. Co. to earn the remaining lands of the grant was

not transferable; that the effect of the assignment to the J. Co. was a surrender of the right to the state, and which by the Act of Congress it was authorized to confer, and by said act of 1865 did confer upon the J. Co.; and that, therefore, the right of the J. Co. to earn and obtain the grant was derived not from the assignment but from said act of 1865.—Jackson, L. & S. R. Co. v. Davison, 65 Mich. 416.

¶ 264. Laws 1877, Act No. 132, confirming the transfer by the governor and by the board of control of railroads to the Port Huron & L. M. A. Co. of lands granted by congress to the state in aid of the construction of railroads, and at first assigned to the Detroit & M. R. Co., was void as impairing the general government's conditional right of reverter for noncompletion within a specified time of the roads to which the state assigned the lands.—Fenn v. Kinsey, 45 Mich. 446.

¶ 265. The transfer by mutual agreement and legislation of the beneficial interest of the Amboy, Lansing & Traverse Bay Railroad Company in the land grant to the Jackson, Lansing & Saginaw Railroad Company could not affect rights previously acquired by third parties, and the government's patent to the latter company was unimportant, as the government then had no title.—Johnson v. Ballou, 28 Mich. 379.

¶ 265a. Void legislation is to be regarded as absolutely void until the legislature, after obtaining authority by amendment or change of the constitution, re-enacts it; and accordingly a statute ratifying the action of state officers in attempting to transfer to another railroad a forfeited land grant, being void as impairing the contract in the original grant, cannot be made good by a congressional release to the state of the reversion.—Fenn v. Kinsey, 45 Mich. 446.

§ 71. Rights and relief of bona fide settlers on railroad lands.

What constitutes bona fide homestead settlement, see ante ¶ 96.

¶ 266. The rules adopted in the state land office relating to selections do not apply to cases under Laws 1883, Act No. 197, for the relief of bona fide purchasers under an invalid railroad grant.—Webster v. Newell, 66 Mich. 503.

¶ 267. Laws 1883, Act No. 197, for confirmation of titles of bona fide settlers and purchasers under a void railroad grant, being a statute granting privileges, not rights, its requirements must be strictly complied with.—Paine v. State Land Office Com'r, 66 Mich. 245.

¶ 268. Under Laws 1883, Act No. 197, for confirmation of titles of bona fide settlers and purchasers under a void railroad land grant, unless the claim and its proofs were presented "within six months" after the statute took effect, it was too late. March 8th being the last day, an averment that the papers were filed "on or about" that day is insufficient.—Paine v. State Land Office Com'r, 66 Mich. 245.

¶ 269. Where a statute (Laws 1883, Act No. 197) for the relief of innocent settlers and purchasers of railroad-grant lands provided that claims shall be presented within six months from its taking effect—whereby March 8 was the last day—an averment in a bill that the claim was filed "on or about March 8" is defective.—Paine v. State Land Office Com'r, 66 Mich. 245.

¶ 270. Under Laws 1883, Act No. 197, for confirming titles of bona fide settlers and purchasers under a void railroad land grant, the purchaser claiming a patent must show a deed valid on its face. If the deed to him was so drawn as not to cover the land, it would have to be corrected and reacknowledged in time to save the title under the statute, else it would not save the statutory privilege.—Paine v. State Land Office Com'r, 66 Mich. 245.

¶ 271. A claimant under Laws 1883, Act No. 197, for relief of bona fide purchasers under an invalid railroad grant, is entitled to have the commissioner of the state land-office enjoined from selling the lands until complainant can make the selection to which he is entitled.—Webster v. Newell, 66 Mich. 503.

¶ 272. Under Laws 1883, Act No. 197, for the relief of innocent purchasers and actual settlers on certain railroad lands, the title to which had been held invalid, a claimant may select from the descriptions in his deed, which he desires patents for, not exceeding the 160 acres limited by the act; and the commissioner cannot make the selection for him unless requested to do so. But in order to make up the exact quantity of 160 acres a government description cannot be subdivided.—Webster v. Newell, 66 Mich. 503.

VII. INDIAN LANDS.

§ 72. Tribal reservations.

Individual rights and allotments, see post § 73.

Disposal by Indians, see post § 74.

Extinction of Indian reservation as rendering lands open to general entry, see ante ¶¶ 23, 24.

Extinction of reservation as to lands granted for St. Mary's Falls Canal, see ante ¶ 245.

Subjection of lands to school grant on extinction of reservation, see ante ¶ 228.

Treaty rights of Indians in lands, see Indians §§ 3, 4.

¶ 273. By the act of congress of March 1, 1847, which created the land department of

Superior and authorized the president to set apart such portions of land within the district as were necessary for public uses, he was not given power to interfere with an Indian reservation existing by force of a treaty.—Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; affirming 84 Mich. 140.

§ 73. Individual reservations, allotments, and grants.

Individual rights and allotments of tribal lands, see Indians §§ 2, 4.

Parol evidence as to identity of reservee who received patent, see Evidence ¶ 1095.

¶ 274. Where, by a treaty with the Chippewa Indians, lands were reserved for certain individuals specified, to be afterwards located in such manner as the president might direct, it was held that this reservation was equivalent to an absolute grant; and the title was conferred by the treaty, though not perfect until the location was made, which was necessary to give the grant identity.—Dewey v. Campau, 4 Mich. 565; Stockton v. Williams, W. 120; Stockton v. Williams, 1 D. 546.

¶ 275. A patent issued by the president to a person claiming to be a reservee under the Saginaw treaty of Sept. 24, 1819, was void, and could in nowise affect the title of the reservee under the treaty.—Stockton v. Williams, W. 120; Stockton v. Williams, 1 D. 546.

§ 74. Disposal by Indians.

¶ 276. Indians have no power to dispose of the fee of their lands, except to the United States, without the concurrence of the government.—Cook v. Biddle, 2 Mich. 269.

¶ 277. The treaty of Oct. 18, 1864, with the Chippewa Indians, provided for patenting public lands in fee-simple to such as would have been declared "competent," and under restrictions to those who were not competent. Held, that the practical construction put on the treaty was that the determination of competency and the selection of the grantee's land became operative together, when fixed by the proper official authority, and that if an Indian disposed of the land he expected to receive before he was found to be "competent," such disposition would be invalid; the finding of competency does not relate back.—Raymond v. Shawboose, 34 Mich. 142.

¶ 278. The executive department is not so bound by the conduct of the Indian agents that it cannot repudiate their frauds and decline to follow their false decisions.—Raymond v. Shawboose, 34 Mich. 142.

¶ 279. A deed to an individual of land near the Canadian border in Michigan, secured in 1796 from the Indians, is not honored by the United States or Great Britain.—State v. Venice of America Land Co., 160 Mich. 680.

¶ 280. Defendant's predecessors in title, the Harsens, in the latter part of the eighteenth century secured Indian deeds to certain land in the disputed border strip between the United States and Canada. The Harsens applied to the British and American boards to have the title confirmed, but the request was denied on the apparent ground that the boards had no authority to settle titles in the disputed strip. There was no evidence that the Harsens claimed at the time any grants, lost or otherwise, from either government. They occupied the land for many years. The evidence was disputed as to whether a tradition existed in the Harsens family of a lost grant. The Harsens secured by act of congress, the confirmation of their claims to title to certain lands near by those in question. Held, no presumption existed from these facts of a lost grant from the American or British government.—State v. Venice of America Land Co., 160 Mich. 680.

VIII. TRESPASS OR MISUSE OF UNSETTLED LANDS.

§ 75. In general.

Rights of state under certificate of purchase, see also ante ¶ 124.

Rights of applicant for lands within railroad grant, see also ante ¶ 249.

Title as against trespassers, by relation back to time when land grant was earned, see ante ¶ 100.

Railroad right of way over public lands, see Railroads, III.

Crime of cutting timber on public lands, see Crimes § 130.

¶ 281. The general government has all the common-law rights of an individual in respect to depredations committed upon the public lands. And the commissioners of the general land-office may lawfully direct the seizure and sale, by the local land-officers, on behalf of the government, of timber cut by trespassers on the public lands.—Stephenson v. Little, 10 Mich. 433.

¶ 282. The commissioner of the state land office appointed an agent to reclaim timber wrongfully taken from state lands. The agent reclaimed certain logs from trespasser, and sold them at private sale. In replevin for the logs by the purchaser it was objected that the commissioner had no power to make any such appointment, and, if he had, the sale must be public. Held, that the trespasser or the one claiming under him would not be heard to urge the first objection, and that the sale was not invalid because of being private, if the case was free from circumstances of secrecy or fraud.—Ballou v. O'Brien, 20 Mich. 304.

¶ 283. A trespasser acquires no title to timber cut on state lands and can transfer

none to a third person.—Raber v. Hyde, 138 Mich. 101.

¶ 284. The purchaser from a trespasser on State lands cannot question the sufficiency of title to timber acquired by the plaintiff in replevin through purchase from the State.—Raber v. Hyde, 138 Mich. 101.

§ 76. Rights of possessor or squatter.

Effect of ejectment action as res adjudicata on character of lands, see ante ¶ 172.

¶ 285. A mere possessor of public land who has planted a crop thereon cannot maintain an action against a purchaser who enters and removes such crop.—Heilwig v. Nybeck, 179 Mich. 292.

¶ 286. A trespasser upon a section 16 reserved for school purposes, claiming a title adverse to that of the state, cannot inquire into mere irregularities by which the state sells the land under its own statutes. The state alone can complain of the sale.—Cooper v. Roberts, 18 How. (59 U. S.) 173, 15 L. ed. 338; reversing 6 McLean 93, Fed. Cas. No. 3201.

§ 77. Remedies and procedure and evidence.

Presumption as to British grant, see post ¶ 298.

¶ 287. The title of the State is sufficient to maintain ejectment from swamp lands at the mouth of the St. Clair river where a survey showing the tract to be land has been made and approved by the State.—State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580.

¶ 288. One who enters upon state swamp lands is not entitled to compensation for improvements where the action of ejectment is brought by the State less than six years after the approval of a survey showing the land in question to be land rather than water; and the question is left open whether the statute applies in a possessory action by the state.—State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580.

¶ 289. A bill in equity will not lie to reach money received by the proper state officers in settlement of a trespass on public lands, even though complainant claims that the settlement was procured by false representations as to the extent of the trespass, or by threats of imprisonment.—McElroy v. Swart, 57 Mich. 500.

¶ 290. It is evidence significant of fraudulent cutting of timber on a homestead that the cutting was done by an irresponsible man to whom another loaned a large sum without security, that the borrower bought the timber from the homesteader for money advanced with which to buy a relinquishment, and that the lender was to be repaid by the purchaser of the logs directly after they were cut and sold to a fourth party.—Colburn v. I. Stephenson Co., 133 Mich. 437.

¶ 291. It is a question for the jury whether timber cut on a portion of a homestead entry was in a bona fide endeavor to clear the land, where there was testimony by the person who purchased and cut the timber that a part of it came from other portions of the land than that which was being improved.—Colburn v. I. Stephenson Co., 133 Mich. 437.

IX. EARLY SETTLEMENTS AND CLAIMS ORIGINATING BEFORE AMERICAN SOVEREIGNTY.

§ 78. In general; confirmation and patent.

Early grants by Indians near to international boundary, see ante ¶¶ 279, 280.

Detroit and other town lot claims and settlements, see ante § 13 et seq.

Presumptions and evidence as to early grant, see post § 79.

Rights of aliens to hold lands as affected by treaty confirming existing estates, see Aliens § 2.

¶ 292. A report of the commissioners of the general government appointed for the purpose of settling claims made by citizens of Michigan territory to lands therein, recommending lands for confirmation to a certain person, and an act of congress confirming such recommendation, are equivalent to a grant of such lands.—Solomon v. Grosbeck, 65 Mich. 540.

¶ 293. The Act of Congress of April 17, 1828, confirming certain Michigan land claims, held to be a direct legislative grant of such lands, the claims to which had been approved and recommended by the commissioners, and no patent was necessary to pass title, although patent might subsequently be issued.—Corby v. Thompson, 196 Mich. 706.

¶ 294. Under Act of Congress of Sept. 26, 1850, chap. 71, 9 Stat. 469, providing for the examination and settlement of claims at Sault Ste. Marie, a finding as to a claim is binding upon those who acquired title to a conflicting claim after the institution of proceedings, although not parties where personal notice was served on record owners and there was also a notice by publication.—Male v. Chapman, 134 Mich. 511.

¶ 295. Under Act of Congress of Sept. 26, 1850, chap. 71, 9 Stat. 469, providing for the examination and settlement of claims at Sault Ste. Marie, a confirmation of a claim with certain exceptions and with a subsequent rehearing and similar confirmation with exceptions, special and general, is held conclusive as to that claim as against subsequent purchasers of a conflicting claim, not made a special exception nor subsequently allowed.—Male v. Chapman, 134 Mich. 511.

¶ 296. Under Act of Congress of Sept. 26, 1850, chap. 71, 9 Stat. 469, providing for ex-

amination and settlement of claims at Sault Ste. Marie, a claimant whose claim was not included in the exceptions in the confirmation of a conflicting claim, unless by the general exception is precluded by laches after a silence of thirty years.—Male v. Chapman, 134 Mich. 511.

¶ 297. Defendant's predecessors in title, the Harsens, settled on certain island lands in the last part of the eighteenth century. Subsequently their claims to title to these lands were presented to the American board and confirmed with reference to a part of these tracts by act of congress. Held, the acceptance by the Harsens of title under the act settled all their rights in these lands, and they were estopped to set up title to other of the tracts not recognized as being theirs by the act.—State v. Venice of America Land Co., 160 Mich. 680.

§ 79. Presumptions and evidence.

¶ 298. In ejectment by the State a presumption of an ancient grant is raised by evidence that the defendants and their antecedents had been in possession as owners for more than one hundred years, that they had paid taxes for many years, that the possession began at a time when Great Britain alone controlled the lands, that the policy of Great Britain was against Indian grants unless sanctioned by the Crown but there was no interference with the possession in question, that the original Indian grant was recorded in the British province and under the control of a land board instructed to destroy all settlements under grants not sanctioned by the Government, that some Indian grants were validated by the Crown, that it was the policy of Great Britain to confirm the grant after taking title in the Crown, and that subsequent to the grant in question all lands settled on without permission were acquired by the Crown.—State v. Dickinson, 129 Mich. 221.

PUBLIC LIABILITIES to PUBLIC SCHOOLS.

Cross-References.

Public Liabilities—
- Claims and charges against the public, see Counties, IV; Municipal Corporations, XI, XII, XIV; Townships, III, IV, VI.
- Tort liability, see Counties § 36; Municipal Corporations, XII; Townships, IV.
- Liability for injuries from defects in highways, see Highways, XII.

Public Notice—
- See Notices, and see also topics therein referred to.

Public Nuisances—
- See Nuisances.

Public Officers—
- See Officers; Municipal Corporations, XV.

Public Ownership—
- Constitutional provisions as to internal improvements, see Constitutional Law § 281 et seq.
- Powers of municipalities to own utilities, see Municipal Corporations, III, X.

Public Parks—
- See Parks.

Public Policy—
- Respecting contracts, see Contracts, IV.
- Affecting recognition by comity of foreign rights, see Conflict of Laws § 8.
- Validity of conditions in deeds, see Deeds § 82.
- Negotiable instruments contravening public policy, see Negotiable Instruments § 9.
- As to corporate by-laws, see Corporations § 68.
- Disfavor of the law towards forfeitures, see Penalties § 1.
- Admissibility of evidence against public policy and applicability of public policy rules to admissibility, see Evidence § 82.
- Exclusion of evidence against public policy, see Indictment § 154.

Public Property—
- See Counties, III; Municipal Corporations, X; Townships, III; State of Michigan; Schools, IV.
- Adverse possession by or against the public, see Adverse Possession §§ 3, 5; Highways § 10 et seq., § 129.
- Nonleviability for public debt, see Executions § 28.

Public Records—
- See Records.
- Deed and title records, see Notice and Record of Title.
- Chattel mortgage records, see Chattel Mortgages, I.
- See also ante Public Documents.

Public Revenues—
- See Taxes.

Public Roads—
- See Highways.

Public Sale—
- See Auctions; and see Executions, VII; Foreclosure, II, C, III, Judicial Sales.

Public Schools—
- See Schools; University of Michigan.

PUBLIC SERVICE.

TREATS of the general law and regulations pertaining to the business of serving the public with conveniences and commodities especially the purveyance of gas, electric current, water, common carriage, and communication of messages.

Analysis.

§ 1. In general; services affected with public use.
§ 2. Power to regulate or fix rates and service.
§ 3. Procedure to regulate rates or service.
§ 4. Right to complain; estoppel.
§ 5. Construction and validity of orders.
§ 6. Reasonableness of regulations.
§ 7. Basis for fixing rates.
§ 8. Judicial review.
§ 9. Injunctions and mandamus.
§ 10. Suspension of rates by appeal or suit.
§ 11. Enforcement of orders.
§ 12. Presumptions and evidence as to reasonableness of rates.

[Note.—The statutes relating to the various public utilities and the operation of them are very numerous. A large part of the Railroad Commission Act has concrete and specific application to Carriers, Railroads, or Street Railways, so that if references were made they would be germane to those topics rather than to Public Service. For these reasons no effort has been made to cite the statutes by cross-references except in the most general way.]

General law of common carriers, see Carriers.

General law relation to sale and use of gas, electricity, and water, see Gas; Electricity; Waters, VI.

General law of railroads and street railroads other than as carriers or as employers, see Railroads; Street Railways.

General law of franchises and corporations, see Corporations; Franchises.

Necessity of approval of corporations by Railroad Commission, see Corporations § 24.

Necessity of approval of Michigan Railroad Commision to admit public service corporation of another state to do business, see Foreign Corporations § 3.

Supervision and approval of stock and bond issues, see Corporations, XXV.

Supervision and regulation of railroad crossings by commissioners, see Railroads, IV.

§ 1. In general; services affected with public use.

Duty of gas corporation to serve public, see Gas § 2.

Regulations of gas service, see also Gas § 3.

Duty of millers to receive offered grain impartially, see Mills § 1.

Rates and charges by common carriers, see also Carriers §§ 3-5, 72-77, 122, 123.

Electric rates and charges, see Electricity § 3.

Gas rates, see Gas § 2.

Water rates, see Waters, VI.

Telegraph and telephone rates, see Telegraphs.

Tolls for use of improvements to navigation, see Navigable Waters § 19.

Rights acquired by acceptance of grant or privilege with conditions as to rates for service, see also Municipal Corporations § 68.

Uses and servitudes proper to streets and ways, see Highways § 157.

Construction of public utility corporation charters with respect to rights and powers, see Corporations § 70, ¶ 254.

Local and statutory power to enfranchise electric corporations under the Constitution, see Franchises ¶ 1.

Power of municipalities to issue special utility bonds, see Municipal Bonds § 3.

Nonleviability of property devoted to public service, see Executions § 28.

¶ 1. A railroad which was not a private railroad but a common carrier built branch roads or stems and operated them for the convenience of timber owners reached by the branches, published tariff rates to the ends of the branches and filed them with the Michigan Railroad Commission. Held, that the Michigan Railroad Commission has jurisdiction over such branch railroads.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 2. The properties of railroad companies and other public utility corporations are devoted to public use, and therefore are necessarily subject to public regulation within constitutional limitations.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

§ 2. Power to regulate or fix rates and service.

Basis for fixing rates, see post § 7.
Irreviewable decisions of the Commission, see also post § 8.
General power of the state to regulate rates, see Constitutional Law § 96.
Nature of functions of Railroad Commission under the constitution, see Constitutional Law § 50.
Railroad Commission Law as a delegation of power, see Constitutional Law ¶ 416.
Relative constitutional powers of legislature and courts in establishing and passing on rates, see Constitutional Law, §§ 44, 50.
Due process of law in railroad regulations, see Constitutional Law §§ 159, 160.
Due process in laws fixing rates, see Constitutional Law § 160.
Railroad Commission Law and regulations thereunder as denial of equal protection of the laws, see Constitutional Law § 225.
Validity of Railroad Commission Act as affecting interstate commerce, see Commerce §§ 13, 14.
Filing, posting, and publishing rates for carriage, see Carriers § 5.
Municipal powers to regulate rates, see Municipal Corporations § 84.
Regulative power over telegraph and telephone service, see Telegraphs.
Disability of municipality to place rates by contract beyond public control, see Municipal Corporations ¶ 362.
Constitutional grant of power to regulate railroads and rates and to delegate power to commission, see Const. art. XII, § 7.
Act establishing Michigan Railroad Commission and prescribing its powers and duties, see Comp. L. 1915, chap. 155.

¶ 3. The Michigan Railroad Commission is a body possessing such limited powers only as are ascertainable from the statute creating it.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

¶ 4. The provisions of Public Acts 1911 No. 173 (How. St. 2nd Ed., §§ 6526, 6531), confers on the State Railroad Commission power over car service and demurrage rates only as to traffic beginning and ending within the state.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 5. Except by contract, the fixing of rates for gas to be charged the consumer by a gas company is a governmental legislative function, but which may be delegated to the municipality.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 6. Act No. 300, Pub. Acts 1909, giving the Michigan Railroad Commission power to prescribe demurrage rules, applies only to commerce within the state, and the commission has no power to make rules governing interstate commerce.—Ann Arbor R. Co. v. Michigan Railroad Commission, 163 Mich. 49.

¶ 7. The Michigan Railroad Commission under the Michigan Railroad Act, § 22, Laws of 1909, How. St., 2nd Ed., § 6545, has jurisdiction to consider a petition of a water transportation company asking that a through route and joint rate be made by connecting railroads, although it has no jurisdiction over the business of the water transportation company and water rates.—Grand Rapids & I. Ry. Co. v. Michigan Railroad Commission, 188 Mich. 108.

¶ 8. Under How. St., 2nd Ed., § 6545, providing that orders of the Railroad Commission shall take effect and become operative 20 days after service, and section 6547, providing that the commission may, upon application, rescind or alter any order, and section 6548, providing that all regulations, practices, and services prescribed by the commission shall be in force and be prima facie lawful and reasonable until finally held otherwise in a suit brought for the purpose under section 6549, or until rescinded or altered by the commission under sections 6547 and 6549, providing that a carrier may, within 30 days after notice of an order, commence a suit in equity to vacate it, the burden being upon the carrier to show that the order is unlawful or unreasonable, as interpreted by the supreme court of Michigan, whether a logging spur 5 miles long was merely a private convenience or was so used and operated by the railway company that the latter was not free to discontinue service thereon, in the circumstances existing when a part of the rails was removed so as to shut off use of the spur by a particular concern, was primarily a question for the commission, and secondarily for the state circuit court wherein the commissioner's order was sought to be vacated.—Detroit & M. Ry. Co. v. Michigan Railroad Commission, 240 U. S. 564, 60 L. ed. 802, 36 Sup. Ct. Rep. 424; affirming 178 Mich. 230.

¶ 9. Questions relating to the quality and reasonableness of service and compensation therefor, under the Railroad Commission Act, Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139, § 7, How. St., 2nd Ed., § 6530, regulating intra-city transportation on railroads, are primarily addressed to the railroad commission, subject to revision by the courts.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 10. It is beyond the power of the Michigan Railroad Commission to determine on what terms and conditions a railroad shall construct and maintain a side track for the benefit and convenience of a private shipper, since it is a matter which concerns only the carrier and the shipper.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

¶ 11. The railroad commission may properly make an order for a through route and

joint rate from points on one railroad over such railroad and a noncompeting railroad to a water junction point used by a water transportation company.—Grand Rapids & I. Ry. Co. v. Michigan Railroad Commission, 188 Mich. 108.

¶ 12. As the regulation of public utilities by the state through the Railroad Commission is an interference to some extent with private property it can only be justified by the demands of public convenience and necessity, and the regulation must be reasonable, having in view the public interests to be conserved and the extent of the burden imposed.—Michigan State Tel. Co. v. Michigan R. Commission, 193 Mich. 515.

§ 3. Procedure to regulate rates or service.

Posting and publication of rates, see also Carriers § 5.

Provisions respecting complaints to commission, see Comp. L. 1915, § 8130 et seq.

Rules of practice and hearings before the commission, see Michigan Railroad Commission Rules.

¶ 13. Complaints before the Michigan Railroad Commission should be considered with reference to the real substance of the issue presented.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

¶ 14. Where charges exacted by a carrier have been duly fixed by the Railroad Commission, and they are attacked, the commission, and not the courts, should be first applied to, since the commission is the rate-maker, and it would be wholly incongruous from an administrative standpoint to have successive juries, or different courts or judges, passing upon the reasonableness of a rate already fixed by the commission.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 469.

¶ 15. In proceedings before the Michigan Railroad Commission unnecessary formality should be dispensed with.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

¶ 16. The courts may determine whether the rates fixed by a city as a condition for the use of streets by a gas company are reasonable.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 17. Objection to rates fixed by a public service corporation for electricity should first be made to the railroad commission, since under Public Acts 1909, No. 106 that commission has supervisory control over same.—Alpena Electric Light Co. v. Kline, 180 Mich. 279.

¶ 18. In a suit by a shipper to recover demurrage charges paid to a railroad which has filed with the interstate commerce commission a schedule of its tariffs and demurrage charges, the courts have no original jurisdiction to determine the reasonableness of the tariff published and so filed, since resort for relief must first be addressed to the interstate commerce commission.—L. Starks Co. v. Grand Rapids & I. Ry. Co., 165 Mich. 642.

¶ 18a. Since Act No. 206, of Pub. Acts 1913, confers on the Michigan Railroad Commission power to pass upon and to determine the reasonableness of charges for telephone service, the right to resort to the courts in the first instance to determine such question is impliedly abrogated or limited in a large degree.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 18b. In deciding what sums booming companies may properly charge for booming under Comp. L. 1871, ch. 88 (How. St. ch. 114), it is proper to admit evidence of the fair market value of their booming-grounds as helping to afford a basis for a proper estimate, and the fact that they are generally of little value for any other purpose requires considerable latitude to be exercised in admitting evidence; the value is not conclusively fixed by their actual cost to the company.—Pere Marquette Boom Co. v. Adams, 44 Mich. 403.

§ 4. Right to complain; estoppel.

¶ 19. An order made by the State Railroad Crossing Board, in a case where the board has jurisdiction of the subject-matter, cannot be questioned, on the ground that the board exceeded its authority, by a party who has for several months acquiesced in such order by taking steps to secure the right of way.—Fort Street Union Depot Co. v. State Railroad Crossing Board, 81 Mich. 248.

¶ 19a. A private individual cannot maintain a bill on his behalf and on behalf of the public generally to set aside an order of the Railroad Commission authorizing a merger of certain telephone companies under Act 138, P. A. 1911, and to restrain such merger where there is no allegation that such individual is affected in a different manner than the public generally, but such a suit can only be maintained by the Attorney General.—Home Tel. Co. v. Michigan Railroad Commission, 174 Mich. 219.

¶ 19b. Where a lease by one telephone company to another of the use of certain wires, circuits, and other facilities for the transmission of long distance messages and for the conduct of interchanged business provides that all the rights and duties specified in the lease as vesting in each party, or being required from either party to the other, shall be held to apply to the successors and assigns of each, thus authorizing an assignment of such lease by the lessor to a third company to which the lessor had transferred its business, such lessee is not, after such assignment of the lease, under Pub. Acts 1911, No.

138, § 12, How. 2nd Ed., § 7233, a "party in interest" who may commence an action in the circuit court to vacate or set aside an order of the Railroad Commission approving of a contract between lessor and such third person for the exchange and sale to each other of certain telephone property and for a division of certain territory, especially where the rights of the lessee are fully protected by the order of the commission.—Michigan Independent Telephone & Traffic Ass'n v. Michigan Railroad Commission, 190 Mich. 337.

§ 5. Construction and validity of orders.

Reasonableness of orders, see post § 6.

Right of carrier to charge less rates than fixed maximum, see also Carriers ¶ 824.

Invalidity of order relative to rates as justification for disobedience, see Contempt § 10.

¶ 20. An order of the Railroad Commission fixing a flat mileage rate for the transportation of logs over a certain railroad to a certain point and providing that such rates shall apply when the manufactured product is reshipped via defendant's line, and, when not so reshipped, an additional charge of fifty cents per thousand feet additional may be charged, to be refunded, if shipper later ships out the manufactured product, or some of it, must be construed as referring to tonnage generally of a product similar to that of the logs shipped in and not of particular logs shipped in.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 469.

¶ 21. Under Pub. Acts 1909, No. 300, § 11, How. 2nd Ed., § 6534, providing that nothing in the act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, an order of the Railroad Commission fixing rates to apply to a shipper of logs when manufactured product is reshipped via the carrier's line, and, when not so shipped, allowing the collection of an additional charge per thousand feet, to be refunded however, if shipper later ships out the manufactured product, or some part of it, does not provide for a rebate or discrimination, and is not necessarily unlawful.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 469.

§ 6. Reasonableness of regulations.

Construction and application of orders, see ante § 5.

Presumptions and burden of proof as to reasonableness, see post § 12.

¶ 22. A city ordinance requiring a street-railway company to run its cars every six minutes on a specified street will not be held unreasonable, where no trial has been made of its provisions, upon a showing merely that the average number of passengers to a car, under the existing 12-minute service, is between seven and eight only.—People v. Detroit Citizens' St. R. Co., 116 Mich. 132.

¶ 23. The complainant's switching charges at a given point were five dollars per car. The Michigan Railroad Commission decreased the charge to three dollars and fifty cents. It was not proved that the reduced rate was unjust and unreasonable. Held, that, indulging the statute as to the presumption of reasonableness of the rate made by the Commission, the rate was reasonable.—Detroit & Mich. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 24. An ordinance regulating the rates of a gas company is not void for excessive penalties because of the fact that the company has numerous customers and the violations of the ordinance would be numerous, the test being whether it is excessive in each particular case.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 25. An order of a railroad commission fixing new excess baggage rates on the mileage basis instead of on the fare paid by the passenger is not an unreasonable ruling.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 26. The evidence before a railroad commission with regard to excess baggage rates on defendant railroad indicated that each traveling man took along an average of 1,500 pounds; that the old rates for 2, 3, 5, 6 or 8 miles were as great as for 45 miles; that the rates increased 5 cents per hundred for every 15 miles, so that whereas a traveler's fare only increased 2 cents from 45 to 46 miles, his baggage fare increased $1; and that the expense to the railroad of short hauls was proportionately little greater than for long hauls. The defendant railroad put in no evidence. Held, the commission's ruling was not unreasonable in declaring the rates excessive and prescribing new rates.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 27. The car service and demurrage rates established under Pub. Acts 1911, No. 173 (How. St., 2nd Ed., §§ 6526, 6531), by the Michigan Railway Commission, as applied to intrastate traffic, are not unreasonable because differing from the uniform rules approved by the Interstate Commerce Commission for interstate traffic.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 188 Mich. 6.

¶ 28. Under two different tariffs a railroad furnished precisely the same service, length of haul excepted. Under each tariff logs were brought in from branch lines and delivered at destination on the main line. The quantity transported under the lesser rate was much smaller than that transported under the greater rate, but the railroad did not show that the lesser rate was unremu-

nerative. Held, that an order of the Michigan Railroad Commission cancelling the higher tariff and substituting the lesser for it was not unreasonable.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

§ 7. Basis for fixing rates.

Differing rates for fuel and power service as discrimination, see Gas ¶ 8.

¶ 29. What a railroad company is entitled to ask upon its investment is a fair return upon the value of that which it employs for the public convenience.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 30. Under Pub. Acts 1891, No. 90, providing for fixing the rates for transportation of passengers upon railroads, it is competent for the railroad commissioner in fixing such rates, to include in the computation the amount of the interstate fares earned by that portion of the road lying within this State. —Commissioner of Railroads v. Wabash R. Co., 126 Mich. 113.

¶ 31. Under Pub. Acts 1891, No. 90, fixing passenger fares according to gross earnings of passenger trains, such earnings include the receipts from each source of passenger trains, viz.: passenger, baggage, express and mail cars.—Commissioner of Railroads v. Wabash R. Co., 123 Mich. 669.

¶ 32. The ascertainment of the present value of fixed railroad property and rolling stock, for the purpose of determining whether a rate is confiscatory, by proceeding on the theory that cost of reproduction less new accumulated depreciation represents such present value, while the best general method yet devised, cannot be applied in all cases and under all conditions, since in its use some important elements of value are ignored, and, among other elements so partly or wholly ignored, are density of population and traffic and obsolescence of equipment.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 33. For rate-making purposes a railroad company is entitled to include in operating expenses such a sum of money as will make good the depreciation in the perishable units of railroad property.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 34. In determining whether a fixed railroad rate is confiscatory, depreciation should be charged against the roadbed and track structure of the railroad.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 35. In determining whether a railroad rate is confiscatory, it is improper to determine the valuation to be placed upon the railroad right-of-way and station grounds, exclusive of improvements thereon, by applying to the right-of-way without improvements the estimated value of adjacent lands, including buildings and all other improvements and to add to such basic valuation a certain percentage for "overheads."—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 36. Railroad rates which, with efficient and economical management, yield a return equal to that received in other business ventures of similar business character, and attended with like risks, can never be adjudged to be confiscatory.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 37. In determining whether a passenger rate and freight rates are confiscatory, it is improper, in a division, as between passenger and freight service, of the right-of-way, roadbed and track structure, and of the operating expenses incident to such property, to employ what is known as the "locomotive ton mile rates," an allocation made in accordance with which proceeds upon the assumed basis that the ton weight of a locomotive, without its fender, multiplied by the number of miles traveled, correctly represents the measure of the use of the roadbed and track structure in the service in which the locomotive is employed, and also accurately measures the proportion of the expenses of the upkeep or maintenance of the roadbed and track assigned to such service.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 38. A publicly established railroad rate cannot judicially be said to be unreasonable, unless it yields less than the minimum return which the invested capital has a right to demand.—Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; affirmed in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

¶ 39. Where it is to be determined in a suit whether a two-cent passenger law and certain freight rates published by the railroad commission pursuant to statutory authority are confiscatory, the problem to be solved is one of values, revenues, and expenses, and the division or apportionment of such values, revenues and expenses between the passenger and freight operations, and then between the interstate and intrastate services of the railroad, and, finally, the finding of net return upon its intrastate passenger and freight business.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

§ 8. Judicial review.

See also ante ¶ 16.

Relative power of commission and courts, see also ante § 2.

Questions primarily for the commission and then for the courts, see also ante ¶¶ 8, 9.

Necessity of recourse to commission in first instance to have relief from established rates, see ante § 3.

Procedure before commission, see ante § 3.

Suspension of Commission's order by appeal or suit, see post § 10.

When rates are deemed confiscatory, see ante § 7.
Judicial enforcement of orders, see post § 11.
Judgment on appeal from rate decision as estoppel on facts, see Former Adjudication ¶ 448.
Provisions for action in chancery to obtain relief from rates or regulations made by the commission, see Comp. L. 1915, § 8134.
Provisions for appeal from chancery to supreme court, see Comp. L. 1915, § 8134.

¶ 40. The action of the board of control in fixing tolls for use of river improvements, being not reviewable in the courts, in an action to recover such tolls as fixed, the courts cannot assume jurisdiction to decide that the tolls are excessive or that the board was imposed upon—as by false testimony—in fixing them.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Manistee River Improvement Co. v. Lamport, 49 Mich. 442.

¶ 41. Where a decision of the railroad commission as to a question of fact is supported by testimony the supreme court will not substitute its judgment for that of the commission.—Grand Rapids & I. Ry. Co. v. Michigan Railroad Commission, 188 Mich. 108.

¶ 42. Orders of the Michigan Railroad Commission are reviewable by the courts.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

¶ 43. Equity has no jurisdiction in the absence of statute to restrain the removal of a branch of a railroad by a preliminary injunction pending a hearing before the Michigan Railroad Commission as to the right to remove such branch and no such jurisdiction is conferred by Act 300, P. A. 1909, secs. 46 and 47, How. 2nd Ed., §§ 6569, 6570, which is the act prescribing the powers of the Commission.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 175 Mich. 234.

¶ 44. Under P. A. 1911, Act No. 138, How. 2nd Ed., § 7222, the jurisdiction of a circuit court in chancery in passing on an order of the Railroad Commission is strictly statutory.—Briggs v. Cass Circuit Judge, 178 Mich. 28.

¶ 45. A decree of a circuit judge in chancery declaring an order of the Railroad Commission a nullity without complying with P. A. 1911, Act 138, § 14, How. 2nd Ed., § 7235 is void.—Briggs v. Cass Circuit Judge, 178 Mich. 28.

¶ 46. The practice of reviewing in one bill several unrelated orders of the Michigan Railroad Commission is to be criticized.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 47. Where, after complainant railway company's bill to enjoin the railroad commission from enforcing certain orders had been dismissed and such dismissal confirmed on appeal, the commission asked that the decree of affirmance be amended so as to put into immediate effect the order sought to be enjoined. Held, as no affirmative relief was asked for in the court below, the decree could not be amended.—Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission, 178 Mich. 250. Affirmed in 240 U. S. 564, 60 L. ed. 802, 36 Sup. Ct. Rep. 424.

§ 9. Injunctions and mandamus.

See also ante ¶ 43.
Mandamus as proper mode of enforcement, see also post § 11.
General law and practice in injunction and mandamus suits, see Injunctions; Mandamus.
Injunction to prevent enforcement of ordinances regulating public service corporations, see also Injunctions § 97.
Mandamus in rate cases, see Mandamus § 108.
Mandamus pending appeal from federal suit to annul order of Railroad Commission, see Abatement ¶ 50.
Suspension of mandamus to comply with rate decision pending chancery proceedings, see Mandamus ¶ 1007.
Mandamus to compel issuance of injunction in rate case, see Mandamus ¶ 292.
Laches and delay as bar to mandamus to compel issuance of injunction to try validity of rates, see Mandamus § 23, ¶ 152.
Provisions relative to injunctions staying orders of the commission, see Comp. L. 1915, § 8134 (b).

¶ 48. The imposition by a telephone company in the form of a penalty for the nonpayment of bills within a designated time, of a greater charge than that permitted by its franchise, will not be enjoined in a suit by a municipal corporation, where it is not alleged that any subscriber is in default, or has been compelled to pay such penalty, since the bill is without equity.—City of Owosso v. Union Tel. Co., 185 Mich. 349.

¶ 49. The enforcement by the railroad commission of the Railroad Commission Act, Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139, § 7, How. St., 2nd ed., § 6530, regulating intracity transportation of railroads, will not be enjoined on the ground that its enforcement will result in considerable expense to the railroads because of necessary enlargement of their terminal facilities, if they can otherwise be lawfully required to perform the service.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 50. The enforcement by the railroad commission of the Railroad Commission Act, Pub.

Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139, § 7, How. St., 2nd. Ed., § 6580, regulating intracity transportation of railroads, will not be enjoined on the ground that its enforcement will result in temporary congestion of the railroad terminals, pending their extension, upon ex parte affidavits, especially in view of the power of the commission to prevent congestion and because the service was discontinued, not by reason of such congestion, but immediately because of a controversy over rates.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 51. An injunction will not lie to restrain the enforcement of orders of the railroad commission because neither of complainant railroads were parties to the orders where such orders were suspended by a later order of the commission pending a hearing, and the commission is not threatening to hold the hearing without making complainants parties to the proceedings.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 52. A railway company had laid its rails upon the right of way of a lumber company and for several years had transported its logs as well as those of other companies in the vicinity according to a published schedule of rates. Without notice to its shippers or to the railroad commission it tore up a portion of its track and discontinued the service. Held, that an order of the railroad commission to restore the service was enforceable by mandamus.—Michigan Railroad Commission v. Detroit & Mackinac Ry. Co., 178 Mich. 230. Affirmed in 240 U. S. 564, 60 L. ed. 802, 36 Sup. Ct. Rep. 424.

§ 10. Suspension of rates by appeal or suit.

Suspension as affecting right to restrain enforcement, see ante ¶ 51.

¶ 53. The Michigan Railway Commission issued an order establishing certain baggage rates. The respondent applied by bill to the circuit chancery court to have the order vacated as unreasonable and for a temporary injunction, and the circuit court refused the injunction. The respondent then brought mandamus to the supreme court to compel the circuit court to issue the injunction. The writ was denied, the supreme court on the evidence presented deeming the rates to be reasonable. The circuit court also, on the regular hearing of the bill, decided against respondent, who introduced no new evidence, holding the rates to be reasonable. In the present proceeding, while the respondent's appeal from the circuit court is still pending, the relator railway commission brings mandamus to compel the respondent to put the rates in operation. Held, the appeal did not suspend the order and the writ would lie.—Michigan Railroad Commission v. Michigan Cent. Ry. Co., 159 Mich. 580.

¶ 54. Where proceedings in the state courts have been instituted to determine the reasonableness of an order of the railroad commission, such order is operative pending the determination of the matter on its merits.—Michigan Railroad Commission v. Detroit & Mackinac Ry. Co., 178 Mich. 230. Affirmed in 240 U. S. 564, 60 L. ed. 802, 36 Sup. Ct. Rep. 424.

¶ 55. The dismissal of a bill in equity for the cancellation of an order of the Michigan Railroad Commission was affirmed on appeal, and a writ of error to the Supreme Court of the United States denied both by the state supreme court and a judge of the United States Supreme Court; thereafter, a new bill seeking the same relief was filed in the federal court and dismissed on the ground that the complainant having selected the state court as his forum must abide the result, from which decision an appeal is now pending in the Supreme Court of the United States. Held, that as the federal court was without jurisdiction, the proceedings therein would not prevent the issuance of a writ of mandamus by the state court to put such order of the railroad commission into immediate effect.—Michigan Railroad Commission v. Detroit & M. Ry. Co., 182 Mich. 234.

¶ 56. The action of the Michigan Railroad Commission in determining that certain rates previously published and exacted from shippers by a carrier were unreasonable and ought not to be exacted, and that other rates were and would be reasonable and proper to be exacted, and should thereafter be exacted, resulted in a legislative rate, immediately in effect, although liable to be set aside by the courts.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 469.

§ 11. Enforcement of orders.

Judgment on appeal for enforcement of order appealed from, see also ante ¶ 47.

Pendency of nonjurisdictional suit in federal court as affecting enforcement, see ante ¶ 55.

Disobedience of judicial order to carry rates into effect as contempt, see Contempt § 9.

¶ 57. Where the question as to whether or not an order of the railroad commission is confiscatory in its nature has been passed upon by the circuit court in chancery, and on appeal the decree affirmed, the proper method of enforcing such order is by mandamus as provided in P. A. 1909, Act 300, § 47, How. 2nd Ed., § 6570.—Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission, 178 Mich. 250.

¶ 58. Whether a freight tariff applies to the branch lines of a carrier held a question for the State Railroad Commission, and not for the court in a proceeding against the carrier for contempt in failing to obey a writ of mandamus requiring it to put the tariff into operation.—Michigan Railroad Commis-

sion v. Detroit & Mackinac Ry. Co., 185 Mich. 649.

¶ 59. Orders of the Michigan Railroad Commission are, under section 47 of Act No. 300, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 6570, enforceable by mandamus, injunction or other appropriate civil remedy.—Michigan Railroad Commission v. Detroit & M. R. Co., 182 Mich. 234.

¶ 60. Order of the Michigan Railroad Commission are enforceable by application to the courts.—Grand Rapids & I. R. Co. v. Michigan R. Commission, 183 Mich. 383.

§ 12. Presumptions and evidence as to reasonableness of rates.

General law of presumptions and evidence, see Evidence.

Presumption that officers will administer rate making functions constitutionally, and that courts in reviewing will not exceed their powers, see Constitutional Law §§ 23, 24.

Presumption as to reasonableness of action of commission, see also Constitutional Law ¶ 106.

Burden of proof and presumptions as to validity and reasonableness of rate statute, see Constitutional Law § 24.

Statutory rule as to burden of proof, see Comp. L. 1915, § 8134.

¶ 61. Upon a complainant attacking the findings of the Michigan Railroad Commission, with respect to rates, rests the burden of showing by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 62. In mandamus by the commissioner of railroads to compel a railroad company to reduce its passenger rates to 2½ cents per mile, based upon its annual report showing earnings in excess of $2,000 per mile, where the company claimed that this report included not only way or local fares in Michigan, but also through or interstate fares, but failed to show the amount of such interstate fares earned in Michigan, the company was not in position to raise the question; as it had the burden of proving that it had erroneously included sufficient items coming within the rule of interstate commerce, to reduce its earnings below $2,000 per mile.—Commissioner of Railroads v. Wabash R. Co., 123 Mich. 669.

¶ 63. Under Pub. Acts 1909, No. 300, § 26, (How. St., 2nd Ed., § 6549), burden of showing that an order of the Michigan Railway Commission is unlawful or unreasonable, rests upon the one attacking it, and must be established by clear and satisfactory evidence.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 64. For precisely the same service, length of haul excepted, two different tariffs for hauling logs on a line of railroad were in force. The Michigan Railroad Commission canceled the higher tariff and substituted the lesser for it. The railway company complained that the result would be such a reduction of the earnings of complainant that it would not receive a fair return upon the value of property devoted to public convenience. Held, that, in absence of proof by complainant that its other tariffs were just and reasonable and not too low, the court cannot say that the finding was wrong.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

¶ 65. The findings of the Michigan Railroad Commission with respect to rates are not conclusive, but have the effect of establishing prima facie that the rates considered are reasonable and just, and therefore lawful, or are unreasonable and unjust and unlawful. Its orders stand until modified or set aside by it or by the courts.—Detroit & M. Ry. Co. v. Michigan R. Commission, 171 Mich. 335.

PUBLIC SQUARES to QUIET ENJOYMENT.

Cross-References.

Public Square—
- As park or public ground, see Parks.
- Validity of common law dedication for square, see Dedication § 2.

Public Trial—
- Right of person accused of crime, see Constitutional Law § 199; Indictment § 827.
- General conduct of civil trials, see Trial, II.

Public Uses—
- See Highways; Dedication; Parks; Eminent Domain.

Public Works—
- See Highways; Local Improvements; Drains; Canals; Navigable Waters, III.
- Internal improvements under the constitution, see Constitutional Law § 281 et seq.

Publication—
- Service by publication, see Process, II; Notices.
- Of ordinances, see Municipal Corporations § 48.
- Of notices in special kinds of proceedings, see topics treating of such proceedings, e. g., Foreclosure, II, B, III, E (notices of sale); Intoxicating Liquors §§ 24, 26 (petition and proceedings for local option election).
- Element in libel or slander, see Libel, IV.
- Execution of will by declaration of testator, see Wills, IV, B.

Puffing—
- Seller's talk as fraud, see Fraud §§ 14-17.

Puis Darrein Continuance—
- See Pleading, VII.

Punctuation—
Regard in construction to grammar and punctuation, see Contracts § 154; Statutes, V; Wills, VI.
Punishment for Contempt—
See Contempt § 39 et seq.
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Punitive Damages—
See Damages, VII.
Purchase Money—
Price for goods or lands, see Sales; Vendors and Purchasers.
Priority of mortgages to secure, see Mortgages § 91; Chattel Mortgages § 80; Exemptions § 10 et seq.; Homesteads § 28.
Purchasers for Value—
See Notice and Record of Title, I; Sales, XI; and see Fraudulent Conveyances, I.
Purchases—
See Sales; Vendors and Purchasers.
Pure Food Laws—
See Adulteration; Food.
Purgation of Contempt—
See Contempt § 17.
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See Highways, XI; Nuisances § 3.
Putting on Inquiry—
As notice, see Notice and Record of Title, I, B; Negotiable Instruments § 69 et seq.; Sales, XI; Fraudulent Conveyances, I, B. See also Fraud § 9.
Qualifications—
For office, see Officers, II.
Of person or officer for service in given capacity, see specific topic treating of the office or capacity, e. g., Jury; Judges; Estates of Decedents, III (for letters).
Qualified Fees—
See Real Property.
Qualified Indorsements—
See Negotiable Instruments, VII.
Quality of Goods—
Terms and construction of sale contracts, see Sales.
Quantum Meruit—
See Assumpsit; Contracts, X; Implied Contracts.
Quantum Valebant—
See Assumpsit; Sales, VIII; Implied Contracts.
Quantum of Estate—
See Deeds, III; Wills, VI.
Quarantine—
See Health.
Animal quarantine, see Animals § 21.
Widow's allowances and privileges, see Estates of Decedents, V, D.
Quare Clausum Fregit—
See Trespass.
Quarreling; Quarrelsomeness—
Factors in criminality of assaults and killings, see Assault §§ 6, 7; Homicide, V.
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Employers' liability to servants in quarries, see Master and Servant, III.
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In government land surveys, see Boundaries; Public Lands § 3.
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Certiorari to quash proceedings, see Certiorari.
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Quasi Contracts—
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See Corporations, V; and see Joint Stock Companies.
Question of Public Importance—
As factor in review on appeal or error, see Appeal, XII, A.
As reason for overruling demurrer in equity, see Equity § 210.
Questions and Answers—
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Questions Certified or Reserved—
See Appeal § 6; Indictment § 573.
Questions of Law and Fact—
See Trial, VI; Indictment, IX, D. [Note. The cases passing on whether a particular question is or is not for the jury have been placed in the specific topics as far as possible. See such topics and the cross-references in Trial, VI, and Indictment, IX, D.]
Quia Timet Suits—
See Equity § 251; Quieting Title.
Quiet Enjoyment—
Covenants in deeds, see Covenants for Title.
Covenants in leases, see Landlord and Tenant § 68 et seq.

QUIETING TITLE.

TREATS of suits in equity for the removal of clouds on the plaintiff's title to land or for the clearing of his title from unfounded claims. It excludes actions for the recovery of possession under a claim of title (see Ejectment), suits to annul or rescind conveyances and the like as between the parties and their privies or to reform and correct them (see Reformation; Rescission), and suits to compel the making of instruments

which will perfect the title (see Specific Performance). Suits under the tax laws are treated in Taxes, XII.

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I. Nature and grounds of bill in general.

§ 1. In general; nature, propriety and occasions of remedies.
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II. Clouds and adverse claims, what are.

§ 15. In general.
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III. Pleading and procedure.

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§ 28. Admissibility of evidence.
§ 29. Weight and sufficiency of evidence.
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§ 31. Decree and relief.
§ 32. ——Dismissal or nonsuit.

I. NATURE AND GROUNDS OF BILL IN GENERAL.

Clouding titles as fraud, see Fraud § 74.
Bills by execution purchasers to declare equities of debtor and others in lands levied on, see Executions § 100.
Bills by execution purchasers to annul debtor's transfers as fraudulent, see Fraudulent Conveyances, V, A.
Creditors' bills after levy and before sale in aid of execution by removing obstacles, see Creditors' Suits.
Jurisdiction to order rescission or cancellation, see generally Rescission and Cancellation.

§ 1. In general; nature, propriety and occasions of remedies.

Existence and adequacy of other remedy, see post § 4.
Title, interest or equities in plaintiff, see post § 8.
Bills of peace against vexatious claims, see post § 14.
What are clouds and adverse claims, see post, II.
Right to maintain suit to quiet title, see post § 19.
Quieting title as against tax or assessment liens or titles, see Taxes.

Quieting title as against assessment liens for local improvements, see Local Improvements § 128, ¶ 388.

¶ 1. A bill to avoid an alleged fraud in attempting to establish an unauthorized redemption of an attachment title is not a bill to quiet title.—King v. Harrington, 14 Mich. 532.

¶ 2. A bill to restrain a sale on execution is not one to quiet a title, but may be one to remove therefrom a cloud arising out of proceedings said to be invalid.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189.

¶ 3. How. St. § 6626, which provides that any person claiming the legal or equitable title to lands may institute a suit in chancery against any other person not in possession to quiet his title, is not repealed by the tax law of 1889, which provides a proceeding wherein the landowner may contest the validity of the tax.—Lake Superior Ship Canal, Ry. & Iron Co. v. Aplin Auditor General, 79 Mich. 351.

¶ 4. A bill to quiet title and to enjoin a mining company and others from entering upon lands under their claim based upon a 99-year lease is not a bill for forfeiture, although based in part upon the defendant's failure to act under the lease for many years, but rather a bill to prevent a multiplicity of suits for threatened trespass.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 5. A bill alleging that defendant procured a deed from a grantor by fraud and deceit while standing in a confidential relation to said grantor and asking that said deed be declared void is not a bill to quiet title but to procure annulment and cancellation.—Gragg v. Maynard, 164 Mich. 535.

¶ 6. A bill to correct a mistake in a deed is not a bill to quiet title under the statute, and it is immaterial that the bill fails to make out an indefeasible legal or equitable title.—Salisbury v. Miller, 14 Mich. 160.

§ 2. Statutory and common law jurisdiction in equity.

Existence and adequacy of legal or other remedy, see post § 4.

Suits by trustee in bankruptcy, proper court, see Bankruptcy § 16.

General law as to equity jurisdiction, see Equity, III.

Assumption of bill to quiet title against numerous claims at law in order to avoid multiplicity, see also Equity ¶ 141.

Statutory jurisdiction of chancery independent of possession, see Jud. Act, chap. VI, § 4; Comp. L. 1915, § 12302.

¶ 7. Under the code of 1833 chancery had jurisdiction to quiet the title of the legal owner of the land in possession of the same, as against any other person setting up a claim thereto.—Rowland v. Doty, H. 3.

¶ 8. Exclusive of any statutory provision equity has jurisdiction to set aside deeds and other legal instruments which are a cloud upon real estate, and to order them to be delivered up to be cancelled.—Rowland v. Doty, H. 3.

¶ 9. Independently of the statute a court of equity has the power to remove a cloud from title.—Cleland v. Casgrain, 92 Mich. 139.

¶ 10. Where legal titles are brought into litigation under the statute regarding the quieting of titles in equity, the statutory requisites must exist; but equitable remedies existing before the passage of the statute remain.—Ormsby v. Barr, 22 Mich. 80.

¶ 11. Comp. L. 1871, § 5072, How. St. § 6626 was meant to enlarge the powers of equity in regard to quieting title, by allowing a decree in favor of a party in possession without the necessity of repeating trials at law.—King v. Carpenter, 37 Mich. 363.

¶ 12. A bill which is so framed as to call for redemption, and the setting aside of interfering obstructions on equitable grounds, even though it contains allegations appropriate to a statutory proceeding to quiet title, presents a case which falls under the inherent jurisdiction of the court of chancery and needs no statutory aid.—Geney v. Maynard, 44 Mich. 578.

¶ 13. A court of equity is not deprived of its jurisdiction to quiet title and to issue an injunction in a proper case by the fact that a determination of the questions involved requires the location of a disputed boundary.—Campbell v. Kent Circuit Judge, 111 Mich. 575.

¶ 14. The jurisdiction of the equity court (exclusive of any statutory provision on the subject) to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up to be canceled, is fully established.—Nisbett v. Milner, 159 Mich. 337.

§ 3. ——Relief incident to general equities.

Decree and relief in general, see post § 31.

[Note. The right to quieting of title as an incident to reformation, rescission, specific enforcement, etc., is treated in the topics bearing those names. Such cases are illustrative of the incidental jurisdiction and are treated there for convenience, but should be consulted in this connection.]

Bill to enjoin trespass by public officers and to quiet title, see Injunctions § 56.

¶ 15. Where one claims relief against other parties on the ground that he has a

complete equity and that they have set up claims that are subordinate to and in fraud of it, the case is one of original equity cognizance, and in nowise derived from the statute for quieting titles in favor of parties not in possession, and the fact that the complainant is out of possession is not important.—Waterman v. Seeley, 28 Mich. 77; King v. Carpenter, 37 Mich. 363.

¶ 16. Complainants seeking to have a cloud removed from their title will be granted relief whether in or out of possession of the land in question, where equity has jurisdiction on another distinct ground.—Nisbett v. Milner, 159 Mich. 387.

§ 4. Existence and adequacy of other remedy.

Jurisdiction of equity where title in dispute, see also post § 8.

As affecting equity jurisdiction generally, see Equity, III.

¶ 17. Where parties were trying their rights to land at law, and the claim of defendants was a legal and not an equitable one, with nothing to prevent their establishing it as fully at law as in equity, it was held that equity would not interfere on their application, but leave them to establish their defense at law.—Stockton v. Williams, W. 120.

¶ 18. A bill to quiet title will be entertained on behalf of the legal owner when he is not in a position to force the adverse claimant into a court of law to test its validity; but when each party claims the legal title, and a court of law is already possessed of the case, and it is not alleged that either fraud, accident or mistake has intervened to prevent the possessor establishing his title at law, equity will not interfere on his behalf.—Moran v. Palmer, 13 Mich. 367.

¶ 19. It is for a court of law rather than of equity to decide whether the valid legal title to lands concurs with one chain of conveyances or another.—Crooks v. Whitford, 40 Mich. 599.

¶ 20. Possession of a tax-title does not necessarily prevent one from relying on an equitable title, and compel him to seek a remedy at law; but when it appears upon his case in equity that he has such remedy that the court in chancery should remit him to it.—La Cass v. Wadsworth, 56 Mich. 421.

¶ 21. Complainant in possession of land under a tax homestead certificate and deed was sued by defendant by bill in chancery to cancel the certificate and in another suit at law in ejectment, and defendant further brought petitions to reopen the decrees of sale for taxes and to set aside the auditor general's deed to complainant. These suits were all pending and complainant was unable to get the law suit dismissed through lack of authority on the part of defendant's supposed attorney. Held, equity had jurisdiction to entertain complainant's bill to quiet title.—Olsen v. Williams, 172 Mich. 316.

¶ 22. For the purpose of sustaining resort to equity to protect one's title a mere equitable estoppel is not needed to aid a legal title which may be adequately protected at law; proof of equities becomes important when the legal title is defective, or where it is proposed to assail it.—Shaw v. Chambers, 48 Mich. 355.

§ 5. ——Ejectment against defendant in possession.

Adequacy of ejectment to try title dependent on disputed boundary, see Boundaries § 24.

General law as to ejectment, see Ejectment.

Propriety of ejectment to determine title, see Ejectment § 1.

Validity of law extending remedy to cases where jury and law trial would have been allowed, see Constitutional Law § 192.

¶ 23. The fact that there may be two new trials in an action of ejectment is no reason for the interposition of equity to try titles to land.—Blackwood v. Van Vleet, 11 Mich. 252.

¶ 24. One cannot file a bill to quiet his title to lands against a person in possession claiming adversely, and the legislature cannot confer such a right. The remedy is by ejectment, in which the claimant is entitled to jury trial.—Tabor v. Cook, 15 Mich. 322.

¶ 25. It is unconstitutional to provide for the trial in equity of title to realty, where the defendant is in possession.—Dolph v. Norton, 158 Mich. 417.

¶ 26. A bill to quiet title where the complainant can obtain an adequate remedy in ejectment is not saved by an allegation of the defendant's bad faith in taking a deed.—Crosby v. Hutchinson, 126 Mich. 56.

¶ 27. Ejectment may not be avoided by a bill to cancel an adverse deed and quiet title where the deed is void and may be defeated in the ejectment suit.—Crosby v. Hutchinson, 126 Mich. 56.

¶ 28. Where the remedy of ejectment is open, equity will not entertain a bill to quiet title simply because no question for the jury is involved.—Moody v. Nacomber, 158 Mich. 209.

¶ 29. A bill to quiet title will lie even when an action of ejectment is pending against part of the land, if judgment for defendant therein would still leave the title in dispute.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 30. A remedy at law by an action of ejectment is inadequate where a judgment would still leave complainant's title clouded.—La Coss v. Wadsworth, 56 Mich. 421.

¶ 31. A bill to remove from complainant's title a cloud caused by defendant's claim under a reservation in a deed will not lie where the land is in possession of a party working under an option from defendant, both at the time the bill was filed and afterward, so that a remedy exists at law.—Deer Lake Co. v. Michigan Land & Iron Co., 83 Mich. 11.

¶ 32. A suit in equity to set aside a tax deed should not be dismissed because the defendant is in possession and entitled to a trial of his right in a court of law, when it appears that the defendant's alleged possession is only such as is incident to removing the timber upon the land.—Case v. Skinner, 121 Mich. 206.

¶ 33. A bill to quiet title to certain lands is not maintainable where it appears that the defendants are in possession of the lands, since How. St. § 6626, as amended by Pub. Acts 1887, No. 260, provides for such procedure only when the party against whom the relief is sought is not in possession.—Seymour v. Rood, 121 Mich. 173.

¶ 34. Ejectment and not bill in equity is the remedy where the grantee of a purchaser at foreclosure sale seeks to obtain possession of a part of the land which is occupied by one claiming 20 years' adverse possession, who was not a party to the foreclosure proceeding.—Chandler v. Graham, 123 Mich. 327.

¶ 35. Under Comp. L. 1897, § 448, ejectment should have been brought, and not a bill to quiet title, to settle the rights of adverse claimants to land, where it appears that the defendant at the time the action was commenced pastured his cattle upon the land in question; that he had thereon many hitching posts, some of which had been there for years, which were used by guests of his hotel and patrons of his boats; that he led his horses daily across such land to water, and that the guests of his hotel went daily over such land to the swimming hole during the summer season; since it could not be said that defendant was out of possession of such land.—Tinker v. Piper, 149 Mich. 335.

¶ 36. Where complainant has the senior recorded legal title to land and is out of possession and defendant is in possession, a bill filed merely to quiet title cannot be maintained.—Beidler v. City Bank of Battle Creek, 172 Mich. 381.

¶ 37. Where a person having a quitclaim deed and an assignment from a vendee of vacant lots under a recorded instalment contract erects a for sale and exchange sign on the land, on a default and declaration of forfeiture the assignee has not such a possession as will preclude the vendor from filing a bill to quiet title, nor need a possessory action be brought before bringing the suit.—Donnelly v. Lyons, 173 Mich. 515.

¶ 38. Ejectment is the proper remedy where defendant is in possession of a disputed piece of land between two tracts of land and not a bill to quiet title or for equitable relief.—Longcor v. Turner, 191 Mich. 240.

¶ 39. A bill to quiet title to realty will not lie where the defendant claims title and is in possession.—Miscotten v. Hellenthal, 162 Mich. 402.

¶ 40. A bill in equity does not lie to obtain a decree restraining repeated trespasses, defining a boundary line, and quieting title in a disputed piece of land between two tracts of land where defendant was in possession at the time of commencement of the action, as the proper remedy is an action at law for ejectment.—Longcor v. Turner, 191 Mich. 240.

§ 6. ——Forcible or fraudulent possession by defendant.

See also ante ¶ 26.

¶ 41. The right to bring a suit under How. St. § 6626, which provides that any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person, not in possession, setting up a claim thereto in opposition to the title claimed by the complainant, is not barred by a possession on the part of the adverse claimant obtained by the forcible ouster of the complainant from possession.—Bigelow v. Sanford, 98 Mich. 657.

¶ 42. Where a widow who had conveyed a farm in trust to her brother-in-law, upon his agreement to cultivate it and render rent, retained possession of the premises—the grantee never entering upon performance of his trust—until forcibly dispossessed by the grantee's attaching creditor under an execution sale and sheriff's deed, such creditor having knowledge of the grantor's equities, and the grantee, after the service of the attachment but prior to the execution sale, having reconveyed to her, it was held, on a bill filed by the grantor to quiet title, that the case was one for equitable relief.—Bigelow v. Sanford, 98 Mich. 657.

§ 7. ——Reformation or rescission suit.

General law as to reformation of instruments, see Reformation of Instruments.
General law as to rescission and cancellation, see Rescission and Cancellation.

¶ 43. Where one's right to a certain strip of land was a mere equity growing out of a mistake in the description in his deed, his appropriate remedy is by bill to reform his deed.—Howell v. Merrill, 30 Mich. 282.

§ 8. Title or interest and equities in plaintiff.

See also ante § 2.

Existence of legal remedy as defeating equity jurisdiction, see ante § 4.
Possession in plaintiff, see post § 10.
Title, claim or interest in defendant, see post § 13.
Effect of acquiescence and laches, see post § 20.
Weight and sufficiency of evidence as to title, see post § 30.
General doctrine of accession to land by improvements thereon, see Accession and Confusion § 5.

¶ 44. Under Laws 1840, Act No. 76, p. 127 (substantially re-enacted in How. St. § 6626) the complainant must show a complete title in himself, or a right to such title, before he can call upon a defendant to release.—Stockton v. Williams, W. 120.

¶ 45. One seeking to quiet title must show: 1, possession; 2, a legal or equitable title; 3, a claim set up by the defendant; 4, his own claim must be substantiated. He cannot rely upon the weakness of his adversary's title.—Stockton v. Williams, 1 D. 546.

¶ 46. A court of chancery is not the appropriate tribunal for the trial of conflicting titles to land.—Devaux v. City of Detroit, H. 98; Blackwood v. Van Vleet, 11 Mich. 252; Moran v. Palmer, 13 Mich. 367.

¶ 47. A bill to remove a cloud upon the complainant's title will not be sustained where the case made by the bill shows that the alleged cloud is supported by an equitable right in the defendant.—Torrent v. Muskegon Booming Co., 22 Mich. 21.

¶ 48. A bill to quiet title will not lie where complainant deduces title through a judicial sale wholly void for want of jurisdiction.—Griswold v. Fuller, 33 Mich. 268.

¶ 49. The legal remedy is not plain and adequate, so that equity will deny its aid, in a case in which the title to land comes under examination, but only incidentally, and a decision for one party leaves an apparent title of record in the other.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 50. Where complainant in a bill to remove a cloud caused by a sale for a city tax had been a city official connected with the tax business when it was levied, and had bought afterwards and expressly subject thereto, he may be presumed to have been allowed to retain enough of the consideration to pay it, and has no equity to entitle him, on dismissal of his bill, to have leave to file another.—Gamble v. City of East Saginaw, 43 Mich. 367.

¶ 51. A man agreed with his son that the son should have a certain piece of property by way of advancement from his estate, and the son took possession of it accordingly. The father executed a deed with the avowed purpose of delivering it to the son, but it was lost. The father, however, referred to the advancement in his will and so recognized it. Ejectment was brought for this land by one who, without consideration, had obtained from another of the testator's children a deed of whatever interest the latter had in the land. Held, that the son who had occupied and improved it could maintain a bill to enjoin the action, and to clear and confirm his title even though he could not show record evidence of title.—Michle v. Ellair, 54 Mich. 518.

¶ 52. A bill to quiet title cannot be filed by any person not interested in the title; and a suit by or against one who is only indirectly interested cannot bind other owners, who cannot be represented in his name.—Jenness v. Smith, 58 Mich. 280.

¶ 53. A guardian's sale of lands made without bond was presumptively affirmed by the wards, after attaining their majority, by retaining the purchase price; and they expressly affirmed it subsequently by conveying to the owner of the title under the probate sale. Held, that such owner, having gone into possession, has a good equity to maintain a bill to quiet title against a third party who by fraud obtained a deed of the wards after their majority, and before their deed to complainant.—Fender v. Powers, 62 Mich. 324.

¶ 54. Where a bill in equity by a lessor who has retaken possession treats a lease as a void encumbrance which because of defendant's claims cloud complainant's title, and the court is asked to ascertain whether or not a completed forfeiture exists, and, if so, to remove the cloud, it does not seek to violate the rule that equity will not enforce a forfeiture.—Pendill v. Union Min. Co., 64 Mich. 172.

¶ 55. An individual who, for the statutory period, has been in the exclusive possession of land claimed by a city to be a public alley, has a sufficient title to maintain a suit in chancery against the city claiming the easement, under How. St. § 6626, authorizing the filing of a bill to quiet title to real estate by persons having the legal or equitable title thereto.—Vier v. City of Detroit, 111 Mich. 646.

¶ 56. On a bill to quiet title to land founded on a tax deed, where there was a mistake because the auditor general had issued two deeds for the same tax, there was not a forfeiture in fact where the complainant's case was not rested upon the nonpayment of a proper sum by the defendant but upon the fact that the payment did not reach him and relief will not be denied the landowner on the ground of a statutory forfeiture, there being in fact none.—Miller v. Steele, 146 Mich. 123.

¶ 57. One claiming an equitable title may be afforded relief upon a bill to quiet title

under Comp. L. 1896, § 448.—Horton v. Helmholtz, 149 Mich. 227.

¶ 58. After the period of redemption from a tax sale expires, the state's title to land sold to it can only be devested by a sale and corresponding purchase, and until there is such purchase, or application to purchase, by someone, there is no equitable right anywhere which will sustain a bill to remove a cloud against another claiming title.—Embury v. Goodenough, 157 Mich. 140.

¶ 59. Complainant holding title to certain property was induced by the representations of her brother to believe that the title was defective, and that, in order to perfect it, it would be necessary for her to consent to a sale of the property by the administratrix of a former owner. She so consented, under an arrangement by which the property was to be bid in by another brother, and reconveyed to her. The property was so sold, and the purchaser executed a conveyance to the brother who had instigated the proceedings, but such brother refused to convey to complainant without payment of an amount which he claimed to be owing him from her husband, and died before the conveyance was made. The second brother, purchasing at an administratrix sale, then conveyed the property to his wife, who was made a codefendant. Held, that complainant was entitled to have the transaction set aside as a cloud upon her title.—Blount v. Eames, 150 Mich. 35.

¶ 60. A bill to quiet title is properly dismissed where the evidence establishes title in defendant.—Allen v. Maser, 157 Mich. 479.

¶ 61. A purchaser under proceedings to foreclose a first mortgage after the expiration of the time for redemption may maintain a bill to quiet title against a second mortgagee on the ground that he has threatened to take proceedings to foreclose his mortgage.—Steyskal v. Radford, 166 Mich. 365.

¶ 62. A widow, who, by the will of her husband, has an estate in fee in real property, has such an interest in land conveyed by a deed signed by herself and husband as to be able to maintain a bill to quiet title to such property in the grantees, since she would be liable as legatee to the grantees, if the title should fail, by reason of her having succeeded to the title of the estate of the warrantor.—White v. Grand Rapids & I. Ry. Co., 190 Mich. 1.

¶ 63. A widow who, by will of her husband, has an estate in fee in real property has such an interest in the portion of the estate which had been sold upon land contracts as to sustain a bill to quiet title thereto.—White v. Grand Rapids & I. Ry. Co., 190 Mich. 1.

¶ 64. A complainant seeking to remove cloud to her title to real estate will not be granted relief where by her own testimony it appears that the conveyances under which she claims, were made to defraud the creditors of vendor; since the complainant, coming into court of equity, must show clean hands.—Barrett v. Lowrey, 77 Mich. 668.

§ 9. ——Title by adverse possession.

General law as to adverse possession, see Adverse Possession.

¶ 65. A decree quieting title was granted upon a showing that complainant had been in undisturbed possession for more than twenty years before the suit under claim of title based upon sales for taxes; and this without reference to the validity of the tax deeds.—Hardy v. Powell, 40 Mich. 413.

¶ 66. A complainant whose possession under a foreclosure deed has been open and exclusive for more than twenty years is entitled, whether his title is formal or not, to have set aside transfers made by one purporting to act as the administrator of the deceased mortgagor but without color of authority as such.—Chesebro v. Powers, 70 Mich. 370.

¶ 67. In a suit to remove a cloud from his title complainant may show that the land, consisting of an island in a stream, passed to him before defendant's patent was issued, through a patent of land on the bank of the stream.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246. Affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

§ 10. Possession in plaintiff.

See also ante ¶¶ 11, 15, 16.

Title, interest or equities in plaintiff, see ante § 8.

Averments in bill as to title, see post § 23.

Burden of proof as to possession, see post § 27.

Weight and sufficiency of evidence as to possession, see post § 30.

¶ 68. Possession by complainant, ostensibly of the whole land, and rightfully at least of an undivided half, is sufficient to enable him to maintain a bill under the statute to quiet his title against a third person claiming it.—Blanchard v. Tyler, 12 Mich. 339.

¶ 69. A bill was filed to quiet complainant's title to land bounded on a river, of the whole of which he was in possession, except a small portion, being a boom, embracing the bed of the stream and a footpath along the bank. His title to the whole was the same, and was undoubted. A decree quieting his title to the whole was affirmed.—Fitzhugh v. Barnard, 12 Mich. 104.

¶ 70. Under Comp. L. 1871, § 5072, How. St. § 6626 any person in possession of swamp lands with legal and equitable title thereto, based on a purchase from the general government before the transfer of such lands to the

state was completed, can maintain a bill to quiet title as against any person not in possession but claiming title under a subsequent patent from the state.—Dale v. Turner, 34 Mich. 405.

¶ 71. One who has a right to file a bill to quiet title may properly include parcels of land contracted to others and in their possession.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 72. Possession is not absolutely necessary to enable one to maintain a bill to relieve his title to land from an encumbrance.—Newark M. E. Church v. Clark, 41 Mich. 730.

¶ 73. How. St. § 6626, prior to its amendment by Laws 1887, Acts Nos. 22 and 260, did not authorize a bill to quiet title to be maintained by one not in actual possession of the premises.—Newark M. E. Church v. Clark, 41 Mich. 730; Page v. Montgomery, 46 Mich. 51; Kilgannon v. Atkinson, 51 Mich. 240; Hatch v. Village of St. Joseph, 68 Mich. 220.

¶ 74. Occupancy of rooms in a building containing several separate leaseholds is not to be assumed to be the "actual possession" required in one who seeks to quiet title to the premises, in the absence of a showing that he does not hold under defendants; and if he does not, he is in a situation to bring ejectment for the holdings occupied by others than himself.—Geney v. Maynard, 44 Mich. 578.

¶ 75. One out of possession could not maintain a bill to quiet title, especially if a suit at law was pending to settle the right of possession.—Page v. Montgomery, 46 Mich. 51.

¶ 76. One out of possession cannot file a bill to quiet title under a tax-deed executed in 1883, How. St. § 1168 having been repealed, and the want of possession preventing such a bill independently of the statute.—Goodman v. Nester, 64 Mich. 662.

§ 11. ——Colorable, forcible or fraudulent possession.

General law as to fraud, see Fraud.

¶ 77. A suit to quiet title cannot be maintained if complainant received possession from his opponent only on an agreement that no legal rights should be affected by his occupancy.—Newark M. E. Church v. Clark, 41 Mich. 730.

¶ 78. The statute authorizing a person in possession to file a bill to quiet title does not apply to a case where a person by sharp practice acquires possession just before filing his bill, and where previously he had a remedy by ejectment.—Stetson v. Cook, 39 Mich. 750; Watson v. Lion Brewing Co., 61 Mich. 595.

¶ 79. A bill to quiet title is not maintainable where complainant took and held forcible possession for the purpose of filing such a bill and of avoiding a suit at law.—Rubert v. Brayton, 82 Mich. 632.

¶ 80. One who upon a speculation buys a disputed title under an agreement that he is to pay nothing unless he succeeds in getting the land, cannot, after he has forced himself into possession during the temporary absence of the person claiming ownership, have the aid of a court of equity to quiet his title and to assist him in his wrongful holding.—Rubert v. Brayton, 82 Mich. 632.

¶ 81. A party cannot found a possession entitled to recognition by a court of equity upon an entry made by collusion with the servant of the actual occupant; nor can a possession necessary to support a bill to quiet title be predicated upon an entry secured by misrepresentation as to its purpose.—Wakefield v. Sunday Lake Mining Co., 85 Mich. 605.

¶ 82. Under How. St. § 6626, providing for a suit in chancery to quiet title by any person having actual possession and legal title to lands, a complainant who has obtained possession by wrongful conduct is not within the spirit of the statute and cannot maintain the bill. A bill is not prevented on the ground that the complainant has acquired possession by unfair means, where the facts show that the complainant having acquired a tax title, induced a tenant of the defendant to vacate the premises and yield up possession upon the payment of a certain sum, there being no force used, and no evidence of collusion. It is lawful and no breach of duty for a tenant to surrender possession of premises to the true owner, where the title of a former owner has been terminated by operation of law.—Lillie v. Snow, 118 Mich. 611.

¶ 83. Where an alleged cotenant in fee, immediately after death of the life tenant, set up a tent and subsequently broke into the house occupied by the defendant and ousted him, the possession thus gained is not sufficiently exclusive to maintain a bill to quiet title.—Crosby v. Hutchinson, 126 Mich. 56.

§ 12. ——Neither in possession; unoccupied wild lands.

Bill by one in possession of swamp lands, see ante ¶ 70.

¶ 84. A bill to quiet title to unoccupied wild lands not in the actual possession of either party could not be maintained prior to 1887.—Jenkins v. Bacon, 30 Mich. 154.

¶ 85. Under Comp. L. 1897, § 448, in a suit to quiet title it is immaterial whether the complainant is in possession or not where it is not pretended that the defendant is in possession.—Messenger v. Peter, 129 Mich. 93.

§ 13. Title, claim or interest in defendant.

See also ante ¶¶ 52, 53.

Ejectment as adequate remedy where defendant in possession, see ante § 5.
Title, interest or claim in plaintiff, see ante § 8.
What are clouds and adverse claims, see post § 15 et seq.
Averments as to defendant's claim or interest, see post § 24.
Estoppel by reason of words of counsel to assert that title is threatened, see Estoppel ¶ 219.

¶ 86. Bill to quiet title cannot be maintained against defendants not charged and shown to hold or claim some title or interest in the land in question.—Rodgers v. Beckel, 172 Mich. 544.

§ 14. Bills of peace against vexatious claims.

Bills of peace generally, see Equity, XII.

¶ 87. A bill of peace is a bill filed for securing an established legal title against the vexatious recurrence of litigation, whether by a numerous class insisting on the same right or by an individual reiterating an unsuccessful claim; hence it does not lie to compel different persons having different claims under different and unconnected contracts to join as defendants in litigating them so that plaintiff may safely recognize one or the other.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 88. An owner of real estate leased the same and thereafter contracted to sell it to another person. The contractual vendee claimed that the lessee forfeited his rights under the lease by attempting to assign same and demanded of the lessor that he terminate the lease and deliver possession to the vendee in accordance with the terms of the contract. The vendee's right to damages for breach of contract did not necessarily depend upon complainant's right to enforce a forfeiture. Held, complainant owner's bill of peace against the lessee's assignee and the vendee would not lie.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

II. CLOUDS AND ADVERSE CLAIMS, WHAT ARE.

§ 15. In general.

[Note.—The question what constitutes a "cloud of title" also arises in connection with contracts for sale and conveyance of lands, where the proffered title is deemed unmarketable or clouded and is rejected or questioned for that reason. See Vendors and Purchasers, III, for cases on this subject.]

Lis pendens as cloud, see also Lis Pendens ¶ 22.
Quieting title as against tax or assessment liens or titles, see Taxes.
Actions to quiet title as remedy against illegal or excessive assessment for local improvement, see Local Improvements § 128.
Right to quiet title of cloud from assessment laid under unconstitutional statute, see Local Improvements ¶ 388.
General doctrine of bona fide purchaser, see Notice and Record of Title, I.
Actual notice as affecting rights in title, see Notice and Record of Title, I, A.
Notice of title implied from recitals, possession or other facts calling for injury, see Notice and Record of Title, I, B.
Necessity and office of record and instruments of title recordable, see Notice and Record of Title, II, A.
Persons who are bona fide purchasers, see Notice and Record of Title, I, C.
Discharges and releases of record as affecting title, see Notice and Record of Title, II, D.
Hostility or friendliness of possession as affecting notice of title arising from fact of possession, see Notice and Record of Title § 20.
Effect of illegal or unauthorized record as affecting rights in title to real property, see Notice and Record of Title, II, E.

¶ 89. A cloud upon title to land is something which constitutes an apparent defect or encumbrance, or shows a prima facie right in another to some interest in the property.—City of Detroit v. Martin, 34 Mich. 170.

¶ 89a. If the statute annexing lands to a city is unconstitutional, the invalidity of an assessment of such lands by the city is apparent on its face, and the tax does not cloud the title.—Curtis v. City of East Saginaw, 35 Mich. 508.

¶ 90. A cloud rests on title so long as it is questionable if defendant's title is not prima facie better than complainant's.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 91. Under our recording laws any record title is presumptively better than a title defective of record, and clouds it.—King v. Carpenter, 37 Mich. 363.

¶ 92. The record title in the former owner of land is not a cloud upon the title of a purchaser, acquired through tax proceedings.—Triangle Land Co. v. Nessen, 155 Mich. 463.

¶ 93. Equity will not decree a release by A to B for the reason, merely, that the deed under which A claims was executed while B was in possession of the premises claiming under a title adverse to that of A's grantor.—Stockton v. Williams, 1 D. 546.

¶ 94. A cloud on the title is created by an instrument which purports by its terms to be a conveyance from the original source of title to an adverse claimant, if extrinsic evidence is needed to show the invalidity of the instrument.—Stoddard v. Prescott, 58 Mich. 542.

¶ 94a. In a suit by a cestui que trust against the trustee of a passive trust, a con-

veyance will be decreed because the nominal trust beclouds the title and embarasses the rights of alienation that belong to the true owner.—Rothschild v. Dickinson, 169 Mich. 200.

§ 16. Mortgage liens.

General law as to mortgages, see Mortgages.
Suits to compel discharge of mortgage and declare debt satisfied, see Mortgages § 160.
Provisions as to quieting title against mortgages, see Comp. L. 1915, §§ 11745, 11746, 12715.

¶ 95. A husband bought land purchased partly with funds furnished by his wife. He gave her a mortgage on it to represent her contribution. Later they separated and at the time of the separation there was a division of the property, and an agreement that the mortgage should be discharged. Held, that, where she has not rescinded in toto, equity will restrain the enforcement of the mortgage against the portion of land awarded to him, and quiet the title in him, or in one claiming under him.—Brown v. Miller, 63 Mich. 413.

¶ 96. Without requiring proof of actual payment equity will compel discharge of an outlawed mortgage as a cloud upon title.—Kingman v. Sinclair, 80 Mich. 427.

§ 17. Lien of judgment or execution.

See also ante ¶ 2.
General law as to executions, see Executions.
General law as to judgment liens, see Judgments, VIII.
Frauds or defects in execution sale as clouds on purchaser's title, see also Executions §§ 90-93.
Bill by claimant or mortgagee to remove execution sale as cloud for failure to sue within year to declare debtor's equities, see Executions ¶¶ 261, 263.

¶ 97. The holder of the legal title can maintain a bill to remove the cloud caused by levy of execution to reach an equitable interest in the land, where there has been more than a year's delay to ascertain the judgment debtor's equities under the statute relating to execution sale of property standing in another's name.—Edsell v. Nevins, 80 Mich. 146.

¶ 98. Complainant to quiet title cannot complain of a decree adjudging a lien in favor of defendant whose claim was under a judgment in attachment assailed by complainant as void, but in law valid, and a sale under such judgment.—Kurtz v. Gartner, 141 Mich. 262.

¶ 99. Attachment proceedings and execution levies purporting to affect real property, when the only interest to which they could apply has terminated, are a cloud on title.—Grover v. Fox, 36 Mich. 453.

¶ 100. Under Act No. 256, Pub. Acts 1909, relating to the removal of clouds on title by suits in chancery, a complainant may maintain such a suit to clear his title against a defendant who, pursuant to a judgment against complainant, has filed a notice of levy pursuant to section 9224, Comp. L. 1897.—Monroe v. Carter, 167 Mich. 325.

¶ 101. In disposing of a bill to quiet title by setting aside an execution sale made on a transcript of a justice's judgment, the execution being assailed as void, the justice's judgment record will be tested by what it shows of the essential facts to a common intent of certainty.—Vroman v. Thompson, 51 Mich. 452.

§ 18. Void or inoperative deeds, conveyances or patents.

¶ 102. Where it can be shown that a partition deed which clouds a reversionary title is void, relief can be had in equity against a title in fee claimed under the partition.—Willetts v. Mandlebaum, 28 Mich. 521.

¶ 103. Title may be quieted in favor of devisee as against deeds from devisor which had never become operative by delivery; and of the existence of which the grantee named in such deeds had no knowledge until after the devisor's death.—Lyon v. Lyon, 76 Mich. 610.

¶ 104. An intestate's heir can maintain a bill to remove from his title the cloud created by a conveyance consummating an administrator's sale void because the administrator was appointed upon a petition that did not confer jurisdiction.—Haug v. Primeau, 98 Mich. 91.

¶ 105. Complainant purchased a lot for a valuable consideration and in ignorance of any claim against it. Defendant had a sheriff's deed of the lot issued upon an execution sale based on a transcript judgment void because the record failed to show that the plaintiff appeared upon the return day. Bill was filed to remove the cloud on the title. Held, that the prayer of the bill should be granted.—Purdy v. Law, 132 Mich. 622.

¶ 106. A defaulting officer quitclaimed to one of the sureties on his official bond the entire title to lands in which another person equitably had a joint interest with himself, the grantee assuring him that his conveyance carried his own title only and that the interests of other persons could be arranged afterwards. Held, that the owner of the joint interest could compel the grantee, by bill in equity, to convey to him his interest; and that the grantee could not plead the statute of frauds.—Byrne v. Rood, 54 Mich. 67.

¶ 107. A bill in equity by parties in possession under grant and confirmation from the United States lies to compel the release of a title held under an apparently legal grant

from the United States which operates as a fraud on complainant's title.—Sanborn v. Vance, 69 Mich. 224.

III. PLEADING AND PROCEDURE.

§ 19. In general; right to sue.

Nature, propriety and occasions of remedy, see ante § 1.
Jurisdiction of equity, see ante § 2 et seq.
Title, interest or equities in plaintiff, see ante § 8.
Possession in plaintiff, see ante § 10.
Acquiescence and laches as defeating right, see post § 20.
Parties to bill to quiet title, see post § 21.
Abatement by transfer of title, see Abatement.
Suit to quiet title pending foreclosure suit, see also Equity ¶ 100.
Necessity of personal service of process in suit to remove cloud upon title, see Process § 11.
Decree quieting title as bar or estoppel upon owners in severalty not made parties, see Former Adjudication ¶ 368.
Decree establishing validity of a tax res adjudicata in suit to quiet title to the land purchased at tax sale, see Former Adjudication ¶ 451.

¶ 108. An administrator of a decedent purchaser of lands at tax sale has no authority as such to maintain a suit to quiet the title to the lands.—Jenkins v. Bacon, 30 Mich. 154.

¶ 109. One who has bought land from an executor empowered by the will to sell it for the heir's benefit can maintain a bill to quiet his title as against one who has purchased the same land on execution running against the heir.—Haddon v. Hemingway, 39 Mich. 615.

¶ 110. Except by leave of court, after the administrator's refusal, a creditor of a decedent's estate cannot bring suit to remove a cloud from the title of land belonging to the estate.—Marshall v. Blass, 82 Mich. 518.

§ 20. Limitations and laches.

General law as to laches, see Equity, IV.
Possession as excusing delay in suing, see Equity § 54.

¶ 111. A deed from a father to his minor son was left unrecorded for some months, but was finally taken by the son from a trunk where it was kept, and recorded. Afterwards the father conveyed a tract, including the parcel covered by the son's deed, to another person, who had notice of the prior conveyance within three years afterwards, but beyond beginning an action of ejectment five years later, and suffering nonsuit, took no steps to clear his title until twenty-four years had gone by from the date of his own deed, and the prior grantee had died. He then entered the land, and being sued in trespass filed a bill to enjoin the action and to clear his title. Held, that the bill was properly dismissed. It was not likely that the son would have fraudulently recorded his deed, as the wrong could be easily found out, nor that the other grantee would have neglected when the facts were recent to seek a remedy if he was entitled to it. The latter's long unexplained delay and acquiescence would have cut off any equities he might have had, so that both at law and in equity he would have had no claim for redress.—Birdsall v. Johnson, 44 Mich. 135.

¶ 112. Delay of eighteen years in bringing suit to quiet title, when complainant during all that time has known of the defect in it and how to perfect it, would go far to defeat the proceeding, even if based on equity.—Frost v. Methodist Episcopal Church Missionary Soc., 56 Mich. 62.

¶ 113. Harvey and Reynolds owned as tenants in common mineral rights under certain land. Harvey, who owned the surface, in 1867 conveyed a portion thereof to complainant's grantors without reserving any mineral rights. In 1870 Reynolds and Harvey with knowledge on Reynolds' part of Harvey's conveyance conveyed their mineral rights to one Breitung. At that time they did not know that any mineral underlay the portion of the surface conveyed by Harvey. For many years Breitung mined coal under his lease and paid royalties to Harvey & Reynolds. In a bill brought by complainant to quiet title to the land conveyed by Harvey in 1867, held, Reynolds having ratified such conveyance complainant was not obliged to move to protect his rights until they were questioned and he was not barred by laches.—Pellow v. Arctic Iron Co., 164 Mich. 87.

§ 21. Parties.

Right to maintain suit, see ante § 19.
Parties defendant to suit to enjoin ejectment and quiet title, see Injunctions § 355.
Parties in equity generally, see Equity, VI.
Provisions as to appearance of interested parties, see Jud. Act, chap. XII, § 26; Comp. L. 1915, § 12377.
Provisions as to suits against "unknown defendants," see Jud. Act, chap. XII, § 20 et seq.; Comp. L. 1915, § 12371 et seq.

¶ 114. On a bill to quiet title where the description in a deed is uncertain because of a discrepancy between a line referred to and a distance specified, and mesne conveyances have followed with a like description, after which other mesne conveyances clearly omitted the strip of land left in dispute by the uncertainty, and it is sought to defeat the apparent legal title of one of the mesne purchasers by extrinsic evidence of a mistake in a boundary or by acts in pais of any of the mesne grantors in making an actual location, or in otherwise creating an equitable estoppel, it is held that the persons whose acts are relied upon, and whose rights are to be affected, are necessary parties.—Howell v. Merrill, 30 Mich. 282.

¶ 115. Where a bill to quiet title seeks to determine the interests of children in lands whereof the proofs show they are entitled to a greater or less share, depending in amount upon the lawfulness of their birth, if the complainant has any interest in the same, and where both complainant and defendant are laboring under different theories to establish that such children have no interest, the children must be made parties.—Watson v. Lion Brewing Co., 61 Mich. 595.

¶ 116. Where a widow who had conveyed a farm in trust to her brother-in-law, upon his agreement to cultivate it, and render rent, retained possession of the premises—the grantee never entering upon performance of his trust—until forcibly dispossessed by an attaching creditor of the grantee under an execution sale and sheriff's deed, such creditor having knowledge of the grantor's equities, and the grantee after the service of the attachment but prior to the execution sale having reconveyed to the grantor, it was held, on a bill filed by the grantor against the grantee and the creditor to quiet title, that the grantee was not a necessary party complainant.—Bigelow v. Sanford, 98 Mich. 657.

¶ 117. A bill to quiet title filed by a party in possession, under Comp. L. 1871, § 5072, How. St. § 6626, may join as defendants persons who claim title from different sources, where all the titles put in issue were once in the same defendant, and the rest held under him by a purchase alleged to have been made in bad faith.—Hammontree v. Lott, 40 Mich. 190.

¶ 118. To a bill to quiet title as against an execution sale, the sheriff is a proper defendant, so as to prevent his executing a deed.—Haddon v. Hemingway, 39 Mich. 615.

¶ 119. In proceedings to quiet title, persons who have conveyed all their interest in the premises and who cannot be affected by the result are not proper parties defendant. So held as to both the grantee and the heir of an original owner, the first having conveyed the land under a misdescription that was in the deed to him, while the last had quitclaimed all her interest in the land itself.—Hammontree v. Lott, 40 Mich. 190.

¶ 120. A bill to quiet title need not include as defendant, an iron company whose charter has expired and whose stock is all owned, and business affairs conducted, by the other defendants.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 121. Where the sheriff of the county has filed a notice of levy on real estate in behalf of a defendant, the latter is a necessary and proper party defendant in a bill to remove such lien as a cloud upon complainant's title.—Monroe v. Carter, 167 Mich. 325.

§ 22. Pleading.

Jurisdiction as affected by allegation of bad faith of defendant in possession, see ante ¶ 26.
Issues, proof and variance, see post § 26.
Equity pleading generally, see Equity, VII.
Multifariousness of bill against distinct parties, see also Equity ¶ 262.
Multifariousness of bills in general, see Equity §§ 73-76.
Repugnancy of allegations of possession and of ignorance of title, see Equity ¶ 303.
Sufficiency of bill to show jurisdiction in equity to settle boundary, see also Equity ¶ 318.
Description in pleading sufficient to cover "island," see Pleading ¶ 31.
Amendments setting up new cause of action, see also Pleading ¶ 530.

¶ 122. A bill to remove from complainant's title a cloud caused by the fraudulent procurement of a deed is open to criticism if it does not show whether the charge against defendant is one of forgery, or of the procurement of a genuine signature to a genuine deed by fraud practiced on the grantor.—Foster v. Hill, 55 Mich. 540.

¶ 123. A bill filed by a firm creditor to remove a cloud created by a sale of land under an execution in favor of an individual creditor of a surviving partner, which sufficiently alleged that the land was partnership property; that the partnership was heavily in debt at the time of the death of one partner; that the land was conveyed to complainant to apply on its partnership debt and that the defendant had notice of such facts, made a sufficient case to require an answer and the taking of proofs.—First Nat. Bank of Cooperstown v. State Sav. Bank of Ionia, 123 Mich. 321.

¶ 124. In a suit to quiet title allegation that the plaintiff is the owner and in possession, taken with an implication in the bill that the defendant is not in possession, is sufficient allegation that the defendant is not in possession where the bill has been held good on demurrer.—Crosby v. Hutchinson, 126 Mich. 56.

¶ 125. Where a bill alleged the execution of certain deeds conveying certain premises to complainant upon condition that he pay a certain sum of money to each of the defendants; that complainant had offered to perform these conditions; that defendants had refused to accept the money, and that they asserted the mental incompetency of the grantor, and threatened to litigate with the complainant, held that the bill was sufficient for relief if such allegations be proven notwithstanding other allegations be not proved, especially where a cross-bill put squarely in issue the question of the validity of the deeds.—Guntzviller v. Gitre, 195 Mich. 695.

¶ 126. Defendant's predecessor in title instituted an ejectment suit against complain-

ant's predecessor in title, and judgment was rendered in favor of complainant's predecessor. Defendant's predecessor obtained a reversal and a new trial, but complainant's predecessor died before the trial was had. Neither defendant nor his predecessor pursued the action further for a period of over fifteen years. Complainant filed a bill to remove cloud from title, setting forth the above facts. Held, such bill was not demurrable on the ground that it showed a prior cause in ejectment to be pending.—Conley v. Sinclair, 163 Mich. 306.

¶ 127. Where a bill of a lot owner asks that the city be restrained from moving a sidewalk in so as to encroach on the lot boundary line as claimed by defendant, and prays for general relief, the complaint is sufficient to warrant a decree quieting title. —Triece v. City of South Haven, 154 Mich. 129.

¶ 128. A bill to quiet title by the holder of a tax deed against the original owner and his mortgagee, upon demurrer, states a sufficient case to entitle complainant to relief, where it alleges that defendants do not acknowledge its fee-simple title; that a disclaimer or quitclaim has been requested from such mortgagee and refused, that he claims to have title thereto, which is a cloud upon claimant's title; that this cloud tends to depreciate the value of the premises, and complainant, by reason thereof, is unable to sell such land for an adequate price.—Flint Land Co. v. Fochtman, 140 Mich. 341.

¶ 129. A demurrer to a bill in an action to remove a cloud from title, filed by the auditor general and the commissioner of the state land office should not be sustained where the action is against them and a third party alleged fraudulently to have obtained a tax homestead certificate of the land, though the auditor and commissioner had good grounds for the dismissal of the action as to them, but such grounds were not also available to the third defendant.—Dixon v. Ludington, 130 Mich. 269.

§ 23. ——Averments and showing as to title and possession.

Necessity of title or possession in plaintiff, see ante §§ 8-12.

Pleading and proof of adverse possession, see Adverse Possession, V.

Sufficiency of allegations to set up title complete by bar against attack on judicial sale, see also Limitations ¶ 407.

¶ 130. Suit could not be maintained where complainant's bill not only failed to show that the complainant was in possession, but actually showed that the defendant was.—Torrent v. Muskegon Booming Co., 22 Mich. 354.

¶ 131. A bill to quiet title, filed by a complainant averring possession of the premises, but not shown to be in actual possession, against a defendant shown to be in possession, cannot be maintained where nothing appears to prevent proceedings at law.—Barron v. Robbins, 22 Mich. 35.

¶ 132. Where a bill to quiet title alleged complainants' seizin and possession, and that they had a direct chain of title from the government, it was held not defective in the averment of the ownership of the lands in controversy.—Hanscom v. Hinman, 30 Mich. 419.

¶ 133. Where complainant in a bill to quiet title shows title in fee from the government, and does not seek a relief based on priority, but attacks an adverse claimant, he is not bound to set out the evidences of his own title in his bill.—Jenks v. Hathaway, 48 Mich. 536.

¶ 134. One who is not in possession cannot maintain a bill to quiet title, and an averment in the bill that defendant had entered upon the premises, and by personal force and violence had prevented complainant from occupying or using them, had the effect of negativing possession.—Kilgannon v. Jenkinson, 51 Mich. 240.

¶ 135. The complainant, an executor, alleged in his bill that after the death of his testator the widow recorded a deed from the testator to her of certain land; and that such deed had never been delivered to her prior to the testator's death. The bill alleged a conveyance by the widow to the defendant and asked to quiet title. Held, that under Comp. L. 1897, § 448, it is essential in a bill to quiet title to aver that complainant is in possession or that defendant is not in possession, and that the bill by failure so to aver was demurrable.—Moody v. Macomber, 158 Mich. 209.

¶ 136. A bill to quiet title is demurrable where it is not alleged that the parties defendant are not in possession.—Berger v. Roe, 179 Mich. 184.

¶ 137. A cloud upon title cannot be created by the owner of the title and exist by his grant. And rights that may accrue to him from his continued occupancy after deeding the property are not to be enforced in equity if the bill does not aver such possession as by lapse of time or otherwise would legally extinguish defendant's claim.—Bresler v. Pitts, 58 Mich. 347.

§ 24. ——Averments as to claim of title or interest by defendant.

Necessity of claim of interest by defendant, see ante § 13.

Waiver of objection for want of allegation of assertion of hostile claim, see also Equity ¶ 464.

¶ 138. A bill in equity which states no title or pretended title in defendant that would be apparently good at law without evidence aliunde cannot be maintained on the ground of removing a cloud upon the title.—Torrent v. Muskegon Booming Co., 22 Mich. 354.

¶ 139. Under Comp. L. 1857, § 3490, How. St. § 6626, permitting suits for quieting title to lands, the complainant need not show by his bill that the defendant's claim is prima facie good at law, nor, since he cannot be presumed to know it, need he set forth therein the ground upon which the defendant asserts its validity.—Holbrook v. Winsor, 23 Mich. 394.

¶ 140. A bill in equity was brought by heirs to remove a cloud cast upon their title by a fraudulent and unauthorized administration; held, that as against defendants alleged to hold interests in the present tile, it would be sufficient to aver that they purchased from their codefendants, whose fraud is complained of, and that the title conveyed to them was void for defects apparent upon its face; but held, also, that in the absence of any allegation of distinct and issuable facts invalidating the rights asserted by the defendants, a decree upon confession would not be supported by a mere averment that such defendants have acquired interests and liens which are void against complainants, without showing that they derived title through such codefendants.—Damouth v. Klock, 29 Mich. 289.

¶ 141. A bill to quiet title must show in some way that defendant is setting up a cloud on the title, and either describe how or explain why the method cannot be described.—Jenks v. Hathaway, 48 Mich. 536.

¶ 142. A bill to quiet title is specially demurrable if it merely states that the county records indicate that defendant has or appears to have some interest in said land by reason of certain tax-titles executed to him by the auditor-general for delinquent taxes of specified years. It should give the date and description of the deeds and show where in the records they are recorded and whether defendant claims all or only part of the land, and whether the interest claimed is entire or undivided. It should also show what defendant has done or failed to do, to complainant's prejudice, and aver any neglect or refusal on his part to do justice.—Jenks v. Hathaway, 48 Mich. 536.

¶ 143. A bill to remove a cloud from a title need not set up an assertion of hostile title by defendants.—Cleland v. Casgrain, 92 Mich. 139.

¶ 144. A demurrer to a bill to quiet title held under a tax deed, on the ground that it failed to show that one of the defendants was setting up a claim in opposition to complainant's title, was not well taken, where the bill alleged that the defendants refused to sign a disclaimer, and the defendant, not separately demurring, merely prayed the benefit of a demurrer in an answer denying complainant's title and praying for the right to redeem.—Flint Land Co. v. Godkin, 136 Mich. 668.

¶ 145. A bill to quiet title under section 448, Comp. L. 1897, is demurrable unless it sets out that defendant is making some claim adverse to the title of complainant.—Triangle Land Co. v. Nessen, 155 Mich. 463.

¶ 146. A bill which alleges possession of land under a contract of sale and full performance on complainant's part and prays for specific performance, and alleges adverse possession and prays that title be quieted, but does not allege that the defendants ever owned or held title to or claimed the land in question and is silent as to the present condition of the second title is defective and demurrable.—Rodgers v. Beckel, 172 Mich. 544.

§ 25. ——Cross-bill.

Cross-bills in equity generally, see Equity, VII, D.

Raising question of power of corporation to hold land on cross-bill to its bill to quiet title, see Corporations ¶ 288.

Propriety of cross-bill to redeem in suit to quiet title, see Mortgages ¶ 765.

¶ 147. The defendant in a bill to quiet title, involving a determination of the question of title between the parties, may assert his legal title by a cross-bill.—McKenzie v. A. P. Cook Co., 113 Mich. 452.

¶ 148. A court of equity may quiet title to land under a bill seeking the removal of attachment levies, where the defendant by cross-bill asks to have the complainant's deed set aside, since the latter plea clothed the court with jurisdiction to dispose of the entire controversy.—Hummell v. Smale, 186 Mich. 199.

§ 26. Issues, proof and variance.

Variance as to title of complainant, see also Equity ¶ 648.

¶ 149. Where a person in possession files a bill to quiet his title under the statute therefor, the claims of defendants may be put in issue and disposed of in one case, no matter how many separate instruments they claim under; but it may be otherwise if they severally claim title to distinct parcels through different sources.—Hammontree v. Lott, 40 Mich. 190; Alterauge v. Christiansen, 48 Mich. 60.

¶ 150. In a suit to quiet title no claim can be litigated by complainant except such as may be asserted by defendant.—Hall v. Kellogg, 16 Mich. 135.

¶ 151. The legitimacy of children in a suit where their interests in property are to be determined upon the fact of their being born in or out of wedlock cannot be litigated unless they are made parties.—Watson v. Lion Brewing Co., 61 Mich. 595.

¶ 152. On a bill to quiet a wife's title to land on which a levy had been made under a judgment against her husband, the suggestion that the husband's creditors may attack the wife's title is of no force where no such issue is raised by the answer and the defendant has not put himself in position to raise it on the proofs.—Woodworth v. Gorton, 46 Mich. 324.

§ 27. Burden of proof and presumptions.

Weight and sufficiency of evidence, see post § 29.

Presumption favoring record title, see Notice and Record of Title § 79.

Constructive notice of title from record, see Notice and Record of Title, II, C.

¶ 153. The fact that a bill to quiet title sustained over demurrer does not expressly allege that the defendant is out of possession will not excuse complainant from the duty of proving this fact by the evidence.—Crosby v. Hutchinson, 126 Mich. 56.

¶ 154. On a bill by a tax title holder to quiet title to land, held that the burden of proof was upon the defendant to prove a false or fraudulent return by the sheriff to a notice to redeem from the tax sale.—Heethuis v. Kerr, 194 Mich. 689.

§ 28. Admissibility of evidence.

¶ 155. An unprobated will in which the premises are not mentioned, though other lands owned by testator are disposed of therein, is not admissible for the purpose of showing title under a claim that testator had deeded the premises to his daughters who had thereafter conveyed to plaintiff.—Brigham v. Reau, 139 Mich. 256.

§ 29. Weight and sufficiency of evidence.

Burden of proof and presumptions, see ante § 27.

¶ 156. Where a mortgagee had been joined as defendant to a bill for removing a cloud from title vitiated by the fraud of his mortgagor, whose title was apparently good of record, said defendant being neither alleged nor proved to have had notice of the fraud, a decree as against him was not sustained.—Damouth v. Klock, 29 Mich. 289.

¶ 157. Where a bill to quiet title makes a case in which the land described is bounded by reference to the line of a third person, the true location of such line is one of the necessary facts of the complainant's case that should be definitely set forth in the bill. But on demurrer to such a bill, where the question was as to what lands it was meant to convey by a certain description, which might be more or less affected by oral evidence of circumstances hard to set forth in the bill in detail, the complainant was held entitled to the benefit of all such extrinsic evidence as might be introduced in support of his theory of the question under the case made by the bill.—Howell v. Merrill, 30 Mich. 282.

¶ 158. Under a bill to remove a cloud upon complainant's title to a strip of land left in dispute through failure to fix the boundary line between adjacent parcels, proof of the defendant's assertion of ownership by various acts not acquiesced in by complainant, is insufficient to establish complete ouster of the latter for want of possession, where it appears that defendant has not fenced it separately, nor defined his own exact boundary by any very clear lines.—Stewart v. Carleton, 31 Mich. 270.

¶ 159. A bill to quiet title as against an indefinite claim was properly sustained where the proofs showed that defendant had tried to sell the land under an invalid levy against complainant's husband, and that the certificate of sale had been filed with the register of deeds.—Woodworth v. Gorton, 46 Mich. 324.

¶ 160. A bill to quiet title cannot be defeated by the testimony of the defendant that he found from records that the title was still in a man by the name of Prussing, that he went to Chicago and through his brother, a constable, located Prussing and obtained a deed from him, where the land was in adverse possession for nearly forty years and the identity of Prussing is doubtful.—Malliat v. Vogel, 125 Mich. 291.

¶ 161. One who purchases property at an execution sale is not entitled to have his title quieted as against the purchaser at a subsequent sale under the foreclosure of a mortgage given prior to the judgment, although the records of the mortgagee show the mortgage paid, where the testimony shows that the mortgage was sold to a third party prior to the execution sale and foreclosed by him and a deed on record since the date of the bank records shows that the mortgage was still alive and recognized.—Flowers v. Reilly, 125 Mich. 562.

¶ 162. In a bill to quiet title brought by the husband against the administrator of the deceased wife and their children, testimony that the husband in failing health, deeded property to the wife, that subsequently he learned the legal effect of the deeds in case his wife should die first and obtained a quitclaim deed from her which was lost or stolen, supported by testimony of a law clerk and the notary who drew the deed and acknowledged it, is sufficient to sustain a decree for the complainant.—Rouleau v. Stradley, 126 Mich. 681.

¶ 163. On a bill to establish a boundary line and to quiet title under Pub. Acts 1909, No. 256, § 36, How. St., 2nd Ed., § 11965, evidence held to sustain a finding that a boundary fence had been in existence for more than 20 years.—Parent v. Hodges, 188 Mich. 69.

¶ 164. On a bill to quiet title to an undivided interest in land, and on a cross-bill praying that title be quieted against complainant, evidence held insufficient to overcome the presumption that a warranty deed to defendant was executed and acknowledged as it purported to be.—Donohue v. Vosper, 189 Mich. 78. Affirmed in 243 U. S. 59, 61 L. ed. 592, 37 Sup. Ct. Rep. 350.

¶ 165. On a bill to quiet title to a farm and to restore a deed evidence held sufficient to sustain a finding that complainant entered into an oral agreement with his mother that he was to have the farm on which they resided in consideration of doing certain work on the farm and performing other services for the mother.—Peterson v. Bisbee, 191 Mich. 439.

§ 30. ——As to title and possession.

Sufficiency of record of title of real property, see Notice and Record of Title, II, B.

Suits to establish lost or destroyed papers as evidences of title, see Restoration of Papers § 1.

¶ 166. In a suit to quiet title it is sufficient, prima facie, if the complainant makes out a title, apparently good, as against the defendant.—Hall v. Kellogg, 16 Mich. 135; Rayner v. Lee, 20 Mich. 384; Loomis v. Roberts, 57 Mich. 284.

¶ 167. Proof that a person occupied the land for several years and died in possession is presumptive evidence of seisin in favor of his heirs and purchasers from his estate; a fortiori in resisting a tax-title set up under an assessment levied against the estate of the deceased by name.—Hall v. Kellogg, 16 Mich. 135.

¶ 168. Where the answer to a bill to quiet title relies upon an adverse right depending entirely upon the location of the description, the proof of possession need not be as strict as when there is a defense distinctly set up and relied on.—Verplank v. Hall, 27 Mich. 79.

¶ 169. Proof that a person entered into possession under a contract with a party under whom complainant holds, it appearing that he never received a deed, and that he had ceased to occupy the premises, is not evidence of possession adverse to complainant. —Rayner v. Lee, 20 Mich. 384.

¶ 170. Where a bill is filed to remove from complainant's title a cloud caused by the execution by complainant's grantor of a later deed to defendant, the latter is estopped from raising, against a decree in favor of complainant, the objection that there was no evidence of title or possession in the common grantor at the time he conveyed to complainant.—Moran v. Lebot, 97 Mich. 472.

¶ 171. The expenditure of money for improvements upon lands by the title holder is some evidence that he is the beneficial owner. —Hamilton v. Wickson, 131 Mich. 71.

¶ 172. A bill to quiet title cannot be maintained by a school district when the only proof of possession of the land in question by the district is that the school children used it as a playground when it was unfenced, and defendant, who holds the legal title, is in open physical possession thereof, having openly and without force fenced it with his other land, after informing the school board that he would do so.—School Dist. No. 2 Sylvan Tp. Washtenaw County v. Musbach, 176 Mich. 243.

§ 31. Decree and relief.

Relief incidental to general equities, see ante § 3.

Weight and sufficiency of evidence, see ante § 29.

Determination and disposal of equity causes generally, see Equity, X.

Rules for awarding costs, see Costs, II, B.

Costs to disclaiming parties, see Costs § 35.

Costs on appeal for fault causing necessity of suit, see Costs § 98.

Retaining partition bill as bill to quiet title where bill shows that defendants are in possession, see Partition ¶ 90.

Retention of bill to decree surrender and cancellation, see also Equity ¶ 877.

Answer and defense by one as inuring to and carrying decree for all defendants, see also Equity ¶ 358.

Rights of tax title purchaser in possession to be reimbursed for taxes paid and improvements made when his tax title is annulled, see Taxes, XII, B, C.

¶ 173. Under a bill to quiet title no relief can be granted on any ground which is not calculated to becloud the title.—Jenks v. Hathaway, 48 Mich. 536.

¶ 174. The court quieting title to land and a boom therewith cannot go further and take an account of the rents and profits of the boom while occupied by defendants as wrongdoers.—Fitzhugh v. Barnard, 12 Mich. 104.

¶ 175. Whether one who seeks to quiet his title against another who claims the same property under a minor's deed should be required to refund to the latter the consideration paid for the minor's deed, quære. But in this case, the complainant impliedly admitting the justice of such refunding, it was made a condition to the granting of the relief sought.—Prout v. Wiley, 28 Mich. 164.

¶ 176. Complainant to quiet title who by secret dealings with a third person obtained an apparent title to an estate that he knew was honestly claimed and occupied by another under a prior equitable title, and who, without regard to the latter's claims, made expenditures for the improvement of the estate that are unsuited to the occupant's needs, will not be supported by a court of equity, which, however while protecting the equity of the occupant, cross complaining, will subject the other to such losses only as are fairly incident thereto.—McCredie v. Buxton, 31 Mich. 383.

¶ 177. On a bill to quiet title the owner of land is entitled, upon establishing his claim as against one who has held the land under color of title for a number of years, and has made improvements thereon, to his election as to whether he will take the land, and pay the increased value due to the improvements, or abandon the land to defendant, upon payment by him of the value it would have had if no improvements had been made.—McKenzie v. A. P. Cook Co., 113 Mich. 452.

¶ 178. A cotenant who asked pay for improvements was required to share the rents and profits of the land.—Eighmey v. Thayer, 135 Mich. 682.

¶ 179. A licensee to cut timber forfeited his rights by a failure to perform the conditions of the license. In a bill to foreclose a mortgage against the licensee, an intervening defendant claimed title to the timber lands through a grant by the owner after forfeiture by the licensee. Held, the intervener was entitled to have the effect of the forfeiture declared and to have all claims of the licensee removed as a cloud on the intervener's title.—Scott v. Sullivan, 159 Mich. 297.

¶ 180. Complainant brought a bill to quiet title to lots 28 and 54. His deed to lot 28 was lost, and never recorded, but no dispute was made by defendant as to his title to that lot. The court found that as to lot 54 complainant had no title. Held, the court would enter a decree quieting complainant's title to lot 28 in order to dispose of the entire matter.—Fuller v. Bilz, 161 Mich. 589.

¶ 181. Where a court of equity finds in a bill to quiet title and to restrain trespass upon land that a complainant has no title to a strip of land which he has long occupied, and upon which he has in good faith erected buildings, it will decree that he have a reasonable time within which to remove his buildings from the strip.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 182. In a suit to quiet title where a sale made by a guardian to complainant is held void because not confirmed by order of court, there being no fraud nor misappropriation of funds by the guardian the court may grant affirmative relief to defendants by setting aside the cloud upon their title.—Hunt v. Stevens, 174 Mich. 501.

¶ 183. Grantor of a void quitclaim deed praying for a decree to remove such deed as a cloud on title, held properly required as a condition of relief, to repay the amount of money received from the grantee in consideration for the deed.—Ernst v. Ernst, 178 Mich. 100.

¶ 184. Different grantees obtained deeds of the same land from different persons of the same name. One brought suit to quiet his title, and the other, though professing to be willing to do justice, did not disclaim but answered, and thereby occasioned costs which might have been avoided by a disclaimer. He was required to release to the complainant. Held, that his expressions of willingness to settle for a small bonus did not justify his failure to disclaim, especially as he had good reason to suppose that his grantor was not the actual owner of the land.—Blodgett v. Dwight, 38 Mich. 596.

§ 32. ——Dismissal or nonsuit.

See also ante ¶ 8.
Equities entitling plaintiff to file a new bill upon dismissal, see ante ¶ 50.

¶ 185. A bill to remove a cloud from title was dismissed when it did not appear that complainant held a valid title; as when he held under Indian grantors, one of whom was under age and did not understand that she was conveying title, and the other had none to convey.—Harrison v. Oakman, 56 Mich. 390.

¶ 186. A guardian obtained leave to sell lands in which his ward inherited an interest, but the sale was not approved as required by How. St. § 6727. The title to the lands was on its face a tenancy-in-common belonging in equity to firms in one of which the guardian, the ward's ancestor, and the grantee were partners, and in the other the first two; and one of the transfers was made in pursuit of a partnership settlement with the grantee. The ward, on becoming of age, brought ejectment for the lands, and the grantee sought to enjoin the action and claims that the guardian's deeds should be made valid. Held, that the bill, which was dismissed without prejudice, was properly dismissed; void guardian's deeds could not be confirmed as such; and though the lands were partnership lands and therefore liable to be used for partnership purposes, still, as they were held by tenancy-in-common, relief could only be worked out in equity unless the deeds were good. And the bill was hardly capable of amendment. The interests belonging to each firm and the condition of each should appear, so as to denote the liability of the different lands, and this can only be reached by some sort of accounting. The bill would probably not be multifarious

in joining these titles.—Jenness v. Smith, 58 Mich. 280.

¶ 187. On the principal that the complainant in a bill to quiet title must rely upon the strength of his own title the bill is properly dismissed without prejudice, where the only evidence of the complainant's title is a recitation in a deed to the grantor of the complainant as follows: "This land, upon which I have paid taxes for over twenty-two years, is the same deeded to me by Andreas Prussing the deed for which was never recorded, but was destroyed in 1871 in the great Chicago fire."—Malliat v. Vogel, 125 Mich. 291.

QUITCLAIMS TO QUOTIENT VERDICTS.

Cross-References.

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- See Deeds, III.
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- Basis for estoppel, see Estoppel § 8.
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- Liability for failure of title, see Covenants for Title; Vendors and Purchasers.

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QUO WARRANTO.

TREATS of proceedings to recover or determine the right to an office or franchise. It excludes the general law of public offices (see Officers).

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I. IN GENERAL; OCCASION AND PROPRIETY OF REMEDY.

§ 1. Nature and propriety of remedy.

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Mandamus to compel performance of duties pertaining to elections, see Mandamus § 82 et seq.
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¶ 1. In the case of an intrusion upon an office the court has discretion to proceed to judgment or not according as the public interests do or do not require it, and will not do so where no good end will be subserved by it.—Osterhous ex rel. Vander Veen v. Van Duren, 168 Mich. 464.

§ 2. Right and title to public office.

Officers subject to writ, see post § 3.
After expiration of term or resignation, see post § 4.
Impropriety of mandamus to try title to office, see Mandamus § 20.
Mandamus to compel admission or restoration to office, see Mandamus §§ 84, 86.
Right to quo warranto where lots are drawn upon equal division of the vote being claimed, see Officers ¶ 84.
Writ in case of fraud or error in elections, see Jud. Act, chap. XXXVIII, §§ 28-30, Comp. L. 1915, §§ 13551-13553.

¶ 2. Quo warranto is the only way to try titles to office finally and conclusively.—Frey v. Michie, 68 Mich. 323.

¶ 3. The right to a public office is to be settled by a proceeding in the nature of quo warranto.—Curran v. Norris, 58 Mich. 512.

¶ 4. Quo warranto is the usual method of settling questions of title to office, and it is important to the public as well as the parties that unnecessary delays be avoided; and especially is this true in cases where large public interests are at stake, and considerable amounts of the public money may be improvidently used.—Fuller v. Attorney-General, 98 Mich. 96.

¶ 5. Where a person intrudes himself into an office, in consequence of the unlawful decision of a board of canvassers, the proper remedy is by motion to the supreme court for leave to file an information in the nature of a quo warranto to try the right to such office.—People ex rel. Attorney General v. Tisdale, 1 D. 59.

¶ 6. Where a board of election canvassers have made a recount of votes and it is claimed that such recount is erroneous quo

warranto is the proper remedy.—Dickinson v. Board of Canvassers of Cheboygan County, 148 Mich. 513.

¶ 7. The members of the board of control of the state house of correction are at least de facto officers, and their title to their office cannot be attacked in quo warranto proceedings instituted to test the title of one appointed warden in place of a former warden who had been removed from office by the board of control under the power conferred upon said board by Laws 1893, Act No. 118. —Attorney-General v. Parsell, 99 Mich. 381.

§ 3. ——Offices subject to writ.

¶ 8. Whether information in the nature of quo warranto lies in the case of an office not created by the state, quære.—People ex rel. Throop v. Langdon, 40 Mich. 673.

¶ 9. The position of policeman of the city of Adrian being subject to the discretion of the common council, it is not an "office" within the meaning of § 21 of the charter of the city (Local Laws 1887, Act No. 384) providing that officers appointed by the mayor shall hold their offices until the first Monday in the ensuing May, the title to which can be tried by quo warranto.—Attorney-General v. Cain, 84 Mich. 223.

¶ 10. A special officer for justices' courts and a county physician are not the holders of such offices as the courts concern themselves about in quo warranto.—Trainor v. Board of Auditors of Wayne County, 89 Mich. 162.

¶ 11. An incumbent of the office of chief of police of West Bay City who is elected or appointed in the manner prescribed by the charter for a term fixed by the statute, and who exercises functions derived from the charter, in addition to those derived from the city ordinances, is a public officer within the meaning of How. St. § 8685, authorizing proceedings by quo warranto against any person who shall usurp, intrude into or unlawfully hold or exercise any public office, etc. —Ellis v. Lennon, 86 Mich. 468.

¶ 12. Probate judges are not within the exception in Comp. L. 1871, § 7101 (How. St. § 8662), which permits informations in the nature of quo warranto to be filed in the circuit court except against state officers.—Secord v. Foutch, 44 Mich. 89.

§ 4. ——After expiration of term or resignation.

¶ 13. The proceeding by quo warranto will not lie when an office is vacant.—Wayne County Auditors v. Benoit, 20 Mich. 176.

¶ 14. Where no substantial benefit would inure to the relator, the proceeding will not as a general rule be continued after the term has expired merely to try the abstract title to an office.—Osterhous ex rel. Vander Veen, v. Van Duren, 168 Mich. 464.

¶ 15. Ordinarily proceedings to try title to a public office cannot be brought after the term has expired, or when it is so nearly expired that the inquiry would be of no effect; but an action commenced during the term of office may be prosecuted to final judgment after the expiration of the term for the recovery of damages or costs which relator has sustained or incurred by the wrongful assumption of authority.—Osterhous ex rel. Vander Veen v. Van Duren, 168 Mich. 464.

¶ 16. Respondent's term of office as justice of the peace expired on July 4, 1911. An information was filed on June 22, 1911, to test his right to hold said office. The case was heard in August, 1911. Held, at said hearing the information was properly dismissed, the sole purpose of the same being to oust respondent from the office.—Osterhous ex rel. Vander Veen v. Van Duren, 168 Mich. 464.

§ 5. Existence and franchise of municipality, division or district.

Offices and franchises of private corporations, see post 6.
Franchises of railroad and public service corporations, see post § 7.
General law of franchises, see Franchises.
Against officers pretending to be a county organization, see also Counties ¶ 13.
Bar of quo warranto to forfeit charter by state proceeding to abolish special charter immunities, see Former Adjudication ¶ 222.
Collateral attack on municipal existence, see Municipal Corporations § 12.

¶ 17. Quo warranto against the district or its officers is the proper proceeding to test the validity of the organization of a school district.—Owosso Fractional School Dist. No. 1 v. Owosso, etc., Joint Board of School Inspectors, 27 Mich. 3.

¶ 18. There should be some special and extraordinary reason to justify interference by quo warranto with the organization of a school district, as the statutes provide a speedier remedy by an appeal from the district board to the township board.—People ex rel. Lord v. Every, 38 Mich. 405.

¶ 19. The writ of quo warranto is a proper remedy where not only the existence of a school district, but the title of its officers, is attacked, these questions being judicial in their nature, and not within the jurisdiction of the township board.—People ex rel. Roeser v. Gartland, 75 Mich. 143.

¶ 20. Quo warranto, directed against the township or its officers, is the proper remedy to contest, after some lapse of time during which it is inferable that officers have been elected and property assessed, the validity of

proceedings of a board of supervisors in organizing a new township from part of an existing one.—Atlee v. Wexford County Sup'rs, 94 Mich. 562.

¶ 21. Quo warranto is the proper proceeding to determine between two municipal bodies asserting the same power of appointment; the boundaries of their franchises must be determined by quo warranto.—Frey v. Michie, 68 Mich. 323.

¶ 22. An information in the nature of quo warranto will not lie against an alleged township whose organization is invalid on the face of the record; it will lie, however, against the several town officers for usurping franchises, but would not lead to any judgment reaching the whole controversy in one record.—People ex rel. Scrafford v. Gladwin Supervisors, 41 Mich. 647.

¶ 23. The action of a board of supervisors in selling a poor-farm is the exercise of a franchise, and not a usurpation or an illegal act; and while such a sale to a member of the board may be void on the ground of public policy, quo warranto is not the proper proceeding by which to test that question.—McDonald v. Alcona County Supervisors, 91 Mich. 459.

§ 6. Offices and franchises of private corporations.

Franchises of railroad and public service corporations, see post § 7.

Against corporations under the statutes, see Corporations § 201.

Proper remedy against foreign corporation doing business without performing precedent conditions, see also Mandamus ¶ 748.

Informations against private corporations, see Jud. Act, chap. XXXVIII, § 13, Comp. L. 1915, § 13536.

¶ 24. Quo warranto is the proper remedy by which to try title to the office of director of a private corporation.—Attorney-General v. Looker, 111 Mich. 498. Affirmed in 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21.

¶ 25. Proceedings in quo warranto are appropriate to try the right of a domestic corporation to act as such, and by analogy may be applied to foreign corporations, even though a bill in equity would also lie to restrain the unlawful acts of such corporation done in furtherance of the purposes for which it is alleged to have been organized.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 26. An information cannot be filed under How. St. § 8635, subd. 3, where the articles of association state a purpose for which the statute authorizes a corporation to be formed, and where the requirements of law preliminary to incorporation are fulfilled. The question whether the corporation is exercising any franchise or privilege not conferred by law is to be tested by information filed, on leave of court, under sec. 8646.—Attorney General ex rel. Miner v. Lorman, 59 Mich. 157.

¶ 27. The statute (Comp. L. 1871, chap. 225, How. St. ch. 298, concerning information in the nature of a quo warranto contemplates the punishment of corporations for the violation of state law and policy only.—People ex rel. Maybury v. Mutual Gas-Light Co. of Detroit, 38 Mich. 154.

¶ 28. Whether quo warranto or scire facias is the proper remedy, by which to proceed against a private corporation for violating its charter, quære.—People ex rel. Platt v. Oakland County Bank, 1 D, 282.

¶ 29. A judgment creditor's application for leave to file an information in the nature of a quo warranto to enforce a forfeiture for nonuser of the rights and franchises of a manufacturing company was denied in the absence of any showing that the statutory remedy provided for judgment creditors, and which is deemed the more appropriate one, is not available.—People ex rel. Carpenter v. Wayland Wood Mfg. Co., 33 Mich. 413.

¶ 30. In the case of an intrusion upon an office of a religious society, the court has discretion to proceed to judgment or not, as the public interests require; and it will not so proceed where no good end will be subserved.—People ex rel. Blomquist v. Nappa, 80 Mich. 484; People ex rel. Koller v. Nappa, 89 Mich. 232.

§ 7. Franchises of railroad and public service corporations.

¶ 31. Where the common council of a city has control of its streets and enacts an ordinance authorizing the construction of a railway in a street, an information in the nature of a quo warranto will not lie in behalf of the state against the railway company to exclude it from laying its tracks in the street.—People ex rel. Kunze v. Fort Wayne & E. R. Co., 92 Mich. 522.

¶ 32. The lessee of a chartered railroad company having discontinued running trains over part of its route and ceased to maintain a station at a certain village, leave to file an information in the nature of quo warranto was denied, where in the opinion of the court no interest of public policy or even individual welfare requires the work and outlay of capital involved.—Attorney General v. Erie & K. R. Co., 55 Mich. 15.

¶ 33. Information under How. St. § 8646, as for exercising a franchise not conferred by law, will not lie against a street railway company, merely because it, though incorporated for a period limited to thirty years, is operating under a grant of the "exclusive and perpetual" right of constructing and operating its road in a street; respondent's term not

having expired, and complaint not being made by the municipality or by persons living in the locality.—Attorney-General v. Detroit Suburban R. Co., 96 Mich. 65.

¶ 34. Leave to file an information was denied where the purpose was to deprive a certain gas company of the right to lay pipe and distribute gas in Detroit, on the ground that it had forfeited the right by violating certain conditions imposed by the city in granting it. —People ex rel. Maybury v. Mutual Gas-Light Co. of Detroit, 38 Mich. 154.

¶ 35. Leave to file an information in the nature of quo warranto was denied where the respondent was a railroad company, the forfeiture of whose charter would not redress the grievance complained of, which was that its lessee had discontinued part of its route and side-tracked a village, which complained of the consequent loss of facilities for transportation.—Attorney General v. Erie & K. R. Co., 55 Mich. 15.

§ 8. Respective power and jurisdiction of supreme and circuit courts.

Extent of supervisory jurisdiction of circuit court, see Courts § 55.
Jurisdiction of supreme court to issue writ, see Const. art. VII, § 4.
Power of circuit court to issue writ, see Const. art. VII, § 10.
Statutory provision for jurisdiction of supreme court to issue writ, see Jud. Act, chap. I, § 9; Comp. L. 1915, § 12014.
Jurisdiction of circuit court under statute, see Jud. Act, chap. VI, § 1, Comp. L. 1915, § 12299; Jud. Act, chap. XXXVIII, § 26, Comp. L. 1915, § 13549.

¶ 36. Quo warranto proceedings should generally be instituted in the circuit court.—Coon v. Attorney General, 42 Mich. 65.

¶ 37. The circuit court having jurisdiction of quo warranto to try the right to a county office, the supreme court should not be asked to entertain such cases unless in quite exceptional cases.—Pound v. Attorney-General, 119 Mich. 528.

¶ 38. The circuit court is a more appropriate tribunal to determine a township drain officer's right to office; but where no objection was made to proceedings in the supreme court before the day of argument the latter court exercised its jurisdiction.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

¶ 39. Pub. Acts 1899, No. 255, section 2 should be interpreted to mean that a suit or a quo warranto proceeding may be instituted in the circuit court by either the attorney general or prosecuting attorney, and "when" (i. e., if) a quo warranto shall be determined upon, it is optional with the attorney general to commence it in the supreme court. Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 40. The supreme court has power by quo warranto to review removals of county officers from office by the governor in order to ascertain whether the statute has been complied with.—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 41. While an information in the nature of a quo warranto to test the right to hold a public office ought generally to be filed in the circuit court, yet where the office in controversy is that of sheriff, and where the prosecuting attorney has declined to file such an information, relief through the attorney general in the supreme court may be sought. —Lamoreaux v. Attorney General, 89 Mich. 146.

§ 9. Laches or estoppel to institute writ.

¶ 42. The state cannot be estopped from instituting quo warranto proceedings against a corporate body on the ground that it has been recognized as a corporation by a municipality.—Attorney General v. Hanchett, 42 Mich. 436.

II. APPLICATION AND LEAVE, AND INSTITUTION OF ACTION.

§ 10. In general.

Practice and procedure to obtain leave, see post § 11.
Necessity and sufficiency of showing for leave, see post § 12.
Security for costs and expenses to be incurred, see post § 13.
Authority, duty and discretion of attorney general or prosecuting attorney, see post § 14.
Occasion and propriety of remedy, see ante I.
Laches and estoppel to institute writ, see ante § 9.
Parties and pleadings after institution, see post III.
Fee on filing of application, see Jud. Act, chap. XLVI, § 2; Comp. L. 1915, § 13670.
Cases in which information may be filed by attorney general without leave, see Jud. Act, chap. XXXVIII, § 1; Comp. L. 1915, § 13524.
Precedence upon calendar over other civil cases, see 1916 C. C. Rule 50, § 5.

¶ 43. It is discretionary with the supreme court to grant an application for leave to file an information in the nature of quo warranto.—People ex rel. Attorney General v. Tisdale, 1 D. 59; Attorney General v. Erie & Kalamazoo R. Co., 55 Mich. 15.

¶ 44. The granting or withholding leave to file an information in the nature of a quo warranto is discretionary.—Boucha v. Alger Circuit Judge, 159 Mich. 610.

§ 11. Practice and procedure to obtain leave.

See also ante ¶¶ 34, 35.
Necessity and sufficiency of showing for leave, see post § 12.

Parties entitled as private relators, see post § 16.
Laches and estoppel to institute writ, see ante § 9.
Power of judge at chambers to grant leave to file information, see Courts § 58, ¶ 195.
Procedure to obtain leave, see Jud. Act, chap. XXXVIII, § 14; Comp. L. 1915, § 13537.

¶ 45. The procedure prescribed by Comp. L. 1898, §§ 9966, 9967 in quo warranto proceedings is not applicable to cases where the attorney general asks the supreme court or a justice thereof for leave to file an information against a corporation under section 9951, and such leave may be granted without notice to the respondent in the discretion of the court or a justice thereof without any further showing than the facts set up in the verified complaint.—People ex rel. Attorney General v. Detroit, G. H. & M. R. Co., 149 Mich. 122.

¶ 46. Where a petition for leave to file information in the nature of a quo warranto has been presented to the circuit judge, failure to file it in the clerk's office before the information is filed is not ground for demurrer.—McDonald v. Alcona County Sup'rs, 91 Mich. 459.

¶ 47. Special leave to a citizen to file an information in the nature of a quo warranto under How. St. § 8662 subd. 2, cannot be granted by the circuit judge at chambers.—McDonald v. Alcona County Sup'rs, 91 Mich. 459.

§ 12. Necessity and sufficiency of showing for leave.
Laches and estoppel to institute writ, see ante § 9.

¶ 48. The law requires a precise and positive showing before the court will interfere by quo warranto.—Boucha v. Alger Circuit Judge, 159 Mich. 610.

¶ 49. Leave to a private relator to file an information in the nature of a quo warranto under How. St. § 8662, subd. 2, should not be granted without a responsible showing of relator's rights in the premises.—Lamoreaux v. Attorney General, 89 Mich. 146.

¶ 50. How. St. § 8662, subd. 2, permitting a private relator, on leave granted, to file an information in the circuit court to try the title to an office, contemplates that a showing for leave shall be made.—Vrooman v. Michie, 69 Mich. 42.

¶ 51. Under Comp. L. 1897, § 9967, How. 2nd Ed., § 14054, providing that informations may be filed by the prosecuting attorney of the proper county on his own relation, or that of any citizen of the county without leave of court, or by any citizen of the county by special leave of court, relators who show by their petition that they have such an interest in the matter as to entitle them to an adjudication of the questions involved, should be permitted to file an information in the nature of quo warranto for the purpose of determining by what warrant certain persons claim to exercise the liberties, privileges and franchises of a corporation, and the matter should not be disposed of on affidavits.—Vertin v. Houghton Circuit Judge, 125 Mich. 685.

¶ 52. Relator filed a petition for quo warranto proceedings to test the validity of the election of his opponent as township supervisor. He alleged that the election board refused to count eleven legal ballots for petitioner because they contained distinguishing marks, the real reason being the board was opposed to him; and that they counted illegal ballots for his opponent which had distinguishing marks. Held, the petition alleged conclusions and did not set forth facts clearly enough to make a prima facie case.—Boucha v. Alger Circuit Judge, 159 Mich. 610.

§ 13. Security for costs and expenses to be incurred.
Right to costs and party liable or entitled, see Costs, §§ 9, 50.

¶ 53. Where the attorney general has obtained leave to file an information against a private corporation to determine its corporate existence, it is assumed that the information was filed upon the authority of the last clause of Comp. L. 1897, § 9950, providing that satisfactory security shall be given to indemnify the people against all costs and expenses incurred.—People ex rel. Attorney General v. Grand Rapids Sticky Fly Paper Co., 144 Mich. 221.

§ 14. Authority, duty, and discretion of attorney general or prosecuting attorney.
Power of attorney general to manage and control action after institution, see post § 15.
Laches and estoppel to institute writ, see ante § 9.
Discretion of attorney general to institute suit in supreme court, see also ante ¶ 39.
Mandamus to control action of attorney general in suing, see Mandamus § 109.
Authority and duty of prosecuting attorney, see Jud. Act, chap. XXXVIII, § 27; Comp. L. 1915, § 13550.
Instances in which information may be filed by attorney general without leave, see Jud. Act, chap. XXXVIII, § 1; Comp. L. 1915, § 13524.

¶ 54. Cases arise where the attorney general in the exercise of a proper discretion declines to institute quo warranto proceedings to test the right of a person to hold a state office.—Phillips v. Attorney General, 167 Mich. 687.

¶ 55. The attorney general has the same discretion in cases on relation as in other cases, under the law requiring him to file informations in the nature of quo warranto where he has good reason to believe they can be established.—People ex rel. Yates v. Attorney General, 41 Mich. 728.

¶ 56. Whether the supreme court would require the attorney general to file an information in the nature of quo warranto against his own judgment, quære.—Coon v. Attorney General, 42 Mich. 65.

¶ 57. Mandamus will not issue to a prosecuting attorney to compel the filing of an information in the nature of a quo warranto, at the instance of a private person, unless the facts making a case for interference on the part of such officer are clearly made to appear by affidavit in such way as to render the affiant guilty of perjury if any material allegation is false.—Cain v. Brown, 111 Mich. 657.

¶ 58. A prosecuting officer might properly place his refusal to institute quo warranto to try the right to a county office upon want of interest of the applicant, he having no sufficient private interest to move the court to grant him the right to prosecute, the validity of the law in question changing the time for the beginning of the official term of the office being presumed, and leaving the question unsettled until a case where a person having such interest should arise.—Pound v. Auditor General, 119 Mich. 528.

¶ 59. The attorney general on the relation of individuals residing in Wayne county may file an information to restrain the county board of auditors from exercising inhibited powers.—Attorney-General ex rel. Seitz v. Board of Auditors of Wayne County, 78 Mich. 53.

¶ 60. A citizen, taxpayer and elector of the county has the right to set the machinery of the law in motion, and to compel the prosecuting attorney or the attorney general, upon a proper and prima facie showing, to file an information in the nature of a quo warranto to test the right of the incumbent to hold the office of sheriff.—Lamoreaux v. Attorney General, 89 Mich. 146.

¶ 61. The attorney general ought not to institute quo warranto proceedings upon the relation of a citizen having no claim of title to the office, unless the showing is such as to afford reasonable grounds for the belief that the incumbent of the office is an intruder therein, or one not competent under the constitution to hold it.—Lamoreaux v. Attorney General, 89 Mich. 146.

¶ 62. It is proper for the attorney-general to file an information, on the relation of a citizen and tax-payer of a county, to ascertain by what authority the respondent holds and exercises the office of superintendent of the poor of said county.—Taggert, Attorney-General v. James, 73 Mich. 284.

¶ 63. Mandamus to compel the attorney general to institute quo warranto to try the right to a county office was denied, the prosecuting attorney being the proper officer to move where other than state officials are involved, the design of How. St. § 8662, being that local officers are within the jurisdiction of local courts and officers, and that the principal law officer of the state may require parties to seek relief through such channels.—Pound v. Attorney General, 119 Mich. 528.

¶ 64. In a quo warranto proceeding the prosecuting attorney on his own sanction cannot sue out a writ of error; only the attorney general can do so in the public behalf.—Babcock v. Hanselman, 56 Mich. 27.

III. PARTIES AND PLEADING.

§ 15. Power of attorney general to manage and control action.

Persons entitled as private relators, see post § 16.

Parties respondent and joinder or misjoinder, see post § 17.

Pleading and practice in general, see post § 18.

Form and sufficiency of information, see post § 19.

Pleas, averments of justification or disclaimer, see post §§ 20, 21.

Replications and rejoinders, see post § 22.

Objections, motions to quash and demurrers to the information, see post §§ 23, 24.

Authority, duty and discretion of attorney general in matter of application and leave and instituting action, see ante § 14.

¶ 65. On quo warranto to try the right to a public office the attorney general has control of the proceedings.—People ex rel. Chapman v. Pratt, 14 Mich. 333.

¶ 66. The attorney general may bring a proceeding in quo warranto under Pub. Acts 1899, No. 255, in his own name and it is immaterial that he has acted at the suggestion and instigation of a private person, and where he has brought the action in his own name for the benefit of the public it is immaterial that the suit is entitled on the relation of a private person or company.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 67. No stipulation can be regarded in a proceeding in the nature of a quo warranto unless signed by the attorney general.—People ex rel. Chapman v. Pratt, 15 Mich. 184; People ex rel. Crawford v. Molitor, 23 Mich. 341.

§ 16. Persons entitled as private relators.

Parties respondent, see post § 17.

Pleading and practice in general, see post § 18.
Form and sufficiency of informations, see post § 19.
Pleas in general, see post §§ 20, 21.
Practice and procedure to obtain leave, see ante § 11.
Necessity and sufficiency of showing for leave, see ante § 12.
Mandamus to compel prosecuting attorney to institute suit, see ante ¶ 57.
Right of private person to file information against corporation, under Anti-Trust Act, see Corporations § 201.

¶ 68. Persons claiming to be wardens and vestrymen of a religious society cannot join as relators to test in one proceeding their right to the offices respectively against adverse claimants.—People ex rel. Hudson v. DeMill, 15 Mich. 164.

¶ 69. The fact that one received, as a candidate for the office of sheriff, the next highest number of votes, does not entitle him to file on his own behalf an information in the nature of a quo warranto to oust the successful candidate on the ground that he is ineligible because of alienage.—Lamoreaux v. Attorney General, 89 Mich. 146.

§ 17. Parties respondent and joinder or misjoinder.

¶ 70. Quo warranto against a single officer of a municipality does not make the corporation a party any more than it would be in a private suit.—People ex rel. Scafford v. Gladwin County Sup'rs, 41 Mich. 647.

¶ 71. Even though its attorney files a brief the municipality does not become a party in a quo warranto directed against one of its officers as such.—People ex rel. Attorney General v. Hatch, 60 Mich. 229.

¶ 72. Inasmuch as one of two persons who have made an unlawful combination is amenable to the law, whether his cocontractor is within the reach of the law or not in a proceeding of quo warranto to determine respondent's legality as a corporation the respondent cannot complain that his cocontractors are not made parties to the suit.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 73. An information filed against a board of supervisors, the county clerk and the keeper of the county poor-farm, to inquire by what warrant they claim the right to sell, deed and surrender possession of a piece of land owned by the county, is demurrable for misjoining respondents and complainants.—McDonald v. Alcona County Sup'rs, 91 Mich. 459.

¶ 74. In quo warranto proceedings respondents are improperly joined in an information where the title of one does not depend upon the title of another.—Attorney-General v. Cain, 84 Mich. 223.

§ 18. Pleading and practice in general.

Form and sufficiency of information, see post § 19.
Pleas in general, see post §§ 20, 21.
Replications and rejoinders, see post § 22.
Objections, motions to quash and demurrers to the information, see post §§ 23, 24.
Practice and procedure to obtain leave, see ante § 11.
General law of pleading, see Pleading.
Summons and appearance, see Jud. Act, chap. XXXVIII, § 2; Comp. L. 1915, § 13525.
Summons and subsequent pleadings in suit against corporation, see Jud. Act, chap. XXXVIII, § 15 et seq.; Comp. L. 1915, § 13538 et seq.
Precedence upon calendar over other civil cases, see 1916 C. C. Rule 50, § 5.

¶ 75. The pleadings in quo warranto cases are governed by the rules in civil cases, except so far as the statutes modifying these rules are, from their terms, applicable.—People ex rel. Benoit v. Miller, 15 Mich. 354.

¶ 76. The statutes prescribe the form of pleading on suggestion of damages on quo warranto, and the supreme court will not prescribe any other.—People ex rel. Dickinson v. Sackett, 15 Mich. 315.

¶ 77. The statute which authorizes the attorney general to enter a rule requiring the defendants to plead to the information within twenty days after service is enacted for his benefit and to enable him to expedite the proceedings. He cannot be defaulted for failure to enter it.—People ex rel. Hudson v. DeMill, 15 Mich. 161.

¶ 78. How. St. § 7551, in relation to notices of trial of issues of fact, does not apply to proceedings in the nature of quo warranto, the same being governed by How. St. chap. 298, and the rules of court (First C. C. Rule 108) adopted thereunder.—Schattler v. Wayne Circuit Judge, 109 Mich. 567.

¶ 79. Notice of hearing in quo warranto to try the title to a public office must be made in the name of the attorney general.—People ex rel. Chapman v. Pratt, 14 Mich. 333.

¶ 80. Quo warranto proceedings brought in October against the persons constituting the board of a school district created by special act of the legislature in March, cannot be said to have been unreasonably delayed.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, aff'd in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

§ 19. Form and sufficiency of informations.

Demurrers to information in general, see post § 23.

Sufficiency of information on private relation against corporation usurping full powers after expiration of term during winding up period, see Corporations ¶ 748.

Matter to be set forth in information for usurpation of office, see Jud. Act, chap. XXXVIII, § 4; Comp. L. 1915, § 13527.

¶ 81. The information need not be entitled of any particular day. It is governed by the rules of pleading in civil cases, and an allegation that the defendant "for the space of two days last past, has usurped," etc., is sufficient; it refers to the two days next preceding the presenting of the information.—People ex rel. Benoit v. Miller, 15 Mich. 354.

¶ 82. Where the information, charging the defendant with usurping the office, and requiring him to show his right thereto, contains in addition an allegation that the relator, by virtue and warrant of due and regular election, is in law and in right entitled to have, hold and exercise said office, it is not necessary that the relator's title to the office be set forth.—People ex rel. Falkenbury v. Miles, 2 Mich. 348.

¶ 83. In an information for intruding into a corporate office it is not sufficient to aver in general terms the corporate existence, unless the corporation is by special statute. The information should set forth such facts as, in connection with the general statutes of which the court can take judicial notice, will make out the corporate existence, that being a judisdictional fact.—People ex rel. Hudson v. DeMill, 15 Mich. 164.

¶ 84. If the corporation is created by special statute its existence need not, in general, be shown by further averment; but where not so created it must be made out according to the facts.—People ex rel. Hudson v. DeMill, 15 Mich. 164.

¶ 85. Where the court is not judicially informed concerning the nature of an alleged office in a corporation, it ought to be so described in the information, as to its nature and duties, as to enable the court to determine whether it comes within the purview of the statute giving this remedy for usurpation of franchises.—People ex rel. Hudson v. DeMill, 15 Mich. 164.

¶ 86. It is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers to show by what warrant they do so; and, when the defendants set forth their claims by plea, the attorney general may show by replication the special grounds he relies on.—People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389.

¶ 87. An information in quo warranto need not set forth the facts which would negative the respondent's title, and the respondent cannot, therefore, demur to it for that deficiency, if it is otherwise sufficient; but wherever he relies upon his own title he must make a showing of it by his own pleadings.—People ex rel. Larke v. Crawford, 28 Mich. 88.

¶ 88. An information in the nature of a quo warranto is not demurrable for stating that a municipality "was and now is possessed" of certain premises, and that respondents unlawfully hold and exercise the franchises of taking possession of them for a public park. Possession for restricted purposes would not exclude possession as an owner.—Thompson v. Moran, 44 Mich. 602.

¶ 89. An information filed to ascertain by what authority a respondent assumes to exercise the office of superintendent of the poor, which charges that the respondent holds, uses and exercises said office, and has done so for six months last past, without any legal election, appointment, warrant or authority whatsoever, and has usurped, intruded into and exercised the said office, and still does so usurp, intrude into and unlawfully exercise the same, sufficiently charges intrusion into and usurpation of the office to sustain the suit.—Taggart Attorney-General v. James, 73 Mich. 234.

§ 20. Pleas; averments of justification or disclaimer.

Pleas puis darrein, see post § 21.

Judgment on pleadings, see post § 35.

Time for plea, see Jud. Act, chap. XXXVIII, § 2, Comp. L. 1915, § 13525.

¶ 90. In quo warranto causes the respondent must either disclaim or justify, and the plea is the first pleading that indicates the facts concerning which the controversy as to the right of office will arise.—People ex rel. Larke v. Crawford, 28 Mich. 88.

¶ 91. When the respondent disclaims holding the office in dispute, no controversy of fact can arise beyond the simple question of his exercise of the office.—People ex rel. Larke v. Crawford, 28 Mich. 88.

¶ 92. A plea of justification must show all the facts necessary to establish respondent's lawful right to the office in question. No issue of fact can be joined in such cases except upon a replication or some pleading subsequent thereto, either by denial or by confession and avoidance.—People ex rel. Larke v. Crawford, 28 Mich. 88.

¶ 93. All that is necessary to state in a plea of title to an office is the authority

for holding the election, the holding it, and that defendant received the greatest number of votes for the office.—People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 94. Where an information charging respondent with intruding into a public office avers that an election to fill the office was held, that relator received a certain number of votes, and was thereby elected, a plea to such information that no election was held for this office, and that no votes were cast for this purpose, should conclude to the country, and not with a verification.—People ex rel. Speed v. Hartwell, 12 Mich. 508.

¶ 95. Where the plea to an information for entering into a public office shows that respondent has been declared elected it need not aver his citizenship or other qualifications for office. And if it states the number of votes cast at the election it need not explicitly negative the casting of a greater number; nor need it be verified (see, as to verification, People ex rel. Larke v. Crawford, 28 Mich. 88).—Attorney-General v. McIvor, 58 Mich. 516; People ex rel. Larke v. Crawford, 28 Mich. 88.

¶ 96. Upon an information filed by a private relator, a plea showing that relator has no right to the office in question is a complete defense, if established.—Vrooman v. Michie, 69 Mich. 42.

¶ 97. Immaterial statements in a plea to an information in quo warranto about the proceedings of the county board of canvassers may be struck out as surplusage.—People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 98. Information calling upon the defendants to show by what right they assume to exercise certain banking powers. Plea, setting forth a charter of defendants as a railroad corporation, which gave them no authority to issue circulating notes; and stating the issue by defendants of certain certificates which, as described, might or might not be within the statute against unlawful banking, and then denying that defendants have exercised the franchises charged, "except as aforesaid." Held that, as the plea neither confessed nor denied the exercise of banking powers, the issue tendered by it was immaterial.—People ex rel. Attorney General v. Van Cleve, 1 Mich, 362.

¶ 99. To an information in the nature of a quo warranto, requiring a corporation to answer by what warrant it claimed to have, use and enjoy certain corporate powers, etc., which it was therein alleged to have usurped, a plea setting forth the charter of the corporation, by which the powers claimed were conferred in præsenti, is a prima facie defense; for, the commencement of a legal existence being thus shown, it will be presumed that the corporation continued to exist, and to perform its duties, until the contrary is alleged.—Walker v. Michigan State Bank, 2 D. 359.

¶ 100. Where, in addition to pleading the charter, the plea contained allegations designed to show either a continued existence of the corporation down to the filing of the information, or that the state was estopped from insisting upon forfeiture of the corporate franchises for causes which arose prior to a certain period, it was held that these allegations were surplusage, and on motion they were ordered to be struck out. —Walker v. Michigan State Bank, 2 D. 359.

¶ 101. A plea in quo warranto that respondent was appointed to the office and that his term is not yet expired, and a replication that he was removed by the action of the superior body (board of control) do not admit of a rejoinder attacking the motives or the good faith of the proceedings whereby he was removed. Such amounts to a collateral attack on the removal proceedings.—Attorney General ex rel. Otis Fuller v. Parsell, 99 Mich. 381.

§ 21. ——Pleas puis darrein.

See also post ¶ 129.

¶ 102. In quo warranto proceedings to forfeit the charter of a plank road company, a plea of puis darrein continuance, setting up an agreement subsequent to starting suit by the respondent to put the road in good condition and the relator to discontinue proceedings, operates as a notice of a specific defense under 1897 Circuit Court Law Rule No. 9, and does not preclude the respondent from relying on the original defense.—People ex rel. Esper v. Detroit & Saline Plank Road Co., 125 Mich. 366.

§ 22. Replications and rejoinders.

Averments in replication treated as surplusage, see post ¶ 155.

Motion rather than mandamus to admit further replication as better remedy, see Mandamus ¶ 209.

Statutory provisions, see Jud. Act, chap. XXXVIII, § 3, Comp. L. 1915, § 13526.

¶ 103. Traversable matters in a replication must be taken as true unless they are traversed or are confessed and avoided.—Attorney-General v. McQuade, 94 Mich. 439.

¶ 104. A replication in quo warranto proceedings is not chargeable with duplicity for stating several distinct facts that are all aimed to make out the one ultimate fact of a violation of corporate duty, urged as a ground of forfeiture of the charter of incorporation.—Coon v. Plymouth Plank Road Co., 31 Mich. 178.

¶ 105. The alternative statement in a replication, that the corporation respondent "did wilfully or negligently so manage their

affairs that," etc., is not material when the facts set up are sufficient of themselves to show it.—People ex rel. Coon v. Plymouth Plank Road Co., 31 Mich. 178.

¶ 106. Where a replication not only avers that the respondent company did not keep their plank-road in lawful repair, but also that the directors did not, the latter averment is of no legal consequence unless it was in such a way the duty of the directors that the company, on information, would be responsible for their failure; in that case the averment would be proper.—People ex rel. Coon v. Plymouth Plank Road Co., 31 Mich. 178.

¶ 107. A replication which, to show that defendants usurp the franchise of banking, avers that certificates issued by them are in the similitude of bank-bills, and also that they are issued with intent to be put in circulation as money, is double.—People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389.

¶ 108. An information in the nature of a quo warranto involved the legality of the organization of a township. The plea alleged its organization after due preliminaries. The replication denied the legality of the proceedings on the ground that the petition for its organization was not signed by the required number of freeholders. Held that, if the objection relied upon was that those who did sign were not freeholders, it should have been distinctly set forth in the replication, and permission was given to amend it.—Attorney General v. Page, 38 Mich. 286.

¶ 109. An information in quo warranto proceedings charged official misconduct and neglect of duty. The plea denied the charge. A replication was filed which merely reiterated the charges contained in the information. It seems that such a replication is open to demurrer since it was incumbent on the relator to state in his replication the specific acts of neglect and misconduct relied upon.—Dullam v. Willson, 53 Mich. 392.

¶ 110. A replication to a plea in quo warranto proceedings to test the title to an office, which apprises respondent of the matters upon which relator relies, and to which the evidence is to be directed, is sufficient.—Attorney-General v. May, 97 Mich. 568.

¶ 111. A course of pleading by which the relator, in his replications, proceeds upon the theory that, except as to the vote of those precincts and the ballots which he specifies, and charges for reasons stated in the replications to be void, the returns of the inspectors and the report of the county canvassers are correct, and give the correct results, is proper and commendable.—Attorney-General v. May, 97 Mich. 568.

¶ 112. A replication alleging that a certain number of ballots were exhibited in a certain precinct, contrary to law, and that the election in that precinct was therefore void, and that, with said ballots thrown out, the relator is elected, is not open to the objection that it tenders an immaterial issue upon an item of evidence, and that it does not aver that the election in the precinct was so invalid as to effect the disfranchisement of all of the electors therein.—Attorney-General v. May, 97 Mich. 568.

¶ 113. Where the issue of fact presented by a replication is whether a certain number of illegal ballots were cast because the voters casting them were unregistered, a verification tendering the registration and poll lists as proof of the issue is sufficient; and if respondent disputes such public records, or seeks to avoid their prima facie effect, he should in his rejoinder give the relator notice of his defense thereto.—Attorney-General v. May, 97 Mich. 568.

¶ 114. Where an information in quo warranto under Pub. Acts 1899, No. 255 asks that respondent show its authority under which it claims to be a corporation, and its authority for doing business in this state, and its pleas attempt to show such authority, replications which attack the showing upon both points by claiming the invalidity of its incorporation because in violation of the Illinois statute, and its right to do business here by reason of its violation of our statute, are in the nature of avoidance of the prima facie defense, and proper under the settled rules of common law pleading.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 115. In denying mandamus to compel the striking from the files of a replication filed in quo warranto to try the title to an office, on the ground that new matter was therein set up which the relator was precluded by C. C. Rule 46 (e) from replying to, the court amended said rules by providing expressly that the court may upon application (after the filing of a replication) permit further pleadings to be filed; although under the rule as it stood the court had such power.—Swart v. Chippewa Circuit Judge, 119 Mich. 598.

¶ 116. The respondent, in his rejoinders, can either admit or traverse any of the allegations of the replications, and, if he claims mistake or fraud in other precincts, he is entitled to set up such claim specifically in his rejoinders, and the relator can, by his surrejoinders, join issue upon such claim.—Attorney-General v. May, 97 Mich. 568.

¶ 117. When the issue is framed in quo warranto proceedings, the same rules of evidence apply as in other cases, and respondent has no cause to complain if the relator has seen fit to set forth in his replication certain evidence upon which he relies to

maintain his title.—Attorney-General v. May, 97 Mich. 568.

¶ 118. In quo warranto against a holding over warden, alleged in the replication to his plea to have been removed by the board of control rejoinders to the replication, charging a conspiracy upon the part of the board of control of the state house of correction to defame and oust the respondent from his office of warden merely for political purposes, are scandalous and impertinent, and will be stricken from the record.—Attorney-General v. Parsell, 99 Mich. 381.

§ 23. Objections, motions to quash, and demurrers to the information.

To pleas and replications, see post § 24.
Laches and estoppel to institute writ, see ante § 9.
Form and sufficiency of information in general, see ante § 19.
Failure to file petition for leave as ground for demurrer, see also ante ¶ 46.
Judgments on demurrer, see post § 35.
Motion to quash information in quo warranto as method of raising question of res adjudicata, see Former Adjudication ¶ 476.
Acquiescence by state as bar to quo warranto for usurpation of corporate power, see also Corporations § 95.

¶ 119. A plea setting up a private relator's incapacity to hold the office sued for —that of county superintendent of the poor —because he, being a supervisor, is forbidden by statute to hold such office, raises a distinct issue, and requires a reply; and, if generally demurred to, being good in substance, it entitles respondent to judgment. —Vrooman v. Michie, 69 Mich. 42.

¶ 120. Although there was nothing in the summons or copy served in a quo warranto proceeding to determine the legality of respondent's incorporation to indicate that leave had not been granted to file the information, the respondent should have presumed its absence and moved to dismiss before pleading. It was his duty to act upon the absence of such notice and to have examined the files and records of the court to ascertain if it was desirable to take advantage of the point, and he cannot complain where he had appeared and pleaded issuably that leave had not been obtained. —Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 121. The fact that an information was filed by the attorney-general as on the relation of a claimant to an office, without the knowledge or authority of such relator, will not entitle him to have the information dismissed on motion. But the court will allow him, at his option, to withdraw from the proceeding.—People ex rel. Darron v. Knight, 13 Mich. 230.

§ 24. ——To pleas and replications.

¶ 122. Where an information in the nature of a quo warranto is filed under Comp. L. 1871, § 7074, How. St. § 8635, and charges individuals with the wrongful assumption of corporate powers, a joinder in demurrer to a plea of incorporation leaves the legal incorporation of the defendants the only question in issue. But where it is filed under § 8646, and is aimed at corporate delinquencies, it admits the corporate existence, and the corporation is duly made a party, and under the admission made by the demurrer it must be deemed to be lawfully incorporated unless there are reasons to the contrary connected with the act of incorporation.—Attorney-General ex rel. Nelson v. McArthur, 38 Mich. 204.

¶ 123. On demurrer to the replication a merely formal defect in the plea cannot be noticed.—People v. Jackson & M. Plank Road Co., 9 Mich. 285.

¶ 124. Where the respondent does not demur to the replication, but pleads over, defects of form will be disregarded.—People ex rel. Benoit v. Miller, 16 Mich. 56.

¶ 125. An election was determined by lot, the vote being tied. Quo warranto proceedings were instituted for the office. The plea set up an equality of votes, and, being demurred to, this fact was admitted. Held that, on overruling the demurrer, the relator could not be allowed to plead the invalidity of votes cast for respondent.—Evans v. Sutherland, 41 Mich. 177.

¶ 126. Where demurrers are interposed in good faith, and not for the purpose of delay, to replications in quo warranto proceedings to test the title to an office, respondent is entitled, upon the overruling of the demurrers, to a reasonable time to plead.—Attorney-General v. May, 97 Mich. 568.

¶ 127. Where the attorney general has filed an information against a private corporation under Comp. L. 1897, § 9950, and the attorney-general moves for judgment on the pleadings, a plea having been interposed, such a motion may be treated as a demurrer to the plea.—People ex rel. Attorney General v. Grand Rapids Sticky Fly Paper, 144 Mich. 221.

IV. TRIAL, EVIDENCE AND JUDGMENT.

§ 25. In general.

Sending issues to circuit for trial, see post § 26.
Issues on hearing, see post §§ 27, 28.
Burden of proof, see post § 29.
Presumptions and evidence, see post § 30.
Questions of law and fact, see post § 31.
Instructions and directing verdict, see post § 32.
Findings and determination of facts, see post § 33.

Judgment and scope of relief, see post §§ 34-36.
Conclusiveness and effect of judgment, see post § 37.
New trials and proceedings thereon, see post § 38.
Restraining collection of tolls pending quo warranto against the company, see Injunction § 5.
Precedence upon calendar over other civil cases, see 1916 C. C. Rule 50, § 5.

¶ 128. When a default is entered in quo warranto, no issue of fact can be framed till the default is set aside.—People v. Pratt, 16 Mich. 65.

¶ 129. In quo warranto proceedings to forfeit the charter of a plank road company, a plea of puis darrein continuance, setting up an agreement, subsequent to starting suit, by the respondent to put the road in good condition and the relator to discontinue proceedings, does not give the respondent the right to open and close the case.—People ex rel. Esper v. Detroit & Saline Plank Road Co., 125 Mich. 366.

§ 26. Sending issues to circuit for trial.

¶ 130. On information for usurpation of an elective county office, the issues will be sent for trial to the county in which the election took place, unless such a showing is made for change of venue as is required in other cases.—People ex rel. Williams v. Cicott, 15 Mich. 326.

¶ 131. Comp. L. 1857, § 5300, How. St. § 8644, which authorizes an issue to be sent to such county as the supreme court may direct, refers only to issues arising on the question of damages for the detention of the office, and not to those referring to the office itself.—People ex rel. Williams v. Cicott, 15 Mich. 326.

¶ 132. When an issue in quo warranto is sent down to the circuit court to be tried, the parties cannot be deprived of a jury against their consent.—People ex rel. White v. Doesburg, 16 Mich. 133.

¶ 133. Where an issue under proceedings in the nature of a quo warranto has been sent down from the supreme court to the circuit for trial, the case remains throughout as an original cause in the supreme court; and the verdict and proceedings on the trial, when certified up, will be subject to the same rules as apply in any court when judgment is moved for on a nisi prius record.—Keeler v. Robertson, 27 Mich. 116.

¶ 134. Quo warranto cases sent from the supreme court to the circuit for trial may be noticed for hearing before the report of the proceedings in the circuit court is filed—the case being regarded as having always been in the supreme court.—People v. Kopplekom, 16 Mich. 61.

¶ 135. The practice in reviewing trials upon issues in quo warranto cases, not being provided for by statute or rule of court, must be governed by that at common law.—People ex rel. Dickinson v. Sackett, 14 Mich. 243.

¶ 136. A verdict finding only part of the facts necessary to decide the issue will be regarded as a special verdict; and, if there be no general finding, no judgment can be entered, and the case must be retried.—People ex rel. White v. Doesburg, 17 Mich. 135.

¶ 137. Where an issue of fact in a quo warranto case has been sent down for trial by jury, and the circuit judge has not certified the evidence with his report of the trial, this omission is no valid objection to the entry of final judgment where the judge was not required to certify it by the order sending the case down.—People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248.

¶ 138. Where issues framed in the supreme court are sent to one of the circuit courts for trial, the circuit judge should make report of the trial, embracing sufficient of the proceedings to show the bearing of any legal rulings made by him to which exception was taken, that the parties may have such rulings reviewed on motion for a new trial. The motion cannot be heard on affidavits as to what the proceedings were.—People ex rel. Dickinson v. Sackett, 14 Mich. 243.

§ 27. Issues on hearing.

Trial of right to vote, see post § 28.
Questions of law and fact, see post § 31.
Offices in religious society which may be determined in one proceeding, see ante ¶ 68.

¶ 139. The question of the boundary line between two cities will not be determined on quo warranto where it is not necessarily raised upon the record, and where neither city is impleaded in the proceeding.—People ex rel. Attorney General v. Hatch, 60 Mich. 229.

¶ 140. The constitutionality of a statute may be inquired into in a proceeding upon an information in the nature of a quo warranto to try the respondents' right to exercise corporate franchises, even though the respondents justify under such statute.—Taggart Attorney General ex rel. Mason v. Perkins, 73 Mich. 303.

¶ 141. The constitutionality of a statute under which an office is created may be tested in quo warranto proceedings against the incumbent.—People ex rel. Bolt v. Riordan, 73 Mich. 508.

§ 28. ——Trial of right to vote.

¶ 142. It is not error for the court to suspend quo warranto proceedings and enter upon the question of whether two electors for the office in question had a right to vote

where after issue joined in quo warranto a petition was presented under Comp. L. 1897, § 3723, asking the court to determine whether the electors in question were entitled to vote, the respondents joined issue on the petition, evidence was introduced and argument made and counsel for the respondents refused to take an extension of time for the preparation of trial of that issue, such statute providing that in any case of contested election after issue joined either party may present a petition to have tried the right of challenged electors to vote.—People ex rel. DeJonge v. Kamps, 129 Mich. 217.

§ 29. Burden of proof.

Presumptions and evidence, see post § 30.

¶ 143. The burden is on the respondent to justify his own title—that of the relator being a collateral issue; and a judgment of ouster will be rendered against a respondent who shows no title, whether the relator's title prevails or not.—Keeler v. Robertson, 27 Mich. 116.

¶ 144. In a contested election case the official majority establishes a prima facie right to the office; and it will require, to overcome it, a finding of the jury showing the number of illegal votes received by each party.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 145. In the case of tenure by appointment the relator has the burden of showing his own title affirmatively; it cannot be shown by respondent's default or agreement.—Frey v. Michie, 68 Mich. 323; Vrooman v. Michie, 69 Mich. 42.

¶ 146. The relator in quo warranto to determine the title to office has the burden of establishing his right, and is entitled to open and close the proofs and the argument.—Attorney-General v. May, 99 Mich. 538.

§ 30. Presumptions and evidence.

General law of evidence, see Evidence.
Exclusion of testimony violative of secrecy of ballot, see Elections § 97.
Conclusiveness and effect of certificate of election, of returns, or of recount, see Elections §§ 47, 48, 67, 72.
Conclusiveness of lot determining tie vote, see Elections § 73.

¶ 147. Where the ballots have not been properly preserved as required by law, but left in an unsafe and exposed condition, the jury, where an election is contested, may properly be governed by the inspectors' return, notwithstanding it differs from the count of the ballots, unless satisfied by evidence that the ballots have not been tampered with.—People ex rel. Williams v. Cicott, 16 Mich. 283.

¶ 148. A witness testified that he was convent certain persons voted a certain ticket. Held admissible.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 149. Where a stipulation signed by relator and respondent was filed previous to a default, but afterwards signed by the attorney-general, held that, as it would only be admissible as evidence upon a proper issue, the entry of the default might operate as a withdrawal of it; and the subsequent signature of the attorney-general could not of itself operate to open the case or hold respondent to the agreement.—People v. Pratt, 16 Mich. 65.

¶ 150. Where, on information in the nature of a quo warranto, the state calls upon an individual to show his title to an office, he must show the continued existence of every qualification necessary to the enjoyment of the office. The state is bound to make no showing, and the defendant must make out an undoubted case.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146.

¶ 151. Where witnesses for the relator in quo warranto testify that they observed the markings on ballots as they were counted by the election inspectors, testimony of other witnesses is admissible in rebuttal to the effect that on a previous election where the arrangement of the place of counting was identical, that the witnesses standing where the relator's witnesses stood, could not see the markings on the ballots.—Johnson v. Jordan, 183 Mich. 108.

¶ 152. It is prejudicial error on the trial of a quo warranto proceeding, to permit witnesses to be interrogated as to which of the contesting candidates for an office they voted.—Johnson v. Jordan, 183 Mich. 108.

¶ 153. In quo warranto by the state to test the right of a corporation to build a dam across a navigable stream, the question of the consent of the United States Government is not raised as it will be assumed in the absence of any evidence to the contrary that if Congress has any jurisdiction, its consent will be obtained before the dam is built.—Valentine ex rel. Dudley v. Berrien Springs Water-Power Co., 128 Mich. 280.

¶ 154. Evidence of specific instances of trouble experienced by travelers upon the road is admissible in a quo warranto proceeding to forfeit the charter of a plank-road company since such evidence tends directly to show the bad condition of the road.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

¶ 155. In a proceeding to forfeit the charter of a plank-road company, it is a sufficient basis for a verdict for relator if it is proved that the condition of the road did not comply with the requirements of the charter, and any extravagant averments as to its condition set out on the replication may be treated as surplusage.—People ex rel.

Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

§ 31. Questions of law and fact.

Sufficiency of acts to constitute "improvement" of river as matter of law, see also Navigable Waters ¶ 95.

¶ 156. In quo warranto upon a contested election it is held proper to submit to the jury special questions as to whether certain alleged illegal voters voted at the election, for whom they voted, and whether they were legally entitled to vote.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 157. Whether a voter had been "duly registered," or was a "legal voter," are proper special questions to submit to a jury in a contested election case. The objection that it requires the jury to pass upon a question of law is not valid.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 158. In quo warranto proceedings the law as to the preservation of the ballots is held so far directory that it becomes a question for the jury as to whether the ballots not cared for strictly as the law directs are in fact the ones cast at the election; but inasmuch as Comp. L. 1897, § 3725, provides no machinery for a trial of disputed questions of fact, such an important judicial power cannot be implied, and a recount can be had only where the recount board can find from an inspection of the ballot box that the statutory requirements for the preservation of the ballots as cast have been observed.—Keith v. Wendt, 144 Mich. 49.

§ 32. Instructions and directing verdict.

¶ 159. In a contested election case it is proper to instruct the jury where the illegal votes can be separated from the legal, to take the former from the total vote proportionately according to the entire vote returned for each candidate.—Attorney-General v. May, 99 Mich. 538.

¶ 160. An instruction on the trial of an information in the nature of quo warranto, that the jury might consider the condition of the contested ballots as of the time of the trial where a fraudulent alteration of some of them was alleged to have occurred prior to a recount before the county board of canvassers, is erroneous.—Johnson v. Jordan, 183 Mich. 108. (Per McAlvay, C. J., and Moore, J., the other justices concurring in result on different grounds.)

¶ 161. Where fraudulent tampering with ballots was alleged between the time they were counted on the night of election by the election board and a recount by the county board of canvassers, an instruction on the trial of a quo warranto proceeding, that the return of the county board of canvassers on the recount was without force or effect on the trial, even though no fraudulent tampering was found, is erroneous, since § 3672, Comp. L. 1897, How. St., 2nd Ed., § 269, declares that such return shall be deemed correct notwithstanding anything in the previous returns from the recounted township, ward or district.—Johnson v. Jordan, 183 Mich. 108. (Per McAlvay, C. J., and Moore, J., the other justices concurring in result on other grounds.)

¶ 162. On the trial of an information in quo warranto where the fraudulent tampering with ballots is alleged to have occurred between the convassing thereof by the election board and their recount by the county board of canvassers, an instruction that the jury might consider the care exercised by the election board in counting the ballots on the night of election, is erroneous.—Johnson v. Jordan, 183 Mich. 108. (Per McAlvay, C. J., and Moore, J., the other justices concurring in result on different grounds.)

¶ 163. On quo warranto by one for an office which it was claimed in the return that he had abandoned and that respondent had been appointed to the vacant office, it is not error for the trial judge to specially submit to a jury the question whether relator acquiesced in the occupancy of the office by the respondent, the submission being stated to be for the guidance of the court if the court should deem the fact to be material.—Attorney General ex rel. Moreland v. Maybury, 141 Mich. 31.

¶ 164. In a proceeding to forfeit the charter of a plank-road company a request to charge that if any two consecutive miles of the road was a fairly good road properly constructed then the verdict must be for defendant, is fairly covered by an instruction that plaintiff cannot recover unless the jury find that nowhere along the road were there two consecutive miles of said road as required by the charter of the company.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

¶ 165. In a proceeding to forfeit the charter of a plank-road company, a request to charge that the jury could not find in favor of plaintiff unless they find that the road was "worthless, worn out, dangerous and highly inconvenient at all seasons of the year" is faulty, where it is the duty of the company under its charter to keep the road in a reasonable condition for public travel during all seasons of the year, taking into account the elements and the weather.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

¶ 166. In a proceeding to forfeit the charter of a plank-road company for failure to maintain its road, a statement in the charge that "it has been urged that frost might heave the earth, and it does; but frost would not heave it to match the statements of the farmers. It was more than frost. It was longer than frost to match the statement of the farmer witnesses" is unjustifiable, but

on a consideration of the whole record was held not to require reversal.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 80.

§ 33. Findings and determination of facts.

Judgment and scope of relief, see post § 34.
Competency and materiality of special questions to jury, see Verdicts and Findings, II.

¶ 167. A relator can take nothing by reason of any statement of facts which has not been found by the jury or admitted by the attorney-general as well as by the respondent.—People ex rel. Crawford v. Molitor, 23 Mich. 341.

§ 34. Judgment and scope of relief.

On demurrer or admissions of pleadings, see post § 35.
Imposition of fine or costs, see post § 36.
Conclusiveness and effect of judgment, see post § 37.
Right to costs and party liable or entitled, see Costs §§ 9, 50.
Costs, see Jud. Act, chap. XLVII, § 7, Comp. L. 1915, § 13688.
Judgment and relief incident thereto, see Jud. Act, chap. XXXVIII, § 5 et seq., Comp. L. 1915, § 13528 et seq.
Judgment and relief against natural person or corporation usurping office, franchise or privilege, see Jud. Act, chap. XXXVIII, § 19 et seq., Comp. L. 1915, § 13542 et seq.

¶ 168. Upon respondent's default, where the information is filed on relation of the claimant to a public office, the court will render judgment of ouster against respondent, but cannot adjudge relator entitled to the office.—People v. Connor, 13 Mich. 238.

¶ 169. In quo warranto to try title to the office of justice of the peace it appeared that sections 36 and 44 of the Detroit election law had been violated in that as to 153 ballots for the relator some were distributed by others than inspectors and some did not have the initials of the inspectors but of clerks, and that some were marked by an inspector with the letters "Theo" instead of initials. As to the respondent 207 were initialed in blue pencil instead of ink. Held that as to all such requirements it became unnecessary to decide whether the statute was mandatory or not, for the result would be the same if all the votes were excluded and the respondent would lose the difference between 207 and 153 votes, which together with other deductions overcame the majority counted for him on which he was seated.—Frazer ex rel. DeGaw v. Fitzsimmons, 124 Mich. 511.

¶ 170. In a proceeding to determine the title to the office of supervisor, the only questions raised being questions of fact, which have all been found for the relator, judgment of ouster is granted with costs.—People ex rel. Pruden v. Denton, 35 Mich. 305.

¶ 171. Judgment of ouster should be rendered against one who, while ineligible and disqualified under Pub. Acts 1891, No. 147, has been elected county commissioner of schools.—People v. Howlett, 94 Mich. 165.

§ 35. ——On demurrer or admissions of pleadings.

Demurrers to information in general, see ante § 28.

¶ 172. The rule that judgment on demurrer must be given against the party who commits the first fault in the pleadings applies only to errors of substance.—People ex rel. Benoit v. Miller, 16 Mich. 56.

¶ 173. Although the pleading demurred to be defective, judgment goes against the party whose pleading was first defective in substance.—People ex rel. Speed v. Hartwell, 12 Mich. 508.

¶ 174. The admissions in a respondent's plea are conclusive against him, and, if they show him not entitled to office, will maintain a judgment of ouster against him; but no judgment can be rendered for the relator thereon, if there has been no trial or finding upon facts.—People ex rel. Crawford v. Molitor, 23 Mich. 341.

¶ 175. Where a demurrer to respondent's plea of title to an office, in quo warranto proceedings, is sustained, but prior to such decision his right to the office is fixed by valid legislation, no final judgment should be rendered against him on the plea, nor should he be required to plead over puis darrein continuance.—Jackson v. James, 74 Mich. 733.

§ 36. ——Imposition of fine or costs.

Suggestion of damages and procedure thereon, see Jud. Act, chap. XXXVIII, §§ 8-12, Comp. L. 1915, §§ 13531-13535.

¶ 176. The imposition of a fine for usurpation of office is in the discretion of the court.—People ex rel. Benoit v. Miller, 16 Mich. 205.

¶ 177. A corporation that has usurped certain franchises, but not in bad faith, may well be merely ousted therefrom, with a nominal fine and costs.—Stewart v. Father Matthew Society, 41 Mich. 67.

¶ 178. No costs are awarded against a respondent who was not in possession of office when the information to try the right thereto was filed.—People ex rel. Andrews v. Lord, 9 Mich. 227.

¶ 179. Where relator, a township officer, has been unlawfully deprived of his office, but where the term thereof has expired, judgment not of ouster but of costs will be entered against respondent.—People ex rel. Bennett v. Benfield, 80 Mich. 265.

¶ 180. An information to try the right to a public office will not be dismissed on the

ground that the office has expired since information filed. To oust the incumbent is not the sole object of the proceeding; but, under the statute, if he is found guilty of the intrusion, a fine may be imposed and costs recovered; and if the relator claims the office, and is found entitled to it, he may recover damages.—People ex rel. Speed v. Hartwell, 12 Mich. 508.

§ 37. Conclusiveness and effect of judgment.

Injunction decree in suit to restrain exercise of franchise as estoppel on facts, see Former Adjudication ¶ 444.

Refusal to consider on appeal questions become moot where right has become fixed, see Appeal § 259.

Party entitled to error on trial of right, see Appeal § 60, ¶ 286.

Reviewableness on error of writ to try title to office, see Appeal § 19.

¶ 181. Whichever party prevails upon an information filed in the circuit court by a private relator to try title to an office, the judgment does not estop the people.—Vrooman v. Michie, 69 Mich. 42.

¶ 182. Upon a judgment of amotion from office, the party amoved is divested of all official authority, and excluded from office, so long as the judgment remains in force; and the relator needs no writ to invest him with the office, but, under How. St., § 8639, is entitled to take upon himself the execution thereof, which right cannot be defeated or suspended by suing out a writ of error and giving a bond to stay execution.—People v. Stephenson, 98 Mich. 218.

§ 38. New trials and proceedings thereon.

¶ 183. A new trial may be granted after a trial on quo warranto upon the same grounds and on the same showing as in civil cases generally.—People ex rel. Dickinson v. Sackett, 14 Mich. 243.

¶ 184. When issues are sent down to the circuit court to be tried, a refusal to grant a continuance will be no ground for a new trial, unless it is made to appear affirmatively that the party asking it has been improperly deprived thereby of material testimony.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 185. If a new trial can be granted at all on the ground that the verdict was against evidence when the judge who tried the case certifies that he was satisfied with it, it can only be when, from the evidence reported, there can be no doubt of the impropriety of the verdict.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 186. If a party moves for a new trial on the ground that the verdict was against evidence, the judge must report the evidence in full, and also whether the verdict upon the evidence was satisfactory to him. And he should fix a time for settling his report, and cause notice thereof to be given to the parties that they may be present.—People ex rel. Dickinson v. Sackett, 14 Mich. 248.

¶ 187. Motion for new trial in quo warranto should be made at the term at which the report is filed where there is ample time to make it before the close of the term.—People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248.

RACE to RAILINGS.

Cross-References.

Race or Color—
- See Civil Rights.
- As qualification for office, see Officers ¶ 38.
- Aspersions on race as improper argument, see Argument of Counsel § 20.

Raceways—
- Duties of bridging and protecting, see Mills § 2.

Racing—
- Offer and competition for premiums as gambling contract, see Gambling Contracts § 1.
- Criminal betting and gaming, see Crimes, II.

Rafts and Rafting—
- See Forestry § 6; Navigable Waters; Shipping, V.

Railings and Barriers—
- Duty to protect highways and bridges and actionable negligence therein, see Highways, XII; Bridges, III.
- Duty of common carriers to protect passengers, see Carriers, IV.
- Duty of persons in control of buildings to protect licensees and trespassers in building, see Buildings.
- Duty of employer towards employees, see Master and Servant, III.

RAILROADS.

TREATS of the general law of railroads and railroad corporations except that the law of common carriers, including liability to passengers and shippers, is treated in Carriers, the general law of liability for personal injuries to servants in Master and Servant and in Workmen's Compensation Law, and the general law of corporations in Corporations and in Foreign Corporations. Matters distinctly pertaining to Street Railways are treated in that topic, and the general law of liability for Death by Wrongful Act is treated in the topic of that name.

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IX. Railroad corporations.

§ 147. In general.

I. FRANCHISES AND PUBLIC REGULATION IN GENERAL.

General law of common carrier, see Carriers.
Branch railroads as common carriers under power of Railroad Commission, see Public Service § 1.
Union stations and terminals, see Union Stations.
General powers of Railroad Commission, see Public Service.
Power of Railroad Commission as to industry and service tracks under contract with user, see Public Service ¶ 10.
Offense of embezzling tickets, see Crimes § 68.
Forgery of tickets, see Crimes § 84.
Liability of railroads for local assessments, see Local Improvements § 56.
Judicial notice respecting railroads and railroad travel, see Evidence § 13 et seq.
Railroad questions as subjects for opinion evidence, see Evidence, VI.
Interstate Commerce laws and regulations, relative state and federal powers, see Commerce.
[Note. The interurban electric railway cases are sometimes of the general nature of street railway cases and sometimes akin to railroad cases. With respect to the law of franchises, permission to use highways, and the rules and duties of operation on highways carrying their tracks they may in general be regarded for purposes of classification as Street Railways, which see. With respect to the care required in operating on private rights of way and across intersecting highways on such rights of way and the actionable neglect of such duties they resemble railroads, and such cases have been retained in this topic. In respect to their duties and liabilities as carriers and employers the cases will be found in Carriers and in Master and Servant, III, and Workmen's Compensation Law.]

§ 1. In general.

Sale and conveyance of franchises, see post § 36.
Right of one railroad to acquire franchises of another, see post ¶ 221.
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Protection of charter or franchises as contract against impairment by law, see Constitutional Law, VI.
Municipal power of regulation, see Municipal Corporations §§ 83, 90.
Leviability of franchise, see Executions § 26; Corporations §§ 198, 199.
Franchises and use of streets by street railways, see Street Railways, I.
Quo warranto to determine right to franchises of railroad corporations, see Quo Warranto § 7.

¶ 1. Though a railroad corporation is private its work is public.—Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666; 22 L. ed. 227, affirming 1 Flipp. 120, Fed. Cas. No. 13735.

¶ 2. In legal contemplation a railroad is neither a public common nor a public highway.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 3. Railroads are often termed public highways, because they accommodate the public travel and are regulated by law so as to exclude partially in their accommodations; but, when in private hands, the resemblance to ordinary highways is fanciful, and they are not a public purpose in such sense that the taxing power may be exercised to help build them.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452; People ex rel. Bay City v. State Treasurer, 23 Mich. 499.

¶ 4. Even if an injunction against the crossing of the tracks of another railroad is vis major and a defense to a cross-bill by a city for forfeiture of the franchise of the railroad in a street, and an excuse for acts or omissions creating or causing such forfeiture, such defense is not established where, by reasonable diligence, the railroad could have discovered within a reasonable time that an amicable arrangement could have been made insuring the crossing of the tracks of such other railroad.—Muskegon, G. R. & I. R. Co. v. City of Muskegon Heights, 194 Mich. 643.

II. ROUTE, LOCATION, TERMINI AND STATIONS.

§ 2. In general.

Right of way, see post II.
Crossing other railroads, see post § 13.
Rights under lease of terminal facilities, see post § 37.
Provisions as to construction and maintenance of depots, see Comp. L. 1915, § 8121.

¶ 5. A chartered railroad company is bound to build its road between the termini named in its charter, and then to operate the whole of it.—Attorney General v. Erie & K. R. Co., 55 Mich. 15.

III. RIGHT OF WAY AND OTHER PROPERTY.

§ 3. In general; property rights and mode of acquisition.

Prescriptive rights in streets or highways, see post § 6.
Deeds, grants or contracts to convey, see post § 9.
Loss or extinguishment of right, see post § 11.
Proceedings to abandon road, see post § 20.
Sale of railroad and rights and liabilities of purchaser, see post § 36.
Leases of right of way and property, see post § 37.
Grants and bonuses in aid of railroad, see post V.
Liens and mortgages upon railroad property, see post VI.
Property of street railways, see Street Railways, II.
Evidence as to ownership or control of railroad, see also Carriers § 215.
Merger of parol right of way agreement in written one, see also Contracts ¶ 1076.
Proof of adverse possession of way against railroad, see also Adverse Possession § 51, ¶ 276.
Right to graze on railroad land under free common regulation, see Animals ¶ 9.
Disability of railroad corporation to take land by dedication, see Dedication § 5.
Rights of railroad as successor to mining company to use for general railroad space reserved in dedication for mining railroad, see Dedication ¶ 143.
Sufficiency of release of right of way for drain to cross railroad, see Drains § 26, ¶ 88.
Location of county drain on right of way, see Drains § 23.
Right of railroad to compensation for drain crossing right of way, see Drains § 56.
Right of way as a "public use" in condemnation proceedings, see Eminent Domain ¶ 29.
Right of contractor acting as agent of railroad to maintain condemnation proceedings, see Eminent Domain § 7.
Necessity and sufficiency of survey and map on condemnation of right of way, see Eminent Domain § 58.
Necessity and sufficiency of previous effort to purchase or obtain consent of condemnation of right of way, see Eminent Domain § 59.
Averments in petition to condemn crossings over other railroads, see Eminent Domain § 67.
Tracks and improvements placed by railroad on land before condemnation as element of damage, see Eminent Domain § 45.
Waiver by railroad of damages for change of grade at street crossings, see Eminent Domain ¶ 98.
Propriety of injunction as remedy for illegal "taking" for right of way purposes, see Eminent Domain ¶¶ 485-486, 488-490.
Necessity of making mortgagees of railroad properties parties respondent in street opening proceedings, see Highways ¶ 246.
Right of railroad to abate nuisances along its right of way, see Nuisances § 16.
Right of way as property within due process clause, see Constitutional Law § 188.
Railroad property subject to seizure and sale for taxes, see Taxes, X, A.
Right of foreign railroad companies to hold real estate, see Comp. L. 1915, §§ 8243, 8421, 8422.

¶ 6. The Michigan Central Railroad Company is the legal owner of its road by purchase and grant from the state, and has by its charter the entire and exclusive right of possession and control of such road.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 7. Railroad companies cannot take land by dedication, and the filing of a plat does not vest in a railroad company title to land designated on the plat by its name. How. St. § 8323, enumerates voluntary grant and donation and condemnation as the only modes

by which they can get title.—Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4.

¶ 8. It is provided by section 5 of the charter of the Michigan Central Railroad Company (Laws 1846, p. 43) that no railroad or railroads from the eastern or southern boundary of the state shall be built, constructed or maintained, or shall be authorized to be built, constructed or maintained, by or under any law of this state, any portion of which shall approach, westwardly of Wayne county, within five miles of the line of said railroad, as designated in said act, without the consent of said company; and that no railroad or railroads shall be authorized or constructed which shall commence within twenty miles of the city of Detroit and extend to Lake Michigan or the southern boundary of the state, the line of which shall, on an average, run within twenty miles of the main line of said Michigan Central Railroad; provided, that said section shall not be construed to restrict or prevent the construction of public roads, or canals, or railroads, or private ways, under, above or across the road of said company, when deemed expedient, but so as not unnecessarily to obstruct the same. It was held that the prohibition contained in the first subdivision of said section does not apply to a chain or series of railroads, one of which might reach one of the prohibited points, and another of which might reach the other point, but only to an entire road in itself extending to each point. Held, also, that the proviso at the end of the section was not limited in its terms by the general language of the first subdivision, and that its intent was not to prohibit the construction of such roads only as did not connect with said southern or eastern boundary.—Michigan Cent. R. Co. v. Michigan Southern R. Co., 4 Mich. 361. Writ of error dismissed 19 How. 378, 15 L. ed. 689.

§ 4. Right of way across public lands.

General law as to public lands, see Public Lands.

¶ 9. Railways, though not strictly "highways," like plank and macadamized roads, are highways within the meaning of U. S. Rev. Stat. § 2477, which grants the right of way for the construction of highways across the public lands.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 10. Under U. S. Rev. Stat. § 2477 a railroad company is entitled to a grant of the right of way over public lands, and the construction of the road is a sufficient consideration for such grant.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 11. No patent is needed for a government grant of right of way to highways across the public lands, where the grant is accepted by the construction of the road; nor is the grant defeated by mere relation back of a homesteader's subsequent patent to the time of his entry; but he is entitled to compensation for improvements.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

§ 5. Right of way on or across streets or highways.

Railroad use as extraneous to dedication for streets, see Dedication § 30.

Incumbrance by right of way easement as obstacle to dedication of same space for streets, see Dedication § 4.

Damages in condemnation for railroad crossing highway, see Eminent Domain § 51.

Damages in condemnation for railroads on highways, see Eminent Domain § 53.

Parol evidence to attach right to additional crossing, see Evidence ¶ 933.

Power and jurisdiction of commissioner to lay highway over railroad or lands in railroad use, see Highways § 28.

Sufficiency of service and proof of service in highway proceedings against railroad companies, see Highways ¶¶ 111, 112.

Right to treat intersecting highway as abandoned, see Highways ¶ 447.

Railroad track in street as nuisance, see Highways § 169.

Illegality of lease of street for depot purposes, see Highways ¶ 569.

Railroad in dedicated way as additional servitude, see Highways § 158.

Limitation of action for land damages for laying tracks in street, see Limitations § 12.

Mandamus to correct judicial orders in crossing proceedings, see Mandamus § 66, ¶ 482.

Condemnation of crossing for parkway over railroad, see Parks ¶ 10.

Obtaining permission of railroad commission to cross streets and highways, see Comp. L. 1915, § 4314.

¶ 12. An owner cannot, by dedicating land to public use as a street affect a railroad company's existing right of way thereover.—City of Detroit v. Detroit & M. R. Co., 23 Mich. 173.

¶ 13. A railroad company seeking to acquire a right of way through city streets has no vested rights entitling it to a judicial investigation by due process of law, except as the legislature may have provided.—Fort Street Union Railroad Depot Co. v. State Railroad Crossing Board, 81 Mich. 248.

¶ 14. Railroad and depot companies have no absolute right to construct their roads upon or across the public streets. That right is derived solely from the people through the legislature, and must be exercised in such manner, and under such restrictions as the legislature, acting within constitutional authority, has seen fit to impose (How. St. § 3301).—Fort-Street Union Depot Co. v. State Railroad Crossing Board, 81 Mich. 248.

¶ 15. Comp. L. 1897, § 6234, par. 5, as amended by Pub. Acts 1899, No. 266, giving

the right "to construct its road upon or across" a highway, does not confer upon a railroad company the right to construct additional tracks for yard purposes upon the public highway without the consent of the highway commissioner.—Highway. Commissioner of Ecorse Township v. Wabash R. Co., 148 Mich. 436.

¶ 16. Where consent is given by a city to one railroad company to occupy a street no consent can be implied therefrom that one or more other companies may use the streets by using the tracks of the licensed company. —Muskegon, G. R. & I. R. Co. v. City of Muskegon Heights, 194 Mich. 643.

¶ 17. Injunction will not issue at the instance of a township to restrain a railroad company from crossing a highway on the ground that no lawful authority was given for the company's action in so doing, where it appears that complainant's township board had knowledge of the crossing, was in consultation with defendant and the state crossing board when the matter was considered, and without protest allowed the work to proceed before taking any steps to prevent the crossing.—Township of Ecorse v. Detroit, M. & T. S. L. Ry. Co., 155 Mich. 347.

§ 6. ——Prescriptive rights.

Prescription of crossing rights over right of way by general use, see also Easements ¶ 56.

Prescriptive rights in street as against abutter, see also Highways ¶ 650.

¶ 18. The operation of a railroad in a city street for forty-two years with the recognition of the public authorities, held to establish a lawful grant of authority to do so. —Felton v. Wedthoff, 185 Mich. 72.

¶ 19. A prescriptive right to maintain a track in a public street may be acquired by a steam railroad company.—Felton v. Wedthoff, 185 Mich. 72.

§ 7. ——Rights and consent of abutting owners.

Compensation to abutting owners for use of streets, see post § 19.

Obstruction of abutter's access by crossing embankment and liability for same, see Highways ¶ 706.

¶ 20. The action of the common council of a city in granting a permit to a railroad company to lay tracks in a street will not be deemed to have affected the rights of abutting lot owners to the use of the streets under a plat showing a street but reserving to the plattor the right for it or its assigns to lay and use a railroad in any of the streets in the plat.—Riedinger v. Marquette & W. R. Co., 62 Mich. 29.

¶ 21. The fact that a portion of the signatures of abutting owners granting consent to the construction of a railroad in a highway was obtained by fraud, is not fatal where a sufficient number of signatures were properly obtained.—Township of Ecorse v. Jackson, A. A. & D. Ry., 153 Mich. 393.

¶ 22. The consent of abutting owners is not essential to the validity of a franchise to construct a railroad track in a public street.—Felton v. Wedthoff, 185 Mich. 72.

Liability to adjoining landowner for injury to property caused by excavation, see note, 6 N. C. C. A. 900-918.

§ 8. Rights of way over and licenses to enter private lands.

Deeds, grants or agreements, see post § 9.

Reversion of title to original owners upon abandonment of the road, see post ¶ 125.

Right to use force in preventing track-laying on one's property, see Assault ¶ 63.

Parol adjustment of boundary of right of way, see Boundaries ¶ 11.

Effect on right to ejectment of parol license to enter and lay railroad, see Eminent Domain ¶ 507.

Contracts for railroad right of way over homesteads, see Homesteads ¶ 192.

Right of railroads to use road under license reserving to licensee right to use track for general railroad purposes, see Licenses to Enter ¶ 40.

Provisions as to tending damages to owner of lands, see Comp. L. 1915, § 8356.

¶ 23. Where the owner of land has allowed the construction of a railroad over it, he is chargeable with knowledge that the road is of such a permanent nature that it cannot well be removed or abandoned.—Harlow v. Marquette, H. & O. R. Co., 41 Mich. 336.

¶ 24. Permission to build a road over one's land implies authority to use it afterwards. —Harlow v. Marquette, H. & O. R. Co., 41 Mich. 336.

¶ 25. Complainant granted to defendant railroad company a right of way over a one-rod strip over which he had a right of way. Defendant proceeded to build a siding. Held, that where it was apparent that the location of defendant's side track upon any particular portion of the one-rod strip would not of itself interfere with complainant's use of it, he could not compel its location where he chose to have it, but might protect himself against unreasonable use of the track injuriously affecting his right of common use.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 26. The owner of land gave permission through her agent to a railroad company to build its road over her land, but with the understanding that it should not thereby acquire any rights to the soil. Held, that the permission was not revoked and its effect was not changed by the fact that the agent,

from time to time thereafter, claimed that the company was trespassing.—Harlow v. Marquette, H. & O. R. Co., 41 Mich. 336.

¶ 27. Where a railway company seeking to condemn lands does not obtain authority from the owner in fee, it can obtain no rights of control over the land by any license or grant from the holder of a contingent dower interest or a tenant at will.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 28. There can be no possessory right in a railroad company adverse to the real owner, without either a license or a payment or tender after a valid condemnation.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 29. A parol license to a railroad company to enter upon land and construct its road is revocable at the will of the owner.—Wood v. Michigan Air Line R. Co., 90 Mich. 334; Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4.

¶ 30. Where, under an oral arrangement with the owner of certain lands a railroad company is given the actual possession of part of the land for the purpose of building a track thereon, and executes the license, it cannot be made a trespasser by an attempted revocation either expressly or by implication of law, but the rights of the parties must be determined in some proceeding wherein a judgment of ouster can be rendered.—Scarvell v. Grand Rapids & I. R. Co., 103 Mich. 373.

¶ 31. A parol license to a railroad company to enter upon land and construct its road is revocable at the will of the owner.—Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4.

¶ 32. A license to construct a logging railroad over the land of another was not irrevocable because the licensee was permitted to expend money in reliance upon the expectation of a continuance of the license.—Nowlin Lumber Co. v. Wilson, 119 Mich. 406.

¶ 33. The consent and license to use land "without consenting or in any way assigning any rights that may have accrued to me by trust deed" does not prevent the licensee from acquiring a tax deed to the land expressly excepted.—Munroe v. Winegar, 128 Mich. 309.

¶ 34. Where a railroad makes a contract with a mill owner to construct a side-track to his mill for a consideration of $1, a free right of way and a guaranty of certain freight receipts for two years, the railroad reserving title to the rails and other materials and also the right to remove after three years upon notice, the grantee may require the removal of the track at any time.—Pontiac, Oxford & N. R. Co. v. Reed, 130 Mich. 661.

§ 9. Deeds, grants or agreements and construction and operation thereof.

Licenses to enter private lands, see ante § 8.
Construction of railroad as consideration for grant of right of way, see Contracts § 109.
Quitclaim deed to right of way in platted lands, see also Dedication ¶ 64.
Interpretation, operation and effect of deeds generally, see Deeds, III.
Construction of deeds as respects intention to grant easement of fee, see Deeds § 45.
Fraud in contracts and deeds, see Fraud ¶ 449.
Effect of contract not to open street, through station grounds, power to condemn, see also Municipal Corporations ¶ 491.
Occupancy of premises by railroad as constructive notice of rights under purchase contract, see Notice and Record of Title ¶ 147.

¶ 35. The charter of a railroad company empowered it to settle with any owner his claim of damages for the occupation of land; therefore a grant to the company, by one of several tenants in common, of the right of way as to his interest over the common estate, although it passes no fee and confers no right as to the other tenants, is nevertheless valid, and operates as to the tenant executing it as a release of his damages.—Draper v. Williams, 2 Mich. 536.

¶ 36. A deed to a railroad company "of 100 feet in width, being fifty feet on each side of the line which may be hereafter established by said company for the route of their railroad over and across" a specified forty-acre tract, conveys a mere floating right that can only become operative as a conveyance of title by the actual location of the route across such tract.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

¶ 37. All grants to a railroad of the right of way over premises must be construed reasonably, and in the light of surrounding circumstances.—Newaygo Mfg. Co. v. Chicago & W. M. R. Co., 64 Mich. 114.

¶ 38. A grant of land to a railroad company for a right of way for the purpose of constructing its road carries with it the right to do all things requisite or incidental to effectuate the purpose of the grant.—Stewart v. Cincinnati, W. & M. R. Co., 80 Mich. 166.

¶ 39. Where the owner of land has previously filed a plat and attempted to dedicate a part of it to a city, a quitclaim deed given to a railroad company for the right of way across several named sections does not operate to convey land in the subdivision although lying within one of the sections described.—Michigan Cent. R. Co. v. City of Bay City, 129 Mich. 264.

¶ 40. A conveyance of a right of way over a certain lot cannot be said to be a mere "floating right" after it has been located by the parties and the railroad built thereon by the grantee.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 41. A contract by which the owner of land agrees to convey land to a railroad company for a right of way at any time when the company shall have located its line and determined upon the construction of its road, does not, though construed in the light of Comp. L. 1897, § 6234, defining the powers of railroad companies, give the railroad such title that it can defeat an action of ejectment though it has built its line and been in possession for some time.—Wilson v. Muskegon, G. R. & R. Co., 132 Mich. 469.

¶ 42. A stockholder in a railroad company, engaged in securing rights of way, obtained a land contract to defendant, attorney for the railroad and construction company, as trustee; the greater part of the purchase price was paid by the construction company. The company assigned all its property to plaintiff company, which used the land continuously for its corporate purpose, and defendant did not claim personal rights in the property until suit was brought to compel a conveyance. Held, that plaintiff was entitled to a decree of conveyance allowing defendant a lien for the amount of the purchase price paid by him.—Detroit United Ry. v. Lau, 157 Mich. 357.

¶ 43. Where a complainant deeds to one acting for a defendant railroad a common use of right of way over a strip of land previously granted to complainant, he is not entitled to any statutory damages for a siding built on such strip by defendant, it having thereby acquired a common right of easement.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 44. Complainant deeded a right of way to a railroad over a strip of land over which he had a right of way. A clause in the deed gave defendant railroad the same right to use the way as complainant enjoyed. Held, the legal effect of that clause was to authorize the defendant to use the right of way for any of the purposes for which a right of way over such a strip of land might usually be used by a railroad company so long as such use did not unreasonably limit complainant's common use thereof.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 45. An agreement for a railroad right of way cannot rest partly in writing and partly in parol, and if so made the written contract supersedes the oral.—Waldron v. Toledo, A. A. & G. T. R. Co., 55 Mich. 420.

¶ 46. An agreement for the conveyance of a right of way through the vendor's land on the route lately surveyed by a railroad company is constructed to mean the land required for a right of way on the line or route then surveyed through the land, and which had been staked out when the agreement was made; the words "or to be surveyed," which appeared in the blank upon which the agreement was written immediately after the words "on the route lately surveyed," having been erased.—Wood v. Michigan Air Line R. Co., 90 Mich. 334.

¶ 47. In the absence of any contract or statute, the owner of land, who had granted the right of way to a railroad company by deed must be held entitled to such crossings over the railroad track and right of way as are reasonably necessary for the use of the premises.—Stewart v. Cincinnati, W. & M. R. Co., 80 Mich. 166.

¶ 48. The question whether certain land which a railroad company claimed under a master's deed in foreclosure of a predecessor road was adapted to use by the company in connection with its road so as to pass by the deed, was for the jury in an ejectment suit for such land.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

¶ 49. An agreement by which a railroad company issues a free pass to an owner of land in consideration of the use of land encroached upon by a right of way does not run with the land, and is not binding upon the purchaser of the rights, franchises, etc., of the railroad company, in the absence of a statute or contract making such purchaser liable.—Wallace v. Ann Arbor & Y. Electric Ry. Co., 121 Mich. 588.

¶ 50. Under a deed granting a railroad right of way, in which the intention to limit the easement to a surface easement appeared plain, the company had no right to build and maintain a trestle, although contrary to the expectation of the parties, the railroad commissioner forbade grade crossings.—Lane v. Michigan Traction Co., 135 Mich. 70.

§ 10. ——Conditions and restrictions and enforcement thereof.

Conditions and restrictions in deeds generally, see Deeds III.
Exceptions of right of way from grants of the land, see Deeds § 77.
Clause for maintenance of station as condition or covenant, see Deeds § 80, ¶ 291.
Reservation in deed of right to construct "railways" in platted streets as limited to street railways, see Deeds ¶ 252.

¶ 51. A deed of a right of way to a railroad company on condition that the company lay a side-track in some convenient place to be chosen by the grantor, on his premises, within a specified time, or in default forfeit the grant, is construed to mean that the period within which the track must be laid shall not begin to run until the grantor has

designated the place for it.—Waldron v. Toledo, A. A. & G. T. R. Co., 55 Mich. 420.

¶ 52. If a deed conferring a right of way to a railroad company expressly is to become inoperative in case the road is not completed through the premises within a time specified, or upon its ceasing to be used as a railroad, on the company's ceasing to use the right of way except for the storage of cars, the deed becomes inoperative.—Hickox v. Chicago & C. S. R. Co., 78 Mich. 615.

¶ 53. A right of way "only for the passage of trains and not for the switching and making up of trains" is limited to those purposes and devoting the tracks laid there to such purposes is actionable by the adjoining landowner holding the fee.—A. Backus, Jr. & Sons v. Detroit, W. T. & J. R. Co., 71 Mich. 645.

¶ 54. Where a right of way has been granted to a railroad company by a deed containing a defeasance in case use as a railroad should cease, and where the running of trains has been discontinued for more than ten years, it is proper in grantor's action to recover possession to exclude testimony as to whether, when the company ceased to run regular trains between the stations, it intended to take them off permanently; and testimony as to the intent of the officers of the road during the time of such discontinuance permanently to abandon the right of way for the running of through trains was also inadmissible.—Hickox v. Chicago & C. S. R. Co., 94 Mich. 237.

¶ 55. A deed to a railroad company for a right of way was not set aside because of the removal of a depot to a point over a mile from the land in question, where neither fraud nor mistake was claimed and the deed was unconditional and made with full knowledge of its contents, though it was expected by both parties that it would not be moved.—Parsons v. Detroit & M. R. Co., 122 Mich. 462.

¶ 56. What constitutes a reasonable use of a right of way granted by the owner of a right of way is for the most part a question of fact, and such use can be enforced by the courts.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 57. Complainant deeded to defendant railway a right of way over a one-rod strip over which he had a right of way. Defendant proceeded to build a siding on the strip, and complainant sought to enjoin it. Held, that in determining the question of defendant's right to build the siding, the court would not consider complainant's contention that the defendant had no valid franchise right to lay its tracks in the streets of the city.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 58. Complainant had a right of way over a strip of land one rod wide lying along the east side of his lot, and used the same for access to his factory. He deeded to defendant railway a right of way over the strip "to the fullest extent which party of the first part had a right to use the strip, but without in any way diminishing the right of first party." Defendant proceeded to build a siding on the strip. When cars were upon the siding complainant could not pass with his teams, but otherwise the siding would not interfere with his right of way. Held, his bill to enjoin the construction of the siding would not lie.—Hanselman v. Grand Trunk Western Ry. Co., 163 Mich. 496.

¶ 59. A right of way in and over a certain strip of land was granted to a railroad company for the construction of a bridge and its approaches through the grantor's land and over his canal and water-power, reserving for the grantor's free and uninterrupted use a portion of said strip, the railroad to have the privilege of building a bridge, or approach to a bridge, over the land so reserved, at such an elevation as not to interfere with the grantor's usual business, and the railroad to have the right at any time to the use of the grounds reserved for the purpose of constructing and repairing such bridge, approaches and railroad, and at all times freely to pass, etc. The bridge was built as prescribed in the grant. Held, that the railroad company would not be allowed so to use its right of way as to interfere with the use of the canal, waterpower and ground reserved, except for such construction and repairs, and should be enjoined from constructing piers for a new bridge that would obstruct the grantor's use of his canal or the portion of the right of way reserved by it, or that would obstruct such an extension of the canal as his business might require.—Newaygo Mfg. Co. v. Chicago & W. M. R. Co., 64 Mich. 114.

¶ 60. A grant of a strip of land to a railway company conveys only an easement for a right of way where the granting clause of the instrument provides that the grant is "for a right of way for a railroad," that, "this grant shall be void and the right of way herein conveyed shall revert to" the grantors on breach of certain conditions and that the grant of the right of way shall, at the option of the grantors, be void and the title thereto revert.—Mahar v. Grand Rapids Terminal Ry. Co., 174 Mich. 138.

¶ 61. Where a grant to a railway company conveys only an easement for a right of way and provides that the grant shall be void and the right of way shall revert on breach of certain conditions, a vendee of the land burdened by such easement may take advantage of a breach of the conditions.—Mahar v. Grand Rapids Terminal Ry. Co., 174 Mich. 138.

¶ 62. Where the grantee of land burdened by a conditional easement in favor of a rail-

way company orders those in charge of the work off the premises when the construction of the road is begun, because of an alleged breach of the conditions and immediately begins negotiations for a settlement, such negotiations amount only to a parol license to build the road and it cannot be contended that the grantee is estopped from enforcing forfeiture of the easement after the completion of the road, because he permitted expensive and beneficial improvements to be made without objection.—Mahar v. Grand Rapids Terminal Ry. Co., 174 Mich. 188.

§ 11. Loss or extinguishment of right.

Proceedings to abandon road, see post § 20.
Extinction of easement by abandonment and nonuser, see also Easements § 34.
Cross-bill by mortgagee in bill to enjoin city from forfeiting franchise of street railway, see Equity ¶ 494.

¶ 63. An easement for a railroad right of way is extinguished as to land in a disused portion of it which is inclosed by the owner of the fee with his remaining premises, and used by him for ordinary farming purposes, continuously, and without the assent of the railroad company, for more than fifteen years, notwithstanding his fee ownership included the right to the use of such land to the extent that it was not required for the purposes of the road.—Matthews v. Lake Shore & M. S. R. Co., 110 Mich. 170.

¶ 64. Where a railroad company buys a 100-foot strip of land, the fact that it only embraces fifty or sixty feet of the strip in an inclosure made by fencing, when it might have embraced one hundred feet, is no evidence of an abandonment of the portion not fenced.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 65. One Legault, complainant's predecessor in title to certain land, conveyed a 100-foot strip from the west side of said land to the defendant railroad. Defendant, instead of fencing the whole strip, built a fence some thirty feet from the center of the strip on the east side thereof. Several of complainant's predecessors holding under Legault occupied with buildings and dwellings the portion of the 100-foot strip lying east of the said fence. By tacking their occupations together, the statutory period necessary to obtain title by adverse possession was exceeded. Held, the defendant was not, in the absence of any fraud on its part, prevented by equitable estoppel from laying claim to title to the unfenced portion of the strip so occupied.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 66. Const. art. 15, § 12, providing that a corporation shall not hold real estate longer than 10 years, except such as shall be actually occupied by it in the exercise of its franchises, does not give the right to a mere squatter to assert the lapse of title against the corporation, but such provision is only enforceable by the public.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

IV. CONSTRUCTION AND MAINTENANCE OF WAY AND APPURTENANCES.

§ 12. In general; construction and maintenance of highway crossings and bridges.

Route, location, termini and stations, see ante II.
Private or farm crossings, see post § 17.
Construction or completion of road as condition to subscription or contribution, see post § 24 et seq.
Sale of uncompleted railroad, see post § 36.
Injuries at crossings, see post § 69 et seq.
Improper planking at crossing as proximate cause of injury, see post § 77.
Agency of construction company or contractor for railroad company, see Agency ¶ 35.
Authority of agents in construction work, see Agency ¶ 168.
Assignability of contract for telegraph line and maintenance savoring of personal services, see Assignments § 7, ¶ 33.
Contracts for joint use and maintenance of bridge by railroad and the public, see also Bridges § 7.
Liability under contract for maintenance of drawbridge, see Bridges ¶ 11.
Construction and maintenance of bridges generally, see Bridges.
Contracts for construction work, see Building Contracts.
Due process in orders and regulations for construction or operation of lines, see Constitutional Law § 159.
Measure of damages for breach of construction contracts, see Damages, §§ 87-89.
Right of railroad to compensation for expense of maintaining highway crossing and conforming to regulations for its safety, see Eminent Domain § 51.
Damages for separation of grades, see Highways § 121.
Proceedings to ascertain grade damages on making crossings, see also Highways § 122.
Right of lessor of consenting railroad to damages for separation of grades, see Highways ¶ 417.
Appraisement of damages for highway crossing railroad, see Highways § 37.
Duty of municipality to inspect and repair walks constructed upon railroad property, see Highways § 204.
Instruction erroneous as assuming obligation of the railroad to maintain bridge, see Instructions ¶ 441.
Mandamus to relay tracks and restore service, see also Public Service ¶ 52.
Provisions as to railroad and street crossings and grades, see Comp. L. 1915, §§ 4314, 4750-4782, 8243.
Duty of railroad crossing roads, streets, water courses, etc., to restore such road, street, etc., to its former condition, see Comp. L. 1915, § 8311.

Powers and duties of railroad commissioners respecting crossings, see Comp. L. 1915, § 8157.
Provisions as to height of bridges over railroads, see Comp. L. 1915, § 8358.

¶ 67. Pub. L. 1881 (How. St. § 1322), in providing that, where any highway may have been or shall be established across a railway, the railroad company shall open, construct and maintain the highway, and the necessary crossing therefor, across its right of way and tracks, cannot be so construed as to compel the company to open and maintain at its own expense that part of a highway which would cross its right of way if the highway itself is not made necessary by the existence of the railroad.—People v. Lake Shore & M. S. Ry. Co., 52 Mich. 277.

¶ 68. Laws 1883, Act No. 166, which amends Pub. Acts 1881, pp. 288-299, by providing as damages the value of the land used for the crossing, is inoperative so far as it seeks to impose upon the company the expense and duty of opening, completing and maintaining the highway and its approaches, guards and fences.—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 69. A railroad company is not required, by How. St. § 3377, to cover a ditch which parallels its track across a highway for the entire distance of four rods, but only so much of such width as is used for highway purposes proper.—Whitsky v. Chicago & G. T. R. Co., 62 Mich. 245.

¶ 70. In construing a contract by which a railroad company agreed to keep in repair the roadbed or roadway across the draw in a drawbridge used by it, and by which a bridge company agreed to keep in repair the highway or roadway across said drawbridge used exclusively by it, it being mutually agreed that all other portions of said drawbridge, its piers and abutments, should be maintained in common by both of the parties, the wheels supporting the draw, upon which it rested and turned, are to be regarded as included with the "other portions of the drawbridge" mentioned in the contract.—Portage Lake Bridge Co. v. Wright, 78 Mich. 426.

¶ 71. The duty imposed upon a railroad company (How. St. § 3323, subd. 5, as amended Laws 1891, Act No. 90) to restore streets crossed by its tracks to their former state, as near as may be, and to construct suitable road and street crossings for the passage of teams, existed, in the absence of the statute, under the common law.—Tobias v. Michigan Cent. R. Co., 103 Mich. 330.

¶ 72. The obligation imposed upon a railroad company, How. St. § 3323, to restore a highway across which it has constructed its road to its former state, as near as may be, and to construct suitable crossings for the passage of teams, rests equally upon a railroad company which receives a conveyance under Laws 1887, Act No. 35 (How. St. § 3406a), of the railway or railroad tracks and their appurtenances of another company from the purchaser thereof upon the foreclosure of a mortgage of the property and franchises of said company.—Gage v. Pontiac, O. & N. R. Co., 105 Mich. 335.

¶ 72a. Where, upon receiving a conveyance and commencing to operate the railroad so conveyed, the defendant railroad company finds that in order to make the approach to a bridge, which its predecessor found it necessary to construct by reason of a cut at a point where its road crossed a public highway, reasonably safe for public travel, it was and is necessary to erect barriers at the sides of said approach, which duty has not been performed, it is the duty of the company receiving said conveyance to erect such barriers, and it will be liable for an injury thereafter received by reason of its failure to perform said duty.—Gage v. Pontiac, O. & N. R. Co., 105 Mich. 335.

¶ 73. The right to except to the ruling of the railroad commissioner in requiring an overhead crossing to be built by a street railway company under Comp. L. 1897, §§ 6466 and 6349 et seq., gives the supreme court a right to review such action at most where there is an abuse of the commissioner's discretion and in the absence of evidence in the records his ruling will not be disturbed.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 74. A railroad company constructed a track through a ravine in a public highway, and elevated the bridge over it so that their trains could pass safely. Thereafter the company repaired the bridge at its own expense, and the township acquiesced in the entire matter. Later the company ceased to use the track, but retained the fee to the right of way, and refused to further repair the bridge. The elevation of the bridge did not inconvenience the public nor increase the cost of its maintenance. Held, that the elevation of the bridge did not impose upon the company the duty to repair or rebuild the bridge.—Township of Burdell v. Grand Rapids & I. Ry. Co., 157 Mich. 255.

¶ 75. The relator railroad crossed a public street and was ordered by the circuit court, under § 6234, Comp. L. 1897, to build a bridge for the street. Held, the order was not invalid from the fact that an interurban railroad on the street would use the bridge, nor was the relator entitled to have said interurban railroad share a part of the expense of erection.—Chicago, D. & C. G. T. Junct. R. Co. v. St. Clair Circuit Judge, 156 Mich. 567.

¶ 76. Pub. Acts 1893, No. 92, creating a crossing board to determine upon application the necessity for a separation of grades at

railroad crossings, repeals Laws 1873, Act No. 79 in so far as it conferred like powers upon the commissioner of railroads.—Attorney-General v. Commissioner of Railroads, 117 Mich. 477.

§ 13. Crossing other railroads.

Connection with other lines, see post § 14.

Damages in condemnation for crossing of railroad by railroad, see Eminent Domain § 52.

City or railroad as responsible for repairing and maintaining traveled way on viaduct over railroad, see Bridges § 5, ¶ 9a.

Proceedings to determine place and manner of crossing other roads, see Comp. L. 1915, § 8241.

Provisions as to construction of tracks across street railroads, see Comp. L. 1915, §§ 8365-8371.

¶ 77. It is a condition precedent to any assumption of power to make a crossing, even after condemnation, that the state board shall determine the manner and conditions of making the crossing.—Detroit, L. & N. R. Co. v. Livingston County Probate Judge, 63 Mich. 676.

¶ 78. The statute does not authorize the road making the crossing, even where the condemnation is regular, to use its own discretion in making it, or to disturb the old road or change its grade. It contemplates harmonious action by both roads, or action under the supervision of the state board.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 63 Mich. 645.

¶ 79. In the absence of proof to the contrary, the certificate of approval of a majority of the state crossing-board, attested by the secretary, will be presumed to have been made at a lawful meeting.—Grand Rapids, L. & D. R. Co. v. Chesbro, 74 Mich. 466.

¶¶ 80, 81. Where a railroad company seeks to cross a street at a place where another railroad crosses, it is competent for the state board to require that the company desiring to cross shall carry its tracks on a bridge above those of the other company, and shall provide a passageway on such bridge for teams and pedestrians, and that the costs of such passageway shall be borne equally by the two companies.—Fort-Street Union Depot Co. v. State Railroad Crossing Board, 81 Mich. 248.

¶¶ 82, 83. Comp. L. 1897, § 6349 et seq. giving the commissioner of railroads the power to order a separation of grades in crossings of railroads and street railways does not require the imposition of all burdens of overhead crossings on the applicant the cost may be divided between the roads.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 84. Comp. L. 1897, § 6349 et seq., giving the commissioner of railroads the power to order a separation of grades in crossings of railroads and street railways does not require a separation of grades in all cases where it is physically possible; it must be reasonably practicable.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 85. Under Comp. L. 1897, § 6349 et seq., giving the state railroad commissioner the power to determine the manner of crossings of street railways and steam railroads and section 6466, providing that street railways shall be subject to the supervisory control of a commissioner, the commissioner has the power and authority to require the street railway company to build an overhead crossing over the steam railroad.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 86. The fact that a street railway company which has obtained a franchise to build a street railway cannot build an overhead crossing over a steam railroad without first obtaining rights from abutting owners which it has no power to condemn, gives no right to build a grade crossing under requirements of the state railroad commissioner under Comp. L. 1897, §§ 6466 and 6349 et seq.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 87. The grant of a right to build a street railway over certain streets does not give a vested right to make a grade crossing over a steam railroad where the law leaves it in the discretion of the state railroad commissioner to determine the manner of crossing to be effected.—Jackson & Suburban Traction Co. v. Commissioner of Railroads, 128 Mich. 164.

¶ 88. An order by the commissioner of railroads under How. St. § 3301, requiring that a viaduct to be erected to carry the tracks of one railroad company over those of another company should be so constructed as to provide a passageway for pedestrians and teams, imposes upon the companies the duty of keeping such passageway in repair, although it does not expressly so provide.—Attorney-General v. Fort St. Union Depot Co., 117 Mich. 609.

§ 14. Physical connections with other lines.

Due process in laws or regulations requiring physical connections with other lines, see Constitutional Law § 159.

Provisions as to construction and operation of joint lines, see Comp. L. 1915, § 8269.

¶ 89. An order issued by the Michigan Railroad Commission ordering the Michigan Central Railroad Company to install a physical connection with an interurban railway running between points within the State of Michigan, and to provide for an interchange

of cars with said railroad, is not unconstitutional as depriving said railroad of its property without due process of law under Act 312, Pub. Acts 1907, § 7, subd. c. (Separate opinion by Ostrander, C. J.)—Michigan Railroad Commission v. Michigan Cent. R. Co., 168 Mich. 230. Affirmed in 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 422.

§ 15. Erection and maintenance of fences, gates and cattle guards.

See also post § 118; ¶ 761.

Injuries to or by cattle at large, see post VIII, F.

Pleading damages from neglect to fence, see Damages § 252.

Provisions as to fences and cattle guards, see Comp. L. 1915, §§ 8304, 8306.

¶ 90. As the statute requiring railroad companies to fence their roads reaches all corporations occupying railways built under the general laws, and as there are no other railways except those built under special charters, of which the courts must take notice, the finding of occupancy by a specified company, as a corporation, brings it plainly within the law.—Continental Improvement Co. v. Ives, 80 Mich. 448.

¶ 91. The statutory regulations, Laws 1875, Act No. 98 (How. St. § 3377), concerning the fencing of railways apply north of Saginaw river, except that the statutory penalty for neglecting to build them is not in force.—Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 92. A railroad company whose road crosses or interferes with an existing highway must bear the expense of putting the crossings and the highway in safe condition; and this includes the cost of such fencing and cattle-guards as may be needed.—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 93. Where a railroad track crosses a highway diagonally, and the company, in fencing its right of way, leaves a space between the termination of its fence and the fence of the adjacent owner, its way is defectively fenced.—Coleman v. Flint & P. M. R. Co., 64 Mich. 160.

¶ 94. The police power conferred upon the commissioner of railroads to interfere when a street crossing becomes dangerous by reason of the frequency of travel, and to order the erection of a safety gate or the employment of a watchman, is not impaired by the finding of a jury when a right of way for a street is condemned across a company's tracks, in regard to damages for maintenance of such gates, etc.—Commissioners of Parks of City of Detroit v. Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291.

¶ 95. Under How. St., § 3377, providing that any cattle-guard which shall have the written approval of the railroad commissioner shall be a legal cattle-guard, a railroad company is protected in the use of a patented guard which has been approved by the commissioner either by name or by definite description.—La Flamme v. Detroit & M. R. Co., 109 Mich. 509.

¶ 96. The statute requiring railroad companies to erect and maintain fences of a specified height and character along their rights of way was adopted pursuant to the police power of the state, not alone as a protection to the property of adjacent owners, but as a protection to the employees and passengers upon trains.—Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146.

¶ 97. How. St. § 3301 providing that the railroad commissioner may require railroads to station flagmen and maintain gates at crossings, the expense to be borne by the two railroads in equal proportion, and section 3310, being an amendment to the same statute, authorizing him to prescribe interlocking switch and signal systems, without prescribing the proportion to be paid by each railroad, should be read together and hence the cost of such interlocking systems should be borne by the companies in equal proportion.—Wabash R. Co. v. Commissioner of Railroads, 120 Mich. 697.

§ 16. ——Station grounds and railroad yards.

See also post § 119.

¶ 98. The private gates constructed by a factory in the fence separating said factory premises from the tracks of a railroad running through a city, and intended to be used only by the employees of said factory, are not within said railroad's station grounds so as to be exempted from the statutory duty to maintain fences and guards for protection.—Sylvester v. Grand Rapids Bookcase Co., 169 Mich. 340.

¶ 99. Railroads are not under any obligation to fence their yard limits.—Katsinski v. Grand Trunk Ry. Co., 141 Mich. 75; Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 313.

¶ 100. The statute does not require fencing, etc., where it would be illegal or improper that the road should be fenced, as at the crossings of streets or alleys in a city of town, or at mills and depot grounds and the approaches thereto, where public convenience requires the way to be left open.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510; Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265; McGrath v. Detroit, M. & M. R. Co., 57 Mich. 555; Earley v. Lake Shore & M. S. R. Co., 66 Mich. 349.

¶ 100a. The track within the corporate limits of a city or town, at points where no such reasons apply, is as much within the statute as the track elsewhere.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510.

§ 17. Private or farm crossings and cattle passes.

Liability for injuries at farm or private crossings, see post § 50.

Liability and actions for injuries to cattle, see post VIII, F.

¶ 101. Railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the road requiring such action on their part.—People v. Detroit, G. H. & M. R. Co., 79 Mich. 471.

¶ 102. Where complainant's father granted to a railroad company an easement across a part of his land, for a nominal consideration, and at the time of the construction of the road the company bridged over a portion of the right of way so as to form a passage under the tracks for the grantor's cattle, and such passage has been used constantly by complainant and his predecessor in title for twenty-three years, it must be presumed that such use was under claim of right, and if defendant company fills up said passage, equity will compel its restoration.—Lamb v. Pontiac, O. & N. R. Co., 150 Mich. 340.

§ 18. Private or side tracks and switch connections.

Operation of private tracks, see post § 39.

¶ 103. Railroad companies are not required to build or maintain tracks to private industries, nor to furnish the right of way or rails by which the traffic of a private industry reaches their lines.—Grand Rapids Terminal Belt Ry. Co. v. Waters, 198 Mich. 285.

¶ 104. Aside from constitutional or statutory requirements, the relation between manufacturers and railroad companies as to the construction and maintenance of side tracks rests entirely in contract, and the mere construction of such a side track by the railroad, as a mutual convenience to the manufacturer and itself, does not create an implied contract on the part of the railroad to continue the track, or to change it to correspond with an elevation of its main tracks necessitated by a separation of railroad and highway grades.—City of Detroit v. Michigan Cent. R. Co., 156 Mich. 121.

¶ 105. Pub. Acts 1907, No. 312, § 6a, and 34 U. S. St. p. 584, providing for the enforced establishment of switch connections with manufacturing plants by railroad commissioners on specified terms and conditions, do not prevent railroads from changing the grade of their tracks, or authorize recovery of damages by manufacturers with whose plants connections at the original grade have been made; but such change as may be thereby required are governed by the same principles as an original construction.—City of Detroit v. Michigan Cent. R. Co., 156 Mich. 121.

¶ 106. A contract between a railroad company and a lumber company for the construction of a spur to the property of the lumber company providing that the right of way shall be furnished by the lumber company and the land graded and ties furnished, the rest of the materials to be furnished, and the rest of the work to be done, by the railroad company, and a supplementary agreement providing that the lumber company had secured the right of way and had graded and prepared the roadbed and delivered the ties on the ground ready for use at the cost to the lumber company at a certain sum, and that until the expense should be collected "from all shippers or consignees" other than the lumber company, a certain extra charge per car should be collected was construed as entitling the lumber company to receive credit of the stipulated sum per car, whether the shipment originated on the spur, or on an extension built to serve other shippers.—Ardis v. Grand Rapids & I. Ry. Co., 200 Mich. 400.

¶ 107. A firm of loggers agreed to build a tram railway and contracted with the corporation controlling it to carry their lumber at certain rates. The corporation afterward assigned, and its assets went into the hands of one of the parties with whom the agreement to build was made, and through him became the property of a railway company in which he was a principal stockholder. This company refused to fulfil the agreement for transportation, and the loggers sued out a preliminary injunction restraining it from running over so much of the road as they had built except on condition of carrying their lumber at the rates agreed on. Held, that the agreement was no more than an ordinary executory contract, and was not enforceable in equity, and gave complainants no more control than other contractors over the road-bed; that the preliminary injunction was a final order and void, and that mandamus would lie to set it aside.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

§ 19. Compensation to abutting owners for use of streets.

Consent of abutting owners to use of streets, see ante § 7.

Condemnation of lands and damages, see Eminent Domain.

¶ 108. Charter of Ann Arbor, § 88, subd. 10 and 31 (Loc. Acts 1889, No. 331), authorizing the city to determine and designate routes and grades of any railroad coming into the city, and to establish grades for streets and sidewalks, does not authorize the city to permit a railroad company to raise the grade of its tracks by building an

embankment which practically vacates a street and deprives the abutting owner and the public of its use, and gives it over wholly to the use of the railroad company, without compensation to such abutting owner.—Dean v. Ann Arbor R. Co., 137 Mich. 459.

¶ 109. Where a railroad company purchases land for the purpose of constructing a railway thereon, with full knowledge that the property is subject to an easement for all purposes of a public alley previously granted by deed to an adjoining landowner, it cannot build its road on such land without making compensation to the abutting owner, as required by statute.—Detroit Leather Specialty Co. v. Michigan Cent. R. Co., 149 Mich. 588.

¶ 110. Comp. Laws 1897, § 6223, par. 5, requiring railways to compensate adjoining owners before occupying public streets, refers solely to the construction of the railway, and has no bearing upon the right of the railway company to occupy a portion of a legally vacated street with its depot.—Detroit & M. R. Co. v. Sioux City Seed & Nursery Co., 168 Mich. 668.

¶ 111. Where a railway has appropriated in the erection of a depot certain city streets vacated for that purpose, the proper recourse for a business house located on said streets and damaged thereby is a suit at law for damages, and not a bill in equity.—Detroit & M. Ry. Co. v. Sioux City Seed & Nursery Co., 168 Mich. 668.

¶ 112. A suburban electric railway company, which, having in good faith constructed and put in operation its permanent public improvement, was obliged to erect a trestle by reason of the refusal of the railroad commissioner to permit grade crossings, was not required to tear up its track and abandon its road under a bill filed by an adjoining owner who under his deed granting the right of way to the company, limited the easement to a surface easement, but was required to pay reasonable compensation for such damages as were fairly chargeable to the erection of such trestle.—Lane v. Michigan Traction Co., 135 Mich. 70.

§ 20. Proceedings to abandon road or a portion thereof.

Provisions as to abandonment of railroads, see Comp. L. 1915, §§ 8363, 8364.

¶ 113. In a proceeding by a railroad company under Laws 1887, Act No. 275 (How. St. §§ 3457a, 3457b) to obtain a decree authorizing abandonment of part of its road, the company cannot question the constitutionality of the statute.—Flint & P. M. R. Co. v. Rich, 91 Mich. 293.

¶ 114. Where a railroad company has ceased to run cars over a part of its route for twelve years, the question of abandonment is to be determined from the facts and not from testimony as to the intention of the company's officers either at the outset or during such period.—Hickox v. Chicago & C. S. R. Co., 94 Mich. 237.

¶ 115. Petition for leave to abandon a railroad track and station may be granted where it has appeared that traffic would not pay and that few persons would be affected by the abandonment.—Flint & P. M. R. Co. v. Rich, 91 Mich. 293.

§ 21. ——Notice to contributors and adjustment of their claims.

Subscriptions and contributions in aid of road, see post § 24.

¶ 116. Pub. Acts 1891, No. 125, providing for the abandonment of railroad tracks on judicial hearing and allowance and making abandonment otherwise unlawful, and providing for the conditioning of the decree on the repayment to contributors of all bonuses made to obtain the location of the line to be abandoned, and providing that notice to contributors to appear and present their claims shall be given, but making no prescribed procedure to bring in those contributors who do not appear voluntarily, is to be construed as intending one proceeding for the adjustment of all claims and also of the rights of the railroad company.—Williams v. Flint & P. M. R. Co., 116 Mich. 392.

¶ 117. A railroad company cannot be permitted to abandon part of its road without reimbursing those who contributed to the construction thereof.—Flint & P. M. R. Co. v. Rich, 91 Mich. 293.

¶ 118. In a proceeding for leave to abandon portions of a railroad track under Pub. Acts 1891, No. 125, that the notice was not given or order made at the instance of the railroad company, but upon a claimant's petition, is immaterial, the court by its order having provided for notice, and that notice having been given.—Williams v. Flint & P. M. R. Co., 116 Mich. 392.

¶ 119. Where a railroad company has filed its petition under Pub. Acts 1891, No. 125, for leave to abandon its track between two stations, notice by publication of the court's order requiring those who contributed to the road to present their claims for reimbursement is sufficient notice to all contributors.—Williams v. Flint & P. M. R. Co., 116 Mich. 392.

¶ 120. Where, after a decree dismissing a company's petition for leave to abandon part of its road under Laws 1887, Act No. 275, had been reversed, and after the case had been remanded for further proceedings under the statute, claims were filed by several contributors to the road who had not appeared prior to the decree, held, that

such claims could be allowed, that the statute allowing filing of claims (Pub. Acts 1891, No. 125) contemplates the giving to the parties in interest an opportunity for a hearing, and that the decree itself may be conditional.—Flint & P. M. R. Co.'s Application, 105 Mich. 289.

¶ 121. A railroad company abandoning its line and being required to refund contributions according to terms of the statute (Pub. Acts 1891, No. 125) is entitled to bond of indemnity before paying claims filed in names of decedents whose estates had not been administered.—Flint & P. M. R. Co.'s Application, 105 Mich. 289.

¶ 122. Under Pub. Acts 1891, No. 125, where a company is permitted to abandon its road between two stations, and makes no provision for the reasonable accommodation of the traffic between those stations, contributions for the construction of such part of the road must be refunded, with interest for not more than five years from the time they were made.—Flint & P. M. R. Co.'s Application, 105 Mich. 289.

¶ 123. Under Pub. Acts 1891, No. 125, requiring refund of contributions made towards the road when the same is subsequently abandoned, persons who gave aid-notes that were afterwards paid by granting rights of way, should not be allowed compensation, but reconveyance to them by the company of such rights should be decreed.—Flint & P. M. R. Co.'s Application, 105 Mich. 289.

¶ 124. A decree closing the proceedings on a railroad company's petition for leave to abandon part of its road under Pub. Acts 1891, No. 125, is final, and those who have not, in pursuance of the court's published order, filed claims for reimbursement must be deemed to have waived them.—Williams v. Flint & P. M. R. Co., 116 Mich. 392.

§ 22. Effect of abandonment.

¶ 125. Upon the abandonment by a railroad company of a part of its road, the title to the land taken for right of way, etc., reverts to the original owners, and no reconveyance or order of the court is necessary.—Flint & P. M. R. Co. v. Rich, 91 Mich. 293.

V. GRANTS AND BONUSES IN AID.

§ 23. In general; aid bonds and delivery thereof.

Actions to enforce aid bonds, see post § 27.
General law as to bonds, see Bonds.
Prohibition of aid bonds, see Constitutional Law § 284.
Construction of road as consideration for voluntary aid note, see Contracts § 107.
General law as to municipal bonds, see Municipal and Public Bonds.
Invalidity of railroad aid bonds for want of power to issue them for private purposes, see Municipal Bonds § 1.
Issuance and delivery of bonds by public officers, see also Municipal Bonds § 9.
Rights of corporate successor to land grant lands, see Public Lands § 70.
Congressional grants of lands to state to be disposed of in aid of railroads, see Public Lands, VI.
Provisions as to levying taxes for payment of bonds, see Comp. L. 1915, §§ 4199-4204.

¶ 126. Municipal bonds voted in aid of a railroad company are rightly delivered to a new or consolidated company into which the former has been merged.—Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024; Township of Chickaming v. Carpenter, 106 U. S. 663, 27 L. ed. 307, 1 Sup. Ct. Rep. 600.

¶ 127. A certificate from the governor that a railroad company has in all respects complied with the provisions of the Act of March 22, 1869, relating to the issuance of railroad aid construction bonds by a township, the delivery thereof to the state treasurer and the delivery of such bonds to the company upon a certificate of the governor of compliance by the railroad with the provisions of the act, is a condition precedent to the power of the treasurer to deliver such bonds to the company.—Young v. Township of Clarendon, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

¶ 128. That municipal bonds were issued to a railroad company as a donation, and not as a subscription to stock, does not affect the legal principles governing them.—Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024.

§ 24. Subscriptions and contributions in aid of road.

Notice to and adjustment of claims of contributors upon abandonment of road, see ante § 21.
Actions to enforce subscriptions and contributions, see post § 27.
General law as to subscriptions, see Subscriptions.

¶ 129. The fact that a company was organized to build the road, or that even in the absence of such a promise the road would have been built, does not defeat a promise to contribute in aid of the railroad.—Stevens v. Corbitt, 33 Mich. 458.

¶ 130. A voluntary subscription in aid of a railroad is not defeated by the fact that the municipal and individual aid and stock subscriptions do not amount to $6,000 per mile; the proviso of Comp. L. 1871, § 2298, merely refers to levying assessments upon stock subscriptions.—Wright v. Irwin, 35 Mich. 347.

¶ 131. Equities subsequent to the execution of a subscription cannot arise against

the subscriber if the beneficiary therein has never relied upon the subscription.—Saginaw, T. & H. R. Co. v. Chappell, 56 Mich. 190.

§ 25. ——Conditions in grant or subscription.

¶ 132. A promise to contribute in aid of a proposed railroad implies, as a condition, in the absence of express conditions, that the road shall be constructed and operated; and if, relying upon such promise, this is done in a reasonable time, where no time is fixed, the promise becomes binding.—Stevens v. Corbitt, 33 Mich. 458; Michigan, M. & C. R. Co. v. Bacon, 33 Mich. 466.

¶ 133. Where a railroad-aid contract is conditioned on the payment of a stated sum when the road is completed, the word "completed" does not have the same force as it would in a contract for construction; the purpose of the condition is accomplished when the road is ready for regular business.—Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328.

¶ 134. An agreement to pay a certain sum to the order of a specified railroad company "in six months after the first cars run over the road from" one specified point to another inside the contemplated termini, does not postpone the period of payment until after the completion of the whole road.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 135. By a contract reciting that it was given to aid in the "construction" of a certain railroad "and in consideration of the benefits derived therefrom," defendant promised to pay a specified sum "when the road is constructed and the cars are running thereon from M. to W.," two points on the road. Held, that the defendant became liable when the road was completed and the cars were running between said points, though the entire line as projected had not been completed.—Gardner v. Walsh, 95 Mich. 505.

¶ 136. A defendant who has promised to pay money one day after the grading is done and the ties are on the ground for the road-bed of a railway between certain points cannot be held liable to another company which, after the road has been abandoned for eleven years, builds a road between those points and uses part of the same line, but does not show that it is the legal assignee or receiver of the former company.—Sickels v. Anderson, 63 Mich. 421.

¶ 137. A company's agreement, as the consideration for an aid subscription, to establish and construct a railroad between two specified points, would not be performed unless the company had a road under its own permanent control covering the entire distance; though it was not necessary that the company should literally build the road all the way.—Brown v. Dibble's Estate, 65 Mich. 520.

¶ 138. Defendant promised to pay a certain sum in aid of the construction of a railroad, provided the cars should run upon said road within one-third of a mile of a certain town within eighteen months from the date of the promise. Held, that the condition did not require that the road-bed and track, and the rolling stock and equipments, should be built and perfected within the eighteen months to the point named, but merely that the road and stock should be so far constructed that cars could be run over the road and should actually make such run within the time stated.—Pontiac, O. & P. A. R. Co. v. King, 68 Mich. 111.

§ 26. ——Railroad aid notes.

Actions upon railroad aid notes, see post § 27.

Bills and notes in general, see Negotiable Instruments.

Maturity and time of payment of note in aid of railroad construction, see Negotiable Instruments ¶ 53.

¶ 139. A promissory note given as a voluntary contribution in aid of a railroad will not be held invalid for want of consideration where the proposed road has been constructed and put in operation.—Wright v. Irwin, 35 Mich. 347.

¶ 140. A promissory note, payable to the treasurer of the Chicago & Canada Southern Railway Company, was made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of passenger and freight depot" at Dundee; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond Dundee, so as to form a through line. Held, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated.—Stowell v. Stowell, 45 Mich. 364.

¶ 141. A railroad-aid note, whereby the makers, in consideration of the building of the V. B. Division of the T. & S. H. Railroad through a certain village, promised to pay to such company, or order, a certain sum in thirty days after notice of the completion of such railroad, could not be enforced against the makers for want of a proper party to the contract; where it appeared that at the time of the execution of such note no such railroad company was in existence, and that no such company was ever organized, but that an independent corporation, having the same name as the promisee

in such note, was afterwards created with a different purpose from that of the unformed company, and, acquiring such note, brought an action against the makers to enforce payment thereof; and where no evidence was introduced to show that such makers assented to such new agreement; since the plaintiff was not the promisee in such note, and there was no privity of contract between the makers of such note and the plaintiff.—Toledo & S. H. R. Co. v. Lamphear, 54 Mich. 575.

¶ 142. The conditions of a railroad-aid note that a regular station for passengers and freight shall be "erected" is not met by putting up a small building without facilities for receiving or shipping freight and without a ticket office or station agent.—Port Huron & N. W. R. Co. v. Richards, 90 Mich. 577.

§ 27. Actions to enforce subscription, contribution, or aid notes.

Collateral attack on corporate existence in action on aid contract, see also Corporations § 10.

Estoppel to deny incorporation of promise in action on aid subscription, see Corporations § 12.

Right of successor of road to recover on aid note, see also Contracts § 279.

Rights of bona fide holders of illegal railroad aid bonds, see Municipal Bonds, III.

¶ 143. A promise to pay an existing company, its successors or assigns, a sum of money sixty days after the road is open for traffic may be enforced in its own name by the successor of such company which has completed the road, and to whom the promisee has assigned all its franchises and property, including such franchise. The essence of the agreement is the building and opening of the road.—Michigan, M. & C. R. Co. v. Bacon, 33 Mich. 466.

¶ 144. A declaration upon a voluntary subscription to the building of a railroad must allege that it was accepted and acted upon.—Northern Cent. M. R. Co. v. Eslow, 40 Mich. 222.

¶ 145. In an action upon a voluntary subscription in aid of a railroad which promises to pay $100 "in six months after the first cars run over the road" between specified points, the defense cannot be raised that the company has forfeited its franchise by not finishing and putting its road in full operation within the time required by Comp. L. 1871, § 2442.—Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148.

¶ 146. The legality of the incorporation of a railroad company cannot be inquired into as between the parties in a collateral action by it upon a transferable aid contract whereof it is equitable assignee, since such question could only be inquired of by the state.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 147. In an action upon a contract, whereby a specified amount was to be paid upon the completion of a certain railroad, the declaration averred the contract to have been made for a valuable consideration, and the antecedent negotiations out of which the contract grew were relied on as constituting such consideration. Held, no error to allow such preliminary negotiations to be very fully disclosed.—Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328.

¶ 148. Several persons signed a paper reciting that, as A. had proposed to construct a railroad from I. to S., in consideration of the right of way and $3,000 a mile local subscription, they promised to give their notes to the I. & S. Railroad Company for the amounts set opposite their names. The company was not then organized nor the line of road fixed. In a suit on one of the subscriptions it was held that plaintiff might show that, owing to the high lands near the city, it had not been contemplated by the parties that the road would be built to the corporate limits of Ionia, but that the line of a previously constructed road was to be used for some distance; and that the nature of the ground might be shown as a reason why a particular route could not be chosen.—Detroit, L. & L. M. R. Co. v. Starnes, 38 Mich. 698.

¶ 149. In an action on an agreement to pay a certain sum of money to a railroad company in a specified time after the cars begin to run, evidence to show what would be a reasonable time for completing the road is inadmissible.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 150. There may be such a change in the location of the line of the road as would warrant the withdrawal of an aid-promise, where the promisor would lose the advantages he expected to accrue to him from the building of the road. The evidence in a particular case held not to sustain such a defense.—Michigan, M. & C. R. Co. v. Bacon, 33 Mich. 466.

¶ 151. In an action upon a voluntary subscription in aid of a railroad, the question whether the company has finished and put its road into full operation is one involving matters of fact for the jury.—Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148.

¶ 152. Township-aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so. Held, on a bill for accounting, that he should be charged with the bonds.—Michigan Air Line R. Co. v. Mellen, 44 Mich. 321.

¶ 153. A railroad-aid note, conditioned on the road's completion to a certain point, may, when it has become absolutely payable, be sued by the payee under the common counts.—Port Huron & S. W. R. Co. v. Potter, 55 Mich. 627.

¶ 154. Successive assignments and deliveries of an aid-note drawn to the order of a railroad company were sufficient to create an equitable assignment of the contract embodied in it, and to authorize the final holder to sue on it in his own name as equitable assignee.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 154a. Where the consideration of a transferable aid-note given to a railroad company is the benefit to be derived by the maker from the construction of its road, he cannot defend on the ground that the road was built by another company.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 155. Where railroad-aid bonds were voted by a township with a condition precedent to their delivery that the road should not only be in running order, but an equivalent amount of the company's stock should be delivered to the township treasurer, and before this was done a new township was set off from the one which voted the bonds, it was held that until this exchange there were no contract relations with the company, and that, even if the bonds had been valid, a judgment against the old township for the amount could not bind the new township.—Beeman v. Black, 49 Mich. 598.

¶ 156. A judgment against a township upon railroad-aid bonds precludes inquiry into the grounds upon which it was rendered, but it does not bind another township that was not made a party to the action; nor can it sustain a claim for apportionment against such other township where the transaction upon which it was based did not become a binding agreement until after the other township had been set off from the one which issued the bonds.—Pierson Tp. v. Reynolds Tp. Board, 49 Mich. 224.

VI. INDEBTEDNESS, LIENS AND FORECLOSURES.

§ 28. In general; railroad bonds and coupons.

General law as to bonds, see Bonds.

Power to sell bonds as implying power to pledge them, see also Corporations § 81.

Power of company to borrow money, see Comp. L. 1915, § 8272.

Provisions as to issuance of bonds, see Comp. L. 1915, §§ 8272, 8359.

¶ 157. The president of a railroad company held bonds of the company which were issued to be used in the construction of the road. A contract for construction having been made by the president and others, who were a committee for the purpose, the president took an assignment of an interest in the contract, and claimed to retain the bonds in respect to such interest. In a suit by the company to recover the bonds, the contract being still unperformed and the assignment having been made without the company's assent, held, that no contract relation was established by this assignment between the company and the assignee which would entitle him to retain the bonds.—Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477.

¶ 158. Where the holder of railroad bonds, after delivering to his wife, who pays no consideration, past-due coupons, sold the bonds, all parties supposing the sale to cover all coupons attached or detached and not paid and canceled, such intention must prevail against the wife, she not being an innocent purchaser for value, and the coupons delivered to her must be considered as paid when cut from the bonds and so delivered.—Chicago & G. T. R. Co. v. Turner, 79 Mich. 133.

¶ 159. A merger of railroad bonds in the stock of the corporation does not occur in favor of a creditor who knew all the facts, by reason of being attorney for the railroad company, the promoter of which, negotiated a contract with an investment company of which H. was president and chief stockholder, by which the investment company was to construct the railroad, and receive for each mile thereof a certain amount of the stock and mortgage bonds of the railroad, which bonds and stock came to H., who acquired them through the investment company.—Ten Eyck v. Pontiac O. & P. A. R. Co., 114 Mich. 494.

¶ 160. Plaintiff and two others entered into an agreement for the promotion of a railroad, organizing corporations for that end and assuming towards each other practically the relation of partnership under their various arrangements. Bonds to a large amount were issued by the railroad company which they organized, in payment for stub lines owned by them. These bonds were secured by a mortgage to defendant as trustee, and were pledged as security for various debts growing out of the transactions. The railroad was constructed, but soon became insolvent and, to prevent forced sale, was sold to another company, and the bonds issued to plaintiff and his associates were on this sale destroyed by defendant, into whose hands they had been delivered by the pledgee. Held, under the facts and other evidence, that the destruction of the bonds was authorized, and that the defendant was not liable to plaintiff in trover therefor.—Randall v. Union Trust Co., 156 Mich. 216.

¶ 161. On a bill by one railroad against another for an accounting and to recover

cash and bonds alleged to be substitutes for bonds issued by complainant's predecessor in title as collateral security for the payment of a certain sum of money under a contract whereby defendant agreed to elevate its tracks so that complainant's predecessor could cross, and to construct a freight depot to be used by complainant's predecessor, evidence held sufficient to sustain a finding that defendant had incurred nearly all of the expense contemplated by such agreement.—Jackson, A. A. & D. Ry. Co. v. Ann Arbor R. Co., 190 Mich. 569.

§ 29. Liability and liens for labor and supplies.

Actions to enforce liens, see post § 31
Assignment of claims against railroad, see post § 31.
Liens for personal injuries or wrongful death, see post § 32.
General law as to mechanics' liens, see Mechanics' Liens.
What regarded as "labor claims," see generally Corporations § 332.
Labor liens on materials taken by railroad, see Liens ¶ 41.
Nonleviability of tracks and roadbed, see Executions ¶ 63.
Assignability of labor liens and claims, see also Liens § 9.
Validity of parol promise of railroad to pay debts of contractor as subcontractor, see Frauds, Statute of ¶¶ 86, 104.
Provisions as to payment and liens of labors and materialmen, see Comp. L. 1915, §§ 8336-8340.

¶ 162. The conditions of Comp. L. 1871, § 2412, making railway stockholders liable for labor debts to the amount of their stock must be strictly complied with.—Peck v. Miller, 39 Mich. 594.

¶ 163. The statute for the protection of laborers and persons furnishing material for the construction and repairing of railroads (Comp. L. 1871, §§ 2393-2395; How. St. §§ 3423-3425), though remedial, must be pursued, as against the railroad company, with some degree of strictness.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 164. How. St. §§ 3423-3425, giving a lien and claim of garnishment for labor and materials furnished for railroads, being in derogation of the common law, must be strictly construed.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 165. The services of an assistant chief engineer of a railroad company are not "labor" for which the stockholders are individually liable under Const. art. 15, § 7, and the statutes.—Brockway v. Innes, 39 Mich. 47.

¶ 166. A contractor who has built a section of the road is not a "laborer" within Comp. L. 1871, § 2412; How. St. § 3385.—Peck v. Miller, 39 Mich. 594.

¶ 167. The protection provided for by (Comp. L. 1871, §§ 2393-2395; How. St. §§ 3423-3425) is confined to laborers for and persons furnishing materials to contractors and subcontractors. One who merely hires out the labor of others is not a laborer.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 168. The labor done by a man's team may be regarded as labor done by him within the meaning of said Comp. L. 1871, §§ 2393-2395; How. St. §§ 3423-3425.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 169. A railroad company is not liable for labor to persons hired by a contractor or subcontractor, except so far as it is indebted to the latter.—Bottomley v. Port Huron & N. W. R. Co., 44 Mich. 542.

¶ 170. How. St. § 3423 for a lien for protection of "laborers" does not apply for the protection of contractors or subcontractors.—Martin v. Michigan & O. R. Co., 62 Mich. 458.

¶ 171. The labor and material for which How. St. §§ 3423-3425 makes a railroad company liable must be such as is performed and used in constructing or repairing the road.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 172. The labor protected by How. St. §§ 3423-3425 giving laborers and materialmen a lien on railroads and contractors for railroads is manual labor, and does not extend to teams used upon the work.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 173. How. St. §§ 3423-3425, giving a lien for labor and materials furnished for railroads, does not extend to feed furnished for teams employed in working upon the road, or to clothing or board of men so employed.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 174. The duty imposed by How. St. §§ 3423-3425 is not that it shall pay the claims of laborers and materialmen on the failure or neglect of the contractors to do so, but that it shall retain in its custody the amount due from it to the contractors, not exceeding the amount of the claims furnished, until such contractors or subcontractors pay such claims.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 175. Under Comp. L. 1897, § 10710, as amended by Act No. 17, Pub. Acts 1903, establishing mechanics' liens, a vendor who supplies engines to be used in an electrical railroad plant secures no lien.—Detroit Trust Co. v. Detroit, F. & S. Ry., 159 Mich. 442.

¶ 176. Pub. Acts 1885, p. 293, providing that every person who shall as contractor

"build, alter, improve, repair, erect, beautify, ornament, or put in, or who shall furnish any labor or materials in and for the building, altering, improving, repairing, erecting, beautifying or ornamenting or putting in, any house, building, machinery, wharf or structure * * * shall have a lien therefor upon such house, building, machinery, wharf or other structure and its appurtenances, and also upon the entire interest of such owner, part owner, lessee or person holding under land contract or otherwise, in and to the lot or piece of land, not exceeding one-quarter section of land, or if in any incorporated village, not exceeding the lot or lots upon which said improvement is made to the extent of the right title and interest of such owner," does not give one furnishing material for a logging railroad a lien upon the railroad property for such material.—Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co., 63 Fed. 11.

§ 30. ——Notices, statements and payments.

¶ 177. To enable plaintiff to recover under the statute it must appear that the itemized bill of material and labor was presented to the company as required by How. St. § 3423.—Martin v. Michigan & O. R. Co., 62 Mich. 458.

¶ 178. A notice of a claim against a railroad company for labor performed for a subcontractor given under How. St. § 3423 (making the company liable in case a bill of items of the labor is furnished to the company with the amount claimed), which fails to show on its face whether the work charged for is the claimant's personal labor or team-work, or to state the kind of labor performed, the dates when performed, and the rate per day, and the amount of payments made thereon, cannot be held to be the "bill of items together with the amount claimed" required by the statute.—Quackenbush v. Chicago & W. M. R. Co., 91 Mich. 308.

¶ 179. As against a garnishing creditor of a contractor for construction work, a railroad company may, under How. St. § 3423, withhold payment for such work for the protection of laborers and materialmen, although no bill of items of material and labor has been furnished.—Dawson v. Iron Range & H. B. R. Co., 97 Mich. 33, per Grant and Long, JJ., Montgomery, J., concurring in the result.

¶ 180. The construction contract having provided that the amount of each monthly statement should be "paid under such regulations as may be agreed upon by the parties," a creditor of the contractor is bound by a method of payment pursued for several months, under which the laborers, the contractor acquiescing, were first paid monthly under the supervision of an officer of the garnishee company; and payments thereunder made to the laborers after the service of the writ could not be regarded as unauthorized.—Dawson v. Iron Range & H. B. R. Co., 97 Mich. 33, per Grant and Long, JJ., Montgomery, J., concurring in the result.

¶ 181. How. St. §§ 3423-3425, effects a garnishment or stop-order of the amount due to the contractor. Voluntary payment by the company to the laborer or materialmen is not provided for, but they are permitted to collect pay by action against the company.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

§ 31. ——Actions and proceedings to enforce.

Mode of enforcing labor claims against stockholders, see Corporations § 335.

¶ 182. Claims under the statute (How. St. §§ 3423-3425), against railroad companies for labor, etc., are assignable, and may be sued by the assignee.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538; Dudley v. Toledo, A. A. & N. M. R. Co., 65 Mich. 655.

¶ 183. Orders drawn by contractors or subcontractors in favor of laborers upon a third party, payable by the latter in money or goods, and accepted and paid by him, do not operate as an assignment to him of the laborers' claims for labor, etc., so as to enable him to sue the company.—Martin v. Michigan & Ohio R. Co., 62 Mich. 458; Dudley v. Toledo, A. A. & N. M. R. Co., 65 Mich. 655.

¶ 184. In suing a railroad company for a labor debt under Comp. L. 1871, §§ 2393-2395; How. St. §§ 3423-3425, a declaration on the common counts in assumpsit, with mere allusions to the statute and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 185. Where a railroad contractor has assigned his contract to the superintendent of the company, and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt does not rest on Comp. L. 1871, §§ 2393-2395; How. St. §§ 3423-3425, but is at common law on a special contract, and the declaration must so aver the cause of action.—Bottomley v. Port Huron & N. W. R. Co., 44 Mich. 542.

¶ 186. A suit against a railroad corporation for a labor debt is brought to fix it with a liability resulting from its ownership of the road, and such a suit does not admit of the theory that defendant is merely an agent of the owner.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 187. Papers issued by a subcontractor to his laborers as tokens of their service are

not admissible as evidence against the company.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 188. Testimony that a director and the superintendent of construction for the railroad company told plaintiff, when the latter presented to him a bill of items for labor and material performed for and furnished to a contractor, that "he would try and have them paid, and thought possible some of them would be paid at that pay-day in December," does not tend to prove that the railroad owed its contractor, nor the amount, if any, of such indebtedness.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 189. To establish a cause of action, under How. St. §§ 3423-3425, against a railroad company, plaintiff must show that at the time he furnished the company with a bill of items, or at the pay-day next ensuing, there was an amount due from the company to the contractor, and the amount of such indebtedness, and, also, that the claims sought to be collected are not only undisputed but acknowledged to be due from the contractor or subcontractor.—Dudley v. Toledo, A. A. & N. M. Ry. Co., 65 Mich. 655.

¶ 190. Defendant insolvent railway company transferred its property and assets to another railway company and received bonds of the latter company in payment therefor. Some two years later complainant recovered a judgment against defendant in a suit for personal injuries. Execution was returned unsatisfied. Complainant filed a bill to invoke a labor lien on said transferred property under Act No. 110 of the Acts of 1899. Complainant did not show that said bonds were not the full value of the property transferred, nor did he show that the stockholders of defendant ever received anything either in cash or stock from said transferee railway. Held, complainant's bill was properly dismissed.—Kaiser v. Detroit & N. W. Ry. Co., 169 Mich. 254.

§ 32. Liens for personal injuries or wrongful death.

¶ 191. No right of lien obtains under Pub. Acts 1899, No. 110, § 2, How., 2nd Ed., § 13800, relating to liens after judgment, upon the property of railroad companies where negligence causing death or personal injuries to a person appears and giving priority to such liens over other judgments, executions or attachments except such as are issued in favor of persons having obtained judgments for personal work, except as expressly provided and to the extent prescribed by statute.—Marshall v. Wabash Ry. Co., 201 Mich. 167.

¶ 192. The statutory lien upon the assets of a corporation afforded by Pub. Acts 1899, No. 110, § 2, How., 2nd Ed., § 13800, providing that all claims arising out of the death or personal injuries to a person resulting from the negligence of a railroad company shall, after judgment is obtained, constitute a lien upon the assets and property of the company, prior to all other judgments, executions or attachments levied upon the property except such as may be issued in favor of persons performing personal work, does not attach until judgment is obtained.—Marshall v. Wabash Ry. Co., 201 Mich. 167.

¶ 193. A judgment against a railroad company for negligent injuries to a person is not a prior lien on the property of the company over an antedated mortgage under Pub. Acts 1899, No. 110, § 2, How. 2nd Ed., § 13800, relating to liens after judgment, upon the property of a railroad company, where a person is negligently injured, and giving priority to such liens over other judgments, executions or attachments except such as are issued in favor of persons having obtained judgments for personal work, although the act was passed prior to the date of the mortgage.—Marshall v. Wabash Ry. Co., 201 Mich. 167.

§ 33. Railroad mortgages and foreclosure thereof.

Purchaser at foreclosure as trustee for those furnishing the funds, see post ¶ 216.
Foreclosure purchaser as successor to franchises and privileges, see also Corporations § 89.
Inurement of after-acquired titles to benefit of mortgagee, see Estoppel ¶ 50.
Priority between mortgage on franchise and levy on it, see Executions ¶ 79.
Mortgagees as parties to street opening proceedings, see Highways ¶ 246.
General law as to mortgages, see Mortgages.
Provisions as to sale of road and franchises, see Comp. L. 1915, §§ 8424, 8428.
Provisions as to foreclosure of mortgages against railroads, see Comp. L. 1915, §§ 8271, 8438.

¶ 194. After-acquired property may be made the subject of a railroad mortgage.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

¶ 195. A delay of ten years in the taking of possession by a railroad company of land apparently conveyed by a foreclosed railroad mortgage and the master's deed issued pursuant to foreclosure of such mortgage, was not conclusive evidence that there was no intention to use such land for construction or equipment, and that therefore it was not within the terms of the mortgage.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

¶ 196. Neither the mortgagee nor the foreclosure purchaser of a railroad acquires

any lien upon, or title to, a side-track built by the company upon adjoining land under an agreement that it is to become the property of the owner of such land.—Spoon v. Chicago & W. M. R. Co., 86 Mich. 309.

¶ 197. Under How. St. § 3351 a foreclosure of a mortgage upon a railroad is valid if in accordance with the power of sale in such mortgage, although it does not follow the statute relating to the foreclosure of mortgages of real property.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494.

¶ 198. A stockholder's claim against a railroad corporation for services rendered in the construction of the road is not entitled to priority over a mortgage given with the approval of such stockholder prior to the rendition of the services.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494.

¶ 199. The rights of bondholders, stockholders, and creditors in a railroad company to the company property are entirely cut off by a mortgage foreclosure sale and they have no claim against a bondholder who purchases at the foreclosure.—Sullivan v. Appelbaum, 164 Mich. 432.

¶ 200. A railroad mortgage covering all present and "in the future to be acquired" property, all the railroad constructed and to be located and constructed, all lands and depot grounds, etc., purchased or to be purchased, all franchises and all property acquired and to be acquired and including all appurtenances and appendages to the railroad, etc., followed by a master's deed following the terms of the mortgage with sufficient accuracy, sufficiently described property adjacent to the main line and adapted to use by the company and acquired after the giving of the mortgage and involved in ejectment proceedings.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

¶ 201. In a suit to foreclose a trust mortgage of a railroad company, the note for a part of the purchase price of a number of bonds, given by the purchaser to his seller who had received the bonds in payment for construction work and who is also a party to the suit, cannot be impounded to pay the seller's debts due to laborers on the construction work who are not then parties to the proceedings.—Union Trust Co. v. Detroit & R. St. C. Ry., 127 Mich. 252.

¶ 202. In a suit to foreclose a trust mortgage of a railroad company, an owner of certain bonds, taken with full knowledge of their doubtful value, for a consideration much less than their face value, will be estopped to claim face value by previous statements of his as to the amount of his claim made to the receiver who has gone ahead and constructed the railroad while it was insolvent and the bonds worthless.—Union Trust Co. v. Detroit & R. St. C. Ry., 127 Mich. 252.

¶ 203. In a suit to foreclose a trust mortgage of a railroad company, an owner of certain bonds who took them with full knowledge of their doubtful value for a consideration much less than their face value is limited to a recovery of the amount of consideration expended.—Union Trust Co. v. Detroit & R. St. C. Ry., 127 Mich. 252.

¶ 204. Where a railroad company has mortgaged, before acquiring the title thereto, lands granted in aid thereof, it is afterwards estopped from setting up an after-acquired title against those who claim under the mortgagees.—Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805.

¶ 205. How. St. § 3351 authorizing railroad companies to execute mortgages with such power contained therein for the sale of the property mortgaged as shall, in the judgment of the board of directors, be found expedient, and providing that such power, and sale in accordance therewith, shall be valid, operates to except railroad mortgages from the general statute relating to the mode of foreclosure of real estate mortgages.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494.

¶ 205a. The purchaser of a railroad at a foreclosure sale acquired an interest in a contract for the joint operation with a telegraph company of the latter's telegraph line which was enforceable where the decree providing for the sale and transfer, as well as the deeds and bills of sale transferring the same, contemplated that the interest of the mortgagee, the receiver operating the railroad, and of the railroad company should pass to the purchaser, and in pursuance of the request of the purchasers the transfers were executed by the master in chancery, by the mortgagees, by the receiver and by the mortgagor.—Detroit, T. & I. R. Co. v. Western U. Tel. Co., 200 Mich. 2.

¶ 205b. The purchaser of a railroad at a foreclosure sale which goes into possession of the railroad property and begins to operate it with the indispensable aid of a telegraph system which the mortgagor constructed and was using under an agreement with the telegraph company elects to be bound by the contract.—Detroit, T. & I. R. Co. v. Western U. Tel. Co., 200 Mich. 2.

VII. CONSOLIDATION AND REORGANIZATION; SALES, LEASES AND TRAFFIC CONTRACTS.

§ 34. In general; consolidation of companies.

Reorganization of companies, see post § 35.

Mutuality of agreements for side tracks and shipments, see Contracts § 2.

Validity of exclusive traffic agreements between railroads, see also Contracts § 86.

Partial validity of traffic and operating contract, see Contracts § 94, ¶ 368.

Merger of agreement for running rights or use of terminals in later agreement, see also Contracts § 265, ¶ 1078.
Construction of side trackage agreement "during such time as the business is carried on," see Contracts ¶ 809.
Consideration for side trackage agreement, see Contracts ¶¶ 440, 441.
Consolidation of foreign and domestic corporations, see also Corporations § 206.
Effect of purchase of road as consolidation of corporations, see also Corporations § 205.
Estoppel of original company by deed as binding consolidated company which succeeds it, see Estoppel ¶ 21.
Provisions of constitution as to consolidations, see Const. art. XII, § 8.
Provisions as to consolidation of roads, see Comp. L. 1915, § 8283.

¶ 206. A certificate, purporting to show approval of a railroad consolidation, signed only by the railroad commissioner and by a person not a member of the board, the two describing themselves as chairman and secretary of the "board of railroad consolidation" (a term not used by the statute), is not evidence of the approval required by How. St. § 3344 as amended by Pub. Acts 1883, No. 174, art. 2, § 30, which provided for a board consisting of the attorney general, the commissioner of railroads, and the secretary of state.—Brown v. Dibble's Estate, 65 Mich. 520.

¶ 207. Under Pub. Acts 1901, No. 30, How. St., 2nd Ed., § 6684 et seq., providing for the purchase of one railroad by another, if they do not have the same terminal points and are noncompeting, one railroad may acquire a controlling interest in another railroad by the purchase of stock in the latter railroad and it is unnecessary that there be a prior acquisition of the physical property of the road.—Lisman v. Knickebocker Trust Co., 211 Fed. 413.

¶ 208. A consolidated railroad company takes, by consolidation under the statute, subject to the liabilities of the original companies.—Dewey v. Toledo, A. A. & N. M. R. Co., 91 Mich. 351.

¶ 209. A railroad company's liability for injuries from negligence attaches to a new company into which it is merged by consolidation (How. St. § 3344).—Batterson v. Chicago & G. T. Ry. Co., 53 Mich. 125.

¶ 210. The Act of February 13, 1855, changing the name of a certain railroad company to the Detroit & Milwaukee Railroad Company, and authorizing it, for the purpose of forming a continuous line, to acquire the franchises of another company, cannot be held to have been unconstitutionally adopted.—Attorney-General v. Joy, 55 Mich. 94.

¶ 211. The M. S. R. Co., organized under a special charter before the adoption of the present constitution, became by successive consolidations with connecting lines in neighboring states, part of the L. S. & M. S. R. Co., the last consolidation being under Pub. Acts 1855, No. 82, § 50 of which authorized the consolidation of continuous or connecting lines into a single corporation, and declared that the "new corporation" should possess all the powers, rights and franchises conferred upon the lines so consolidating, and should be subject to the restrictions and perform the duties imposed by their respective charters not inconsistent with said act, while section 52 provided that upon the election of the first board of directors of the corporation so created, the rights and interests of each of the corporations should be deemed to be transferred to and vested in such "new corporation," and that "such new corporation" should hold the same in the same manner as if the respective corporations had continued to retain the title and transact the business of such corporations. Held, that the original company had lost its special privileges under its charter, and became subject to the general law—the act of consolidation—which was subject to the constitutional reservation of the right to amend, alter or repeal charters.—Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, reversed on other grounds 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

§ 35. Reorganization.

Rates and charges upon reorganization, see post § 38.
Judgment denying right of state to compel railroad to reorganize under the general railroad law as conclusive of the validity of the railroad's special charter, see Former Adjudication ¶ 222.

¶ 212. After a receiver's sale of a railroad under order of court has been duly confirmed, a reorganization is authorized by How. St. § 3314.—Dester v. Ross, 85 Mich. 370.

¶ 213. The purpose of Acts 1859, No. 96, relating to the foreclosure of mortgages on the property of railroad corporations, and the reorganization of such corporations by the purchasers at the foreclosure sale, was not to allow the creation of new corporations, but to permit creditors of chartered corporations to enforce their demands by a sale and transfer of the franchises, and to provide a method whereby those franchises might be kept alive.—Detroit, G. H. & M. R. Co. v. Powers, 138 Fed. 264.

¶ 214. The organization by a railroad company's receiver of another company to build a connecting link in route; contract for construction; and for procuring right of way; when such is contrived as virtually a personal enterprise for his own profit and

advantage is a scheme in fraud of the statute authorizing the organization of railroad companies.—Chicago & G. T. R. Co. v. Miller, 91 Mich. 166.

¶ 215. A new railroad corporation which was created by the purchasers at foreclosure sale pursuant to the provisions of Pub. Acts 1873, No. 198, and which thus accepted the provisions of the act, was bound by existing laws regulating rates of fares upon railroads, and it was estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body.—Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310, affirming 130 Mich. 248.

¶ 216. Defendant was assigned by complainants certain stock and bonds of a railroad under an oral agreement by which defendant was to do all in his power to reorganize said railroad and bring about a settlement of its affairs. Held, under the evidence defendant was not thereby charged with a trust in favor of complainants for benefits received by him through purchasing said railroad at a foreclosure sale with funds supplied by third persons.—Sullivan v. Applebaum, 164 Mich. 432.

§ 36. Sale of railroad and rights and liabilities of purchaser.

Of foreclosure purchasers, see ante § 33.
Reorganization of railroad after sale, see ante § 35.
Lease of right of way or property, see post § 37.

¶ 217. A railroad which has neither station houses, side tracks, turn-tables, nor rolling stock fit for use, and had leased its rolling stock as long as it could do, is an "uncompleted" road the sale of which is authorized under How. St. § 3403, providing that any railroad company which has entered in good faith upon the building of its road and is unable to complete the construction thereof, may sell the whole, or any part of its road so impartially completed, together with the rights and franchises connected therewith, to any other railroad company not having the same terminal points, and not being a competing line, upon the consent, at a meeting duly called, of two-thirds of the stock of such company.—Young v. Toledo & S. H. R. Co., 76 Mich. 485.

¶ 218. The sale of an uncompleted railroad was valid under How. St. § 3403, where at the meeting at which such action was held, stockholders representing 675 shares of the 750 shares of the total stock of such company, were present and voted unanimously for the resolution authorizing the sale, and instructing the directors to consummate the same; and where such directors thereupon authorized the president and secretary to execute the necessary deeds and assignments, and such officers carried out such instructions, executing and delivering to the purchasing company the requisite deeds and assignments.—Young v. Toledo & S. H. R. Co., 76 Mich. 485.

¶ 219. How. St. § 3403, authorizing the absolute sale of a railroad, makes such sale subject to all the obligations and duties prescribed by the general railroad laws of the state, and the vendee cannot claim to be a bona fide purchaser as against the lien for taxes due.—Stevens Auditor General v. Lake George & M. R. R. Co., 82 Mich. 426.

¶ 220. A railroad company which acquires by purchase the property and franchises of another railroad is liable for its grantor's failure, when constructing a road across a highway, to restore such highway to its former state; and it is not relieved from this liability by the fact that the township did some work in order to make the highway passable at the crossing.—Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

¶ 221. Section 28 of the General Railroad Laws of 1873 (How. St. § 3342), providing that one railroad corporation may subscribe to the capital stock of any other company organized under the act, with the consent of the latter, and the Acts of 1869 (How. St. § 3413) and 1873 (How. St. § 3403), authorizing one railroad company to aid another having an unfinished road, and to make running arrangements, and, where their lines are connected, to enter into arrangements for their common benefit consistent with and calculated to promote the objects for which they were respectively created, do not authorize one railroad corporation to acquire the stock and franchises of another completed company, with the intention of exercising the franchises of the latter.—Mackintosh v. Flint & P. M. R. Co., 34 Fed. 582.

¶ 222. A guarantee by three creditors and outstanding bondholders of an agreement with the purchaser of the railway that it should be free from liens and encumbrances and that all debts and demands against the railway should be paid and to save the purchaser harmless cannot be enforced through subrogation by other creditors of the railway to enable them to collect their debts against the guarantors.—Randall v. Detroit & N. W. Ry., 134 Mich. 493.

§ 37. Leases of right of way or property.

Validity of lease of railroad land to shipper excluding right to ship over other lines, see Contracts § 86.
Resort to other contracts as aid in construing terminal leases, see Evidence ¶ 908.

¶ 223. A railroad company may lease part of its right of way or depot grounds to a manufacturing company the lease being

made subject to termination upon 60 days' notice.—Michigan Cent. R. Co. v. Bullard, 120 Mich. 416.

¶ 224. An agreement whereby one railroad pays a lump sum in cash for the permanent use of a few miles of track depots and appurtenances of another railroad constitutes the relationship of lessor and lessee and not that of tenants in common.—Michigan Cent. R. Co. v. Pere Marquette R. Co., 128 Mich. 333.

¶ 225. Where statutory authority has been given to a railroad company to lease its railroad it must be deemed that the legislature intended to authorize an effective instrument, having the characteristics and qualities of a lease.—Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58.

¶ 226. Plaintiff railroad leased its line to defendant, to take effect April 15, 1907. Defendant agreed to pay the taxes, but plaintiff agreed to reimburse defendant for the taxes of the year 1907 prior to April 15th. Held, that under section 6, Act No. 282, Pub. Acts 1905, the taxing year was the calendar year, and defendant was entitled to reimbursement only back to January 1, 1907, and not back to July 1, 1906.—Pere Marquette R. Co. v. Kalamazoo, L. S. & C. Ry. Co., 158 Mich. 40.

¶ 227. A provision in a lease made by and between a union depot company and several railroads, that "It is understood and agreed by the parties hereto that this lease, as to the property described in the last preceding clause, is and shall be subject to a right of way across and over the same for a railroad, to be constructed in the most convenient form for a double track, and to be built so as to enable all parties lessees of said station grounds to reach any passenger station which may be built for use of said lessees," is construed in the light of circumstances and the conduct of the parties to be not a reservation to the depot company but a covenant giving the right to the use of the contemplated double track to each of the parties to the lease without compensation other than that provided in the lease.—Detroit Union Railroad Depot & State Co. v. Fort St. Union Depot Co., 128 Mich. 184.

¶ 228. Under an agreement whereby one railroad pays a lump sum for the permanent use of a few miles and depot facilities of another road and agrees not to accept freight for shipment beyond the terminus of its own road, as it is then constructed or may thereafter be constructed, such restriction to be removed if its road is constructed east of a given point, the purchase of another road extending beyond the point in question is not a construction within the meaning of the contract and the restriction on the receipt of freight is not thereby removed.—Michigan Cent. R. Co. v. Pere Marquette R. Co., 128 Mich. 333.

¶ 229. A lease of terminal rights by a union depot company to a railroad company, certain of them being clearly exclusive, gives a mere right to use other parts devoted to an elevator and its tracks which was covered by a reservation to the lessor of "the land, and like reservation to the lessor union depot company of land or space for ferry tracks and a wharf and necessary future tracks and connections coupled with a grant of the exclusive use of a portion of such wharf implies a right remaining in the lessor to admit other lessees to a use of such terminals according to the nature and purpose of the lessor's organization."—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 230. Exclusive right to a lessee of a union depot company to transport cars and provide ferries for them from a ferry slip, made on ground belonging to the lessor pursuant to a covenant to build certain structures and wharves, is not given by a lease of the ground with certain reservations among which was the right to use tracks leading to the slip; since the reserved right to use the tracks in common would be valueless if the slip also was not to be commonly used.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 231. A union depot company's lease of the entire right of way of a connecting railway to the station is limited by a subsequent clause, "the said right of way is leased with the understanding and reservation" that tracks may be provided for other roads desiring to enter and that in such case the amount of rent payable shall be abated; and it cannot be contended that under such a lease the lessee takes title to the whole right of way for its full width and that other roads shall have only the right to run trains over the tracks to be laid.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 232. An agreement among lessees from a union depot company of distinct and several rights and parcels for the unification of them into terminal yards and a connecting railway, that the portions contributed by each should be valued and that the differences in the values of the contributory parts should be paid, that the property should be improved and additional tracks laid, and that "thereafter during the continuance of this lease" they should be jointly used, and containing no provisions for repayment of the equalizing payment, is not cut down to a ten-year arrangement by reason of the fact that the agreement also provided for the formation of a "Union Terminal Association" of which the three lessees were the component members, which association should continue ten years and should have the "management of the business" of such

unified yards and connecting railway.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 233. A lease by a union depot company to one of the railroads using its terminals of the common use of all the tracks, wharves, etc., reserved in an earlier lease to another of the railroads was held not to cover a slip little or none of which was built on the land covered by the earlier lease and which was built by the lessor for and at the expense of the earlier lessee.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 234. Accounting for the value of the use of a ferry slip during a period when one of the parties to a union terminal agreement was permitted to use it by another of such parties, which owned the leasehold of such slip, was held proper in a suit to adjust the several rights under the leases which they held from a union depot company and in which suit the slip was adjudged not to be one of the properties which the accountable party had a right under such leases to use.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 235. Rights of a railroad leasing terminal ways and facilities from a union depot company are not measured or affected by a subsequent lease to another company.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 236. Where a railroad constructed by a corporation incorporated under the general railroad law is leased to a chartered company, the lessee in operating the road is bound not by its charter but by the general law.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 237. A chartered railroad company is responsible for the performance of the duties imposed by its charter, even though it has leased its road.—Attorney-General v. Erie & K. R. Co., 55 Mich. 15.

¶ 238. A railroad company which has leased its entire railroad and equipment and franchises is not responsible for damages done by the lessee in the maintenance and repair of the road after the lease has become effective.—Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58.

¶ 239. Where a railroad company has leased its railroad and equipment and franchises to a nonresident corporation for a term of 99 years the lessor is relieved from all liability for acts done by the lessee, and the lessee takes the road subject to all the duties and obligations, and with all the rights and privileges prescribed by the general railroad laws of the state.—Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58.

VIII. OPERATION OF ROAD.

A. IN GENERAL; DUTY OF SERVICE; REGULATIONS.

§ 38. In general.

Care and diligence in operation of road, see post VIII, B.

Duty and liability towards trespassers, see post § 46.

Duty and liability towards licensees, see post § 49.

Applicability of existing rates to extensions and additions of lines, see Carriers § 4.

Duty to receive and interchange traffic with connecting lines, see Carriers §§ 6, 7.

Charter provisions affecting liability of Michigan Central Railroad as carrier or warehouseman, see generally Carriers.

What constitutes a "highway" under statute imposing liability for injury caused by failure to restore crossing to proper condition, see Highways ¶ 10.

Validity of preliminary injunction preventing operation of railroad except upon specified conditions, see Injunctions ¶ 433.

Res adjudicata effect of a judgment rendered upon review of a decision of the railroad commission fixing rates, see Former Adjudication ¶ 448.

Operation of crane in unloading cars as constituting public nuisance, see Nuisances ¶ 36.

Basis of capital invested to fix railroad rates, see Public Service, § 7.

General provisions regulating the business and operation of railroad companies, see Comp. L. 1915, §§ 8334-8448.

¶ 240. A railroad company is precluded from substituting another in its place to perform its obligations to the state and public in the absence of statutory authority.—Ackerman v. Cincinnati, S. & M. R. Co., 142 Mich. 58.

¶ 241. The statement in the articles of association of a railroad company formed "for the purpose of constructing, operating and maintaining a railroad, etc.," that its road shall be operated as a transfer road, and that no discrimination shall be made in favor of or against any other railroad, and that uniform rates for the same service shall be charged either to persons or railroad companies, does not exclude it from the carriage of passengers as well as freight.—Bay City Belt-Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 241a. A railroad company is not obliged to build walks in the rural hamlets along its line at all points where any considerable number of persons may find it convenient to establish a footpath across its grounds.—O'Neil v. Duluth, S. S. & A. R. Co., 101 Mich. 437.

¶ 242. Where a franchise granted by a township relating to the charge to be made

by an interurban railroad was clear and unambiguous and provided for a rate of 1½ cents per mile from any point within the township to any point within a city therein and from any point within the city to any point within the township, and this construction of the franchise had been given by the various operating and owning companies during a period of 12 years, held that the operating company was operating the interurban railroad under such franchise and the mere fact that the grantee of the franchise constructed the road only to a particular point in the city, and not to the interurban station, was immaterial and did not warrant the collection of a city 5 cent fare for the ride between such point and the interurban station over tracks of a street railroad under a city franchise, to the rights under which the operating company as lessee had succeeded.—Township of Sandstone v. Michigan Ry. Co., 198 Mich. 234.

¶ 243. A corporation organized under Railway Act § 2 (Comp. L. 1897, § 6224), which provides that upon foreclosure sale of a railroad the purchaser may organize a corporation which "shall have the same rights, powers and privileges" as the original company and shall be subject to all the provisions of the Railway Act, is subject to the amendment of 1889 (Comp. L. 1897, § 6234, ¶ 9), reducing the fare to 2½ cents per mile, though at the time the mortgage was made the only limitation upon the rate was that it must not exceed 3 cents per mile.—Commissioner of Railroads v. Grand Rapids & I. R. Co., 130 Mich. 248, aff'd in 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

¶ 244. The right of the Michigan Central Railroad to fix its own rates (Laws 1846, No. 42, § 15) has not been lost by surrender, as Laws 1848, No. 197, authorizing the railroad to build and operate a road to Chicago did not operate to dissolve the corporation and create a different company. The enlargement of the powers of a corporation cannot be said to determine its existence.—Pingree v. Michigan Cent. R. Co., 118 Mich. 314.

Construction of statutes rendering railroad companies liable for injuries to persons or property occasioned by the running of trains, see note, 10 N. C. C. A. 700-716.

§ 39. Private tracks and operations by private persons.

Construction and maintenance of private tracks and switch connections, see ante § 18.

¶ 245. A railroad company, when backing its cars on a private track laid by its owners by permission of the city across a public street, at the owner's request and for his convenience, is not engaged in the performance of its own business under its charter, but is employed in a special and temporary service, differing in no legal sense from what might have been rendered by men or horses pushing or drawing cars for the same person on his own premises.—McWilliams v. Detroit Central Mills, 31 Mich. 274.

¶ 246. Where a corporation has for over twenty years maintained across its property a road used by the public as a connecting link in a road between two towns, and has laid railroad tracks across said road upon its property, and permitted the public to use the crossing, which it has planked, without any dissent, it is estopped from denying that, so far as said crossing is concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and is bound to use due care and diligence in running its trains over said crossing to prevent injury to persons lawfully on the road.—Adams v. Iron Cliffs Co., 78 Mich. 271.

¶ 247. If a car, on a switch on private land at an ascending grade, is set in motion, for a legitimate purpose, by the landowner while there are cars standing on the lower grade, the landowner is not bound to indulge assumptions as to who owns the loads on these cars, or the purpose of their being there, or that there are persons behind them unseen by him.—McCullam v. Davidson, 95 Mich. 382.

¶ 248. A railroad company which has been accustomed to place cars intended for a factory upon an adjoining side track, and to permit the employees of the factory to uncouple and move them as needed, is not responsible for the act of such employees in uncoupling cars that are not to be removed at once, so as to render it liable in damages to one injured by the unexpected shunting of such cars through the concussion of a train.—Jakoboski v. Grand Rapids & I. R. Co., 106 Mich. 440.

B. CARE AND NEGLIGENCE; TOWARDS LICENSEES AND TRESPASSERS.

§ 40. Duty, care and liability in general.

Duty and liability towards trespassers, see post § 46.
Duty and liability towards licensees, see post § 49.
Proximate cause of injury, see post § 51.
Wilful acts and gross negligence of defendant, see post § 54.
Presumptions and burden of proof as to negligence, see post § 57.
Evidence as to negligence of railroad, see post §§ 58, 59.
Jury questions as to negligence, see post § 63.
Instructions as to duty and care of railroad, see post § 66.
Liability for injuries from collisions and derailments, see post § 67.

Liability for injuries at highway crossings, see post § 69.
Liability for injuries beside or near tracks, see post § 113.
Liability for injuries to animals at large, see post § 117.
In respect to fences and cattle guards, see post § 118.
Liability for injuries from fires, see post § 133.
Who are passengers entitled to care as such, see Carriers §§ 110-113.
Duty and liability of railroads towards employees, see Master and Servant, III.
Liability of municipality for defects in highway within railroad right-of-way, see Highways ¶ 978.
Nonliability of factory owner for injury to railroad employee injured on railroad tracks in premises, see Independent Contractors ¶ 3.
Liability of consignor of lumber for injury to brakemen from shifting of the lumber, see Negligence ¶ 16.
General laws as to negligence, see Negligence.

¶ 249. As the act of running the cars over the road is a lawful act, railroad companies cannot be held liable for accidental injuries occasioned thereby, unless the running was without proper care, or in an unreasonable manner.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 250. A connecting carrier company from which intestate servant's master received the car insecurely loaded, so that the servant was killed by the shifting of the load during switching in the master's yards, is not liable under the rule of Fowles v. Briggs, 116 Mich. 425, where it occurred after a fellow servant's faulty inspection or his failure to inspect and discover the danger and intercept the car before it passed into the switching yards.—Lellis v. Michigan Cent. R. Co., 124 Mich. 37.

¶ 251. Plaintiff, a teamster in the employ of a trucking company, was injured by the fall of a truss while being unloaded from a car due to a chain slipping while being hoisted by a derrick. The chain was furnished by the defendant railroad company and was attached by an employee of the consignee. Held, that defendant was not liable.—Shadduck v. Grand Rapids & I. Ry. Co., 179 Mich. 433.

¶ 252. It is the duty of those operating trains to be watchful and to guard against possible accidents of all kinds without special reference to any particular persons or things, to observe their environment, to watch where they are going and to maintain such a lookout at all times as is reasonably required by the circumstances, especially where there is a risk of access by people to the tracks.—Huggett v. Erb, 182 Mich. 524.

¶ 253. Where one employed with others by a third person to load logs on the cars of the defendant railway company was killed while riding on a freight train of a logging road by a log falling from a car which had been loaded by the deceased and his fellow-servants, and causing the wreck of the caboose in which he was riding, there can be no recovery where the loaded car was inspected and approved by an experienced employee of the defendant before being taken into the train.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331.

¶ 254. Where a railroad company is required by statute to fence its road with a fence "sufficient to prevent cattle or other animals from getting on such railroad," the requirement includes the protection of children.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390; Champlin, J., concurring in the result.

¶ 255. It is not the duty of a railroad company to place fences or screens along its tracks in its station grounds for the purpose of preventing the frightening of horses standing there by the approach of trains.—Flagg v. Chicago, D. & C. G. T. R. Co., 96 Mich. 30.

Liability of railroad company for injuries caused by suction of train, see note, 7 N. C. C. A. 707-712; see note, 12 N. C. C. A. 603-609.
Liability of railroad company for injuries to licensees and trespassers on bridges, see note, 8 N. C. C. A. 146-159.
Liability for injury to vehicle stalled on railroad track, see note, 15 N. C. C. A. 183-194.
Liability of railroad company for loss by fire caused by delaying fire department by obstruction of crossing, see note, 15 N. C. C. A. 1049-1055.
Liability of railroad company for injuries caused by mail bag thrown from car by government clerk, see note, 16 N. C. C. A. 875-878.

§ 41. Safety of appliances and equipment.

Injuries to railroad employees, see Master and Servant, III, A.
Provisions as to safety appliances at crossings, see Comp. L. 1915, §§ 8143-8146.
Provisions as to automatic couplers on cars, see Comp. L. 1915, §§ 8353-8355.
Equipment of passenger trains with air-brakes, see Comp. L. 1915, § 8290.
Provisions as to blocking switches, see Comp. L. 1915, § 8326.

¶ 256. Under Comp. L. 1897, § 5511, which requires safety couplers "upon each end of every freight car," and section 5512 providing a penalty for refusal to comply with such requirements, such couplers are not required on the tenders of locomotives.—Blanchard v. Detroit & M. Ry. Co., 139 Mich. 694.

¶ 257. A railroad company which places cars on a private siding to be loaded by an-

other party is liable to an employee of the other party for injuries sustained through defective brakes.—Sheltrawn v. Michigan Cent. R. Co., 128 Mich. 669.

Liability of railroad companies for injuries to employees of consignor or consignees caused by defective appliances, see note, 7 N. C. C. A. 1008-1019.

§ 42. Makeup and operation of trains or cars.

Management and speed of trains at or near crossings, see post § 73.

Duty of railroad towards servant in respect to appliances and equipment, see Master and Servant § 49.

¶ 258. Section 6290, Comp. L. 1897, providing that in forming a passenger train upon any railroad operated in this state, the engine shall be placed at the head of the train, and no baggage or freight car shall be placed in the rear of any passenger car, applies to the protection of travelers on the highways as well as to passengers.—Morgan v. Pere Marquette R. Co., 162 Mich. 573.

¶ 259. It is negligence toward a mail messenger for a railroad company to run a train between a station and a train opposite it, engaged in discharging and taking on passengers, express, and mail.—Tubbs v. Michigan Cent. R. Co., 107 Mich. 108.

¶ 260. A railroad company is liable for the negligent kicking of cars with unnecessary speed and force whereby servants of the consignee of freight in the car in the line of their duty of unloading and known by the carrier's servants to be there are thrown over the end of the car in front of it and run over, they being in the exercise of due care.—Dolson v. Lake Shore & M. S. R. Co., 128 Mich. 444.

Injuries caused by the making of flying switches or the kicking of cars, see note, 4 N. C. C. A. 627-663.

§ 43. Speed and stopping of trains.

Management and speed of trains at crossings, see post § 73.

Excessive speed as proximate cause of injury at crossings, see post § 77.

Admissibility of evidence as to speed of trains at crossings, see post § 87.

Power of cities to regulate speed of trains within their limits, see Comp. L. 1915, § 3026.

Provisions as to stopping trains at crossings, see Comp. L. 1915, § 8303.

¶ 261. It is negligence not to slacken the speed of a train so that it can be stopped if necessary, if the engineer has seen an object on the track a long way off, and cannot tell what it is.—Keyser v. Chicago & G. T. R. Co., 56 Mich. 559.

¶ 262. An engineer is not required to heed a signal to stop his train, given by a stranger, when no danger is in sight or may be reasonably apprehended.—Blair v. Grand Rapids & I. R. Co., 60 Mich. 124.

¶ 263. A railroad engineer is bound to slow down or stop his train if possible where he finds that persons on the track are apparently unaware of the danger of being run over, and do not hear or give attention to the warning signals.—Bouwmeester v. Grand Rapids & I. R. Co., 63 Mich. 557.

¶ 264. There is no law requiring a passenger express train to run at a rate of speed not exceeding fifteen miles per hour past stations.—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

¶ 265. The engineer of a steam railroad train is not called upon to check the speed of his train until he sees that a pedestrian on the track gives no attention to his signals, and where such pedestrian makes a movement indicating that he means to step off in time, he has the right to believe that his signals have been heard and that the pedestrian will get out of danger.—Starboard v. Detroit, G. H. & M. R. Co., 122 Mich. 23.

§ 44. Lookouts on trains, cars or locomotives.

On trains approaching crossings, see post § 76.

¶ 266. The lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual.—Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 267. The backing of a train across a public street crossing, without signals or lookout, was negligence toward one who had just come upon the street after walking from his work as a section hand along the tracks.—Smith v. Pere Marquette R. Co., 136 Mich. 224.

¶ 268. At places along a railroad right-of-way where there is reason to anticipate that persons, including children, may be upon the track, as in cities and towns, a proper lookout must be maintained with that degree of care which a person of ordinary prudence and caution, having in mind both the safety of the train with its passengers and persons ahead likely to be injured by it, would commonly exercise under like circumstances, according to the probability of danger at the portion of the track being traversed.—Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 313.

¶ 269. The general rule applicable to all conditions is that a lookout shall everywhere be maintained with that degree of care which a person of ordinary prudence and caution, having in mind both the safety of the train, or engine, and those it carries, as well as persons likely to be upon the track and in-

jured by it, would commonly exercise according to the circumstances and probabilities of danger at the portion of the track then being passed over.—Wexel v. Grand Rapids & I. Ry. Co., 190 Mich. 469.

Duty of railroad company as to lookout and signals on approaching private or farm crossing, see note, 16 N. C. C. A. 983-1007.

§ 45. Bells, whistles, lights or other warnings or signals.

Gates, flagmen or signals at crossings, see post § 75.
Gross negligence of railroad, see post § 54.
Jury questions as to signals and warnings, see post § 62.
Trains or cars approaching crossings, see post § 76.
Provisions as to automatic bell signals at crossings, see Comp. L. 1915, §§ 8389-8393.
Provisions as to flagmen and gates at crossings, see Comp. L. 1915, §§ 3026, 8143, 8291-8298.
Provisions as to signal boards at crossings, see Comp. L. 1915, § 8302.
Provisions as to sounding whistles at crossings, see Comp. L. 1915, § 8302.
Provisions as to headlights on locomotives, see Comp. L. 1915, §§ 8378-8380.

¶ 270. A failure to give warning by bell and whistle of a railroad train before reaching a highway crossing may constitute negligence towards one injured by reason thereof, while lawfully using a private crossing at a distance from the highway crossing.—Sanborn v. Detroit, B. C. & A. R. Co., 91 Mich. 538.

¶ 271. One who is permitted by a railroad company to construct and use a private crossing, where signals have not been given, cannot claim, when injured by a train while crossing, that omission to give warning by bell and whistle at such crossing was negligence.—Sanborn v. Detroit, B. C. & A. R. Co., 91 Mich. 538.

¶ 272. Negligence cannot be imputed to a flagman at a railroad crossing who sees an approaching hand-car and a pedestrian walking near the track, and who hears the shouts of warning given by the crew operating the hand-car, as such flagman is justified in thinking that the pedestrian knows of the approach of the hand-car and needs no warning, even though the pedestrian abruptly turns into the path of the car and is injured because of being deaf.—Piskorowski v. Detroit, G. H. & M. Ry. Co., 121 Mich. 498.

¶ 273. Where the servants of a railroad were required to give a warning to the men in and about cars before moving such cars a failure to give the customary warning was a failure to discharge their duty and therefore negligence.—Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194.

¶ 274. A railroad company is responsible for the acts of its trainmen, and therefore liable for injuries sustained by the employee of a lumber company where a train into which he was loading lumber was moved without the warning required by the company.—Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194.

¶ 275. Where a workman is killed by a train running upon a spur track into a sugar factory, the fact that he is informed that the train will soon enter the building, is not a warning that it is actually approaching.—Shall v. Detroit & M. Ry. Co., 152 Mich. 463.

¶ 276. A conductor, before backing his train upon a spur into a sugar factory in process of being torn down, was accustomed to stop the train outside the factory and give a warning to the men inside. On the occasion in question, plaintiff's intestate was working between two cars in the building. The train was not stopped outside, no warning was given, and plaintiff's intestate was killed. Held, the intestate did not assume the risk.—Shall v. Detroit & M. Ry. Co., 152 Mich. 463.

¶ 277. In the absence of evidence tending to establish a custom of a railway company to send a man ahead to give warning of the movement of cars on the siding of a manufacturing company, a servant of the latter company, who relies solely on a breach of such alleged custom, cannot recover for injuries by being struck by a moving train.—Fogarty v. Michigan Cent. R. Co., 180 Mich. 422.

¶ 278. While the statute does not impose upon an interurban railway the positive duty to give signals at highways or other crossings, it is nevertheless bound to operate its cars with reference to known conditions, and it would be a reckless act if it ran a car over its road in the night at a high rate of speed, displaying no light and giving no signals.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

¶ 279. A factory employee working on a private coal trestle beneath a coal car unloading it in a customary manner is not bound to notify a switching crew of his position, but may rely on a known custom, as well as a rule of the railroad company, requiring the giving of notice before the moving of cars on private sidings, to men working about them.—Wells v. Grand Rapids & I. Ry. Co., 184 Mich. 289.

¶ 280. Pub. Acts 1913, No. 77, § 2, providing that other provisions of the act requiring that locomotives shall be equipped with lights of a certain character shall not be deemed violated by the continuation of the operation of the locomotive to its destination where the headlight becomes defective while being used in transportation,

is penal in character, and, while the operation of the locomotive without a headlight under certain circumstances would relieve the railroad company of the penalty provided in the act, such operation might still be highly negligent on the part of the railroad company.—Salabrin v. Ann Arbor R. Co., 194 Mich. 458.

Liability for injuries inflicted by car or train not equipped with electric headlight as required by statute or ordinance, see note, 6 N. C. C. A. 1082-1041.

§ 46. Trespassers and duty and liability towards them.

See also post ¶ 450.
Licensees and duty and liability towards them, see post § 49.
Duty and liability in respect to trespassing horses, see post § 117.
General law as to trespass, see Trespass.
Persons on wrong trains as trespassers, see also Carriers, IV, D.
Injuries from wires or electricity to trespasser, see Electricity § 6, ¶ 18.
Provisions as to trespassing on railroad right-of-way, see Pub. Acts 1917, No. 245.

¶ 281. It is impracticable to keep off trespassers from an open railway track, and all who go upon it do so on their own risk of such dangers as are incident directly to their putting it to such use.—Sturgis v. Detroit, G. H. & M. R. Co., 72 Mich. 619.

¶ 282. One who goes upon a railroad right-of-way, upon which are signs warning those who are not employees to keep off, is a trespasser and not a licensee, although the right-of-way has been used for years as a thoroughfare to the knowledge of the company.—Newell v. Detroit, G. H. & M. Ry. Co., 187 Mich. 697.

¶ 283. One who, while walking along a railroad's right-of-way, comes upon a highway crossing is not traveling along the highway or using it in the ordinary manner; he was a trespasser when he entered upon the right-of-way, and continued such, and the company owed him no duty unless aware of his presence, and able, by the exercise of care, to avoid injuring him.—Kelley v. Michigan Cent. R. Co., 65 Mich. 186.

¶ 284. The fact that plaintiff, a yardmaster of another railroad company, was permitted by defendant company to visit its yard for the purpose of ascertaining whether there were cars there for his road, is no evidence that he was invited to facilitate his examination by riding on the side ladders of defendant's trains, and, in assuming such a position without invitation, he became a trespasser, and is precluded from recovering for injuries sustained, while so riding, by being struck by an arm of a switch alleged to have been placed too near the track.—Grunst v. Chicago & W. M. R. Co., 109 Mich. 342.

¶ 285. Negligence cannot be alleged against a railroad company for not keeping up its fences, where plaintiff himself, at the time of the resulting injury, was using the gap as a passageway for his own convenience in hauling railroad ties. And it is immaterial that the gap was there before.—Clark v. Chicago & W. M. R. Co., 62 Mich. 358.

¶ 286. A railroad company is not liable for injuries to a trespasser or bare licensee resulting from his falling over a semaphore wire while crossing the right-of-way of the company in its station grounds which had been unfenced for many years and frequented by persons crossing.—Clark v. Michigan Cent. R. Co., 113 Mich. 24.

¶ 287. A railroad shop employee who walks along a railroad track upon his way to work at an early hour in the morning and passes over four street crossings, at each of which are located guards, and is injured within the yard limits is not an implied licensee, although such track has been in constant use by defendant's shop employees for years, but is a trespasser.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 288. A railway company owes to a trespasser riding on its train, no duty except that of refraining from wilfully or wantonly injuring him.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331.

¶ 289. A railroad company which puts up signs warning people to keep off its tracks owes no greater duty to a trespasser of mature years upon its tracks than to use reasonable care not to injure him, although no lookout or crew or watchman is maintained, and although people are accustomed to travel on its tracks, and such public use is known to the company.—Newell v. Detroit, G. H. & M. Ry. Co., 187 Mich. 697.

¶ 290. A railroad company owes no greater duty to a trespassing employee walking on its tracks in its yard limits than not to wantonly or wilfully injure him.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 291. A railroad company owes no duty to a trespassing employee who is injured at a point off a highway upon the railroad track to give statutory signals.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 292. The fact that there are no warning signs posted from point to point at street crossings on a railroad track ordering the public to keep off, and no light is placed on a backing engine is immaterial where a trespassing employee passes over guards at four different street crossings in switch yards on his way to his work at defendant's shops at an early hour in the morning.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 293. A motorman discharges his legal duty toward trespassers upon a fenced track, if he sounds his gong or blows his whistle when he sees them, and takes all care possible to stop his car when he discovers that they are not aware of his approach.—Wade v. Detroit, Y., A. A. & J. Ry., 151 Mich. 684.

Liability of railroad company to person traveling on illegal free pass, see note, 14 N. C. C. A. 483-490.
Liability of railroad company for injuries to licensees and trespassers on bridges, see note, 8 N. C. C. A. 146-159.
Liability for injuries to persons asleep or lying or sitting on railroad tracks, see note, 4 N. C. C. A. 741-754.
Invitation or permission by brakeman to pedestrian to climb over cars obstructing crossing, see note, 2 N. C. C. A. 338-345.

§ 47. ——Children on tracks or trains.

Contributory negligence of children on tracks or trains, see post § 53.
Liability of lessee of railroad premises for injury to trespassing children, see Negligence § 8.

¶ 294. Boys riding free upon a freight train, by the permission, express or implied, of the employees in charge, cannot be considered trespassers so as to prevent a recovery against the company for their death.—Ecliff v. Wabash, St. L. & P. R. Co., 64 Mich. 196.

¶ 295. An eight-year-old boy, trespassing upon the premises of a railroad company, got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started that moment and the tender passed over his leg. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. Held, that the railway company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury.—Chicago & N. W. R. Co. v. Smith, 46 Mich. 504.

¶ 296. The company is not liable for injury to young boy resulting from his following advice of employee in charge of gravel train—with whom and by whose invitation he has been sitting beside the track—to get upon a moving train that is to pass the boy's house, to which he has expressed a desire to return; such advice being outside the scope of such employee's service.—Keating v. Michigan Cent. R. Co., 97 Mich. 154.

¶ 297. Where a seven-year-old boy trespasses on a railroad right-of-way there is no liability on the part of the railroad company unless guilty of gross negligence.—Trudell v. Grand Trunk R. Co., 126 Mich. 73.

¶ 298. Knowledge that children were in the habit of playing on or near its tracks would not of itself make the railroad company liable to a child playing there on a sidetrack full of cars liable to be moved at any time.—Katzinski v. Grand Trunk Ry. Co., 141 Mich. 75.

¶ 299. A railroad company is under no duty to station an employee at the point where a street abuts against its side tracks in order to keep off children playing there as trespassers; and the posting of a warning notice to trespassers is all that could be required, if even that.—Katzinski v. Grand Trunk Ry. Co., 141 Mich. 75.

¶ 300. A railroad company is not liable to a child of less than seven years of age playing in its yards under a car or upon it, because of the act of a switching crew in running in and moving that car without any knowledge or reason to know that the child was there playing.—Hamilton v. Detroit, G. H. & M. Ry. Co., 142 Mich. 56.

¶ 301. Since a railroad company is not required to fence its tracks within yard limits, the failure to maintain a fence formerly there is not negligence toward a five-year-old boy who went upon the tracks from an adjacent street across the line of the former fence—Burtram v. Michigan Cent. R. Co., 148 Mich. 166.

¶ 302. A boy of eight, who was riding on a flat car of defendant company without its license or permission, in attempting to jump off the car, fell under the wheels and was killed. Held, that no recovery could be had for his death.—Seeley v. Chicago, D. & C. G. T. Junct. Ry. Co., 157 Mich. 688.

¶ 303. A child too young to appreciate danger in crossing railroad tracks cannot be held as a wilful trespasser in crossing railroad tracks at the time for the passage of a regular train so as to preclude recovery for the negligence of the railroad company.—Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 313.

¶ 304. The erection of signboards forbidding trespassing on a railway right-of-way in a station yard, will not relieve a railway company from liability for injuries sustained by a child non sui juris, as a result of the negligence of those in charge of the train at a point where people of all classes had for years been suffered by the company to use the tracks as a thoroughfare.—Huggett v. Erb, 182 Mich. 524.

Liability of railroad company for injury to child stealing ride, see note, 6 N. C. C. A. 1077-1084.

§ 48. ——Trespassers ejected from trains.

Place for ejection of trespasser on train, see also Carriers ¶ 395.

¶ 305. A railroad company is not liable for injuries to a trespasser ejected from a train by a brakeman who had no authority to eject him.—Randall v. Chicago & G. T. R. Co., 113 Mich. 115; Hartigan v. Michigan Cent. R. Co., 113 Mich. 122.

¶ 306. A brakeman on a freight train has no implied authority to eject trespassers.—Randall v. Chicago & G. T. R. Co., 113 Mich. 115.

¶ 307. The fact that the rules of a railroad company prohibit the carrying of passengers upon freight trains, and that brakemen are required to familiarize themselves with the rules of the company, does not establish the authority of a brakeman upon such a train to eject one who boards the same for the purpose of taking passage thereon, where the rules further provide that brakemen shall be under the orders of the conductor.—Randall v. Chicago & G. T. R. Co., 113 Mich. 115.

¶ 308. A brakeman acts within the scope of his authority in ordering a boy to get off a moving freight train, where he is riding on same unlawfully.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 309. Where the rules of a railroad provide that persons other than passengers must not be allowed to ride on freight trains, and that all employees must assist in enforcing the rules, they impliedly authorize a brakeman to order off a moving train boys who are illegally riding thereon.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

§ 49. Licensees and duty and liability towards them.

Trespassers and duty and liability towards them, see ante § 46.

Liability for injury on bridge kept up jointly by city and railroad over tracks, see Bridges ¶ 9a.

Liability of carrier to person attending on or escorting passengers, see Carriers § 153.

Release by person permitted to use motor car on tracks as bar to action for his death in collision, see Death by Wrongful Act § 8.

Liabilities of drivers towards each other in driveways at stations, see also Highways §§ 420, 421.

[Note. A workman not a servant of the railroad company, while engaged in loading or unloading cars or in doing other work in cars or near them, stands towards the railroad company as a licensee in all ordinary cases. It is not practicable to collate all such cases under one section or group, since the rules which apply are the same in general as the rules towards other licensees. Accordingly the cases will be found throughout this subdivision (VIII, B) arranged under sections indicative of the duty and the corresponding neglect.]

¶ 310. One who walks upon a railroad right of way without any invitation, express or implied, by the company, is a mere licensee.—Newell v. Detroit, G. H. & M. Ry. Co., 187 Mich. 697.

¶ 311. Where to the knowledge of a railway company, its employees and other persons have for many years used its tracks as a footpath to and from their work, they will be regarded as licensees.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 312. An inference that a railway company consents to the use of its tracks as a footpath by its employees and others in going to and from their work arises where such custom has existed for many years with the knowledge of and without objection from the company.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 313. Where a railway company with the knowledge of the facts permits its right of way to be used for many years by its employees and others as a footpath to and from their work, it becomes the duty of the company to operate its trains with reasonable care so as to avoid injury to such licensees while using its tracks.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

¶ 314. It is the duty of those in charge of trains to be watchful and to guard against injury to persons at a point where they have been suffered for many years by a railroad company to make a thoroughfare of a track.—Huggett v. Erb, 182 Mich. 524.

¶ 315. A railroad company owes no greater duty to an adult licensee walking on a path along its tracks without invitation to provide against the danger of accident to him other than not to do him wilful injury where the path is in the same condition that it has always been in.—Newell v. Detroit, G. H. & M. Ry. Co., 187 Mich. 697.

¶ 316. A train crew's knowledge of a custom of the employees of a railway company, as well as other persons, of using a track as a pathway in going to and from their work, is chargeable to the company.—Risbridger v. Michigan Cent. R. Co., 188 Mich. 672.

Liability of railroad company for injuries to licensees and trespassers on bridges, see note, 8 N. C. C. A. 146-159.

Liability of railroad company for injuries to employees of other railroads, see note, 12 N. C. C. A. 1-35.

Injury to person on railroad premises for the purpose of visiting employee, see note, 12 N. C. C. A. 800-810.

Invitation or permission by brakeman to pedestrian to climb over cars obstruct-

ing crossing, see note, 2 N. C. C. A. 338-345.
Liability of railroad company to prospective passenger struck by train or car, see note, 16 N. C. C. A. 758-789.

§ 50. Injuries at farm and private crossings.
Construction and maintenance of private and farm crossings, see ante § 17.
Provisions as to fences and cattle guards at farm crossings, see Comp. L. 1915, §§ 8304, 8306.

¶ 317. Independently of contract or statute, a railroad company which, in pursuance of an agreement with a landowner made on obtaining the right of way, builds a farm-crossing over such way, thus impliedly inviting persons having a lawful right to enter and cross there, is liable for an injury from a defect in said crossing.—Stewart v. Cincinnati, W. & M. R. Co., 80 Mich. 166.

¶ 318. A railroad company which fails to remove a farm-crossing constructed for an adjoining landowner under an agreement binding only on the contracting parties, after its termination, and continues it as a crossing, is obligated to use ordinary care to see that the crossing is not dangerous, while so continued, to those who accept the invitation to use it for the purposes for which it is maintained.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

¶ 319. Where it is a railroad company's duty to exercise ordinary care in ascertaining the condition of a bridge over a farm-crossing, notice to the company of such condition is not a prerequisite to liability.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

¶ 320. The right of one who, on the company's implied invitation, crosses a bridge maintained by it over a farm-crossing, is not, in case of an injury from nonrepair, governed by the rules that regulate liability to a mere licensee.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

¶ 321. The fact that a crossing over which cars are negligently shunted is a private way is immaterial where it is commonly used with the knowledge of and without objection from the employees of the railroad, and where the public has been permitted by consent of the company to use it as a highway.—Schindler v. Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

¶ 322. Where another private corporation had assumed by contract all liability that would otherwise fall on a railroad company for injuries due to open gates at a crossing, and injury has occurred, it is immaterial whether the corporation's licensee or a trespasser left the gate open.—Sylvester v. Grand Rapids Bookcase Co., 169 Mich. 340.

¶ 323. In the operation of an electric interurban car through the country, a failure to sound the whistle upon the approach of a train to a private or farm crossing is not negligence.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

¶ 324. A private or farm crossing over defendant interurban railway's track was about fourteen rods north of the public highway crossing defendant's track. Held, a failure of defendant's motorman to sound the whistle for the public crossing on a northbound car constituted no breach of duty to a person killed by the car while crossing the private way.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

Duty of railroad company as to lookout and signals on approaching private or farm crossings, see note, 16 N. C. C. A. 983-1007.
Liability for injuries at private railroad crossing, see note, 6 N. C. C. A. 420-435.

§ 51. Proximate cause of injury.
Of injuries at highway crossings, see post § 77.
Of injuries beside or near tracks, see post § 115.
Jury questions as to proximate cause, see post § 62.
General law as to proximate cause, see Negligence, III.

¶ 325. Neglect to sound whistle on train's approaching a highway crossing was the proximate cause of injury to person on a private crossing three-quarters of a mile distant from the public crossing where he knew and relied on the duty to signal there.—Sanborn v. Detroit, B. C. and A. R. Co., 91 Mich. 538.

¶ 326. Where a young boy, who, upon the invitation of an employee in charge of a gravel train was upon railroad premises, was injured in consequence of his following such employee's advice to get upon a moving car, it was held that the proximate cause of the injury was not the invitation, but the advice.—Keating v. Michigan Cent. R. Co., 97 Mich. 154.

¶ 327. Where an eighteen-year-old boy, having been detected by the conductor of a passenger train upon which he was stealing a ride, and having been told by the conductor, on his refusal to pay fare, that he would be turned over to an officer at a somewhat distant station, jumped from the rapidly moving train and was killed, it was held that the conductor's threat was not the proximate cause of death, and that decedent was so contributorily negligent as to bar recovery.—Burden v. Lake Shore & M. S. R. Co., 104 Mich. 101.

¶ 328. The negligence of a railroad company in providing a car with a defective

brake to be loaded on an inclined private siding cannot be said not to be the proximate cause of injuries sustained by a private employee through being struck by logs jarred from the car by his stopping it from running away and doing considerable damage by placing a piece of timber under the wheels.—Sheltrawn v. Michigan Cent. R. Co., 128 Mich. 669.

¶ 329. A case is not presented involving two possible causes of an accident, one of which would charge defendant with negligence and the other would not where it seems that a person was struck by one of defendant's trains and the watch carried by him which was found had stopped about the time a train backed through the station, at which he was waiting, carrying two lights on the rear end, and two other trains carrying lighted head lights passed later without it being noticed that anything was struck.—Richardson v. Detroit & M. Ry. Co., 176 Mich. 413.

¶ 330. The failure of a switching crew before moving cars on a private coal trestle, to notify, as required by the rules of a railroad company as well as by custom, an employee of the owner of the trestle, who was killed while working in a customary manner beneath a coal car unloading it, was the proximate cause of his death, instead of the failure of his employer to provide the deceased with a safer and more convenient place in which to work.—Wells v. Grand Rapids & I. Ry. Co., 184 Mich. 289.

§ 52. Care and contributory negligence of injured person.

Of persons injured at highway crossings, see post § 78.
Of persons injured beside or near track, see post § 115.
Of owner of animals injured by trains, see post § 123.
Of persons suing for injury from fires, see post § 136.
Evidence as to contributory negligence, see post §§ 58, 61.
Weight and sufficiency of evidence, see post § 61.
Jury questions as to contributory negligence, see post § 64.
Directing verdict on ground of contributory negligence, see post § 65.
General law as to contributory negligence, see Negligence, IV.
Doctrine of imputed negligence, see Negligence § 30.

¶ 331. It is not contributory negligence to assume that it will be safe to go through an open passage left by a railroad company to give access to their depot, even though the track ends near by and is not protected by snubbing-posts.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

¶ 332. It may be assumed that a railway company will take the utmost care to protect persons from injury in crossing a passage left by it to give access to the depot, when the passage does not actually cross the railway track.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

¶ 333. A person driving his vehicle into the depot grounds of a railroad company, is, notwithstanding the care required of him, not bound to keep a constant lookout against dangers which could not be expected to exist so long as ordinary care is used by those whose action only can cause them.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

¶ 334. A laborer employed by a contractor who had been engaged by a railroad company to lay water-pipes along its right of way, in going home, after his day's work was done, made his way along the tracks to appoint where trains were constantly passing in both directions, and although there was enough room between the tracks he was run over by one train while apparently trying to avoid another. He was not employed upon the road, and might have gone home without going along the track; but his employment enabled him to know the locality, the risk and the need of watchfulness to avoid injury. Held, that no action would lie for his death.—Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410.

¶ 335. A stranger who voluntarily attempted to enter a car in a running train in order to give warning of a broken rail, his previous signal having been disregarded, is guilty of contributory negligence and cannot recover for an injury received in such attempt.—Blair v. Grand Rapids & I. R. Co., 60 Mich. 124.

¶ 336. One who without permission walks upon a railroad track is guilty of such contributory negligence as will preclude a recovery against the company for his death, unless it appears that the engineer of the train saw and understood the danger, and recklessly ran the train upon him without doing what he could to avoid the injury.—Bouwmeester v. Grand Rapids & I. R. Co., 67 Mich. 87.

¶ 337. Where, in an action for negligence causing death, it appears that the accident would not have happened had not the decedent voluntarily and unnecessarily occupied a place of great danger, or even then but for his own inattention, it must be held that his negligence contributed to his death, which would prevent recovery; so, where a switchman of one railroad was killed while standing close to the track of another.—Farmer v. Michigan Cent. R. Co., 99 Mich. 131.

¶ 338. One who is upon the station grounds of a railroad company for the pur-

pose of receiving mail and express from a train is on the same standing as a passenger with respect to the duty to anticipate car movements on intervening tracks while the train is at the station.—Tubbs v. Michigan Cent. R. Co., 107 Mich. 108.

¶ 339. Plaintiff who worked in a mill yard which, upon stated and uniformly recurring occasions, was given up to the business of moving cars on the tracks in such yard; could not recover damages from the railroad company for an injury received from a moving car in such yard; where it appears that on such occasions plaintiff was permitted and was directed to cease work until switching operations were completed, that on one such occasion, plaintiff, having notice that switching of cars in the yard was in progress, voluntarily occupied a position of danger apparent to one exercising ordinary care, and received the injury complained of; since negligence of the plaintiff was the cause of the accident.—Johnson v. Minneapolis, St. P. & S. S. M. Ry. Co., 140 Mich. 292.

¶ 340. A trespasser who acknowledges that he is such, in walking upon the track of a railroad is bound to keep a careful watch behind him.—Wade v. Detroit, Y., A. A. & J. Ry., 151 Mich. 684.

¶ 341. It is the duty of one travelling upon a highway to look and listen before attempting to cross the tracks of an interurban railroad.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

¶ 342. A sane adult, with no infirmities, who unnecessarily uses the track of a railroad as a pathway and continues to remain upon or walk along it until struck by a passing engine is, as a general rule, guilty of contributory negligence.—Wexel v. Grand Rapids & I. Ry. Co., 190 Mich. 469.

¶ 343. An engineer in charge of a backing switch engine on a stormy day in the winter has the right to assume that an adult person using the railroad track as a thoroughfare and walking outside the rails will exercise reasonable care for his own safety commensurate with existing conditions.—Wexel v. Grand Rapids & I. Ry. Co., 190 Mich. 469.

§ 53. ——Of children.

Age of injured person as bearing on contributory negligence, see also Negligence § 19.

¶ 344. A boy twelve years old, who lived in the immediate vicinity of railroad trains and who was accustomed to them, got upon a freight train without leave, and, while on the front of the engine, was killed by a collision in which no one else was hurt. Held, that his contributory negligence would prevent a recovery of damages for his death.—Ecliff v. W., St. L. & P. R. Co., 64 Mich. 196.

¶ 345. It is not per se contributory negligence for a nine-year-old boy to attempt to pass between freight cars three feet apart on a track laid along and upon a street, where the cars were not in motion and he saw no engine, and where the injury befell from the kicking of an unattended car onto the track.—Lehman v. Eureka Iron & Steel Works, 114 Mich. 260.

¶ 346. A child too young to appreciate danger in crossing railroad tracks cannot be held guilty of contributory negligence in attempting to cross at the time for passage of a regular train so as to preclude recovery for negligence of the railroad company.—Hoover v. D., G. H. & M. Ry. Co., 188 Mich. 313.

§ 54. Wilful acts and gross negligence; last clear chance.

In actions for injuries at crossings, see post § 84.

Weight and sufficiency of evidence, see post § 60.

Gross negligence and last clear chance rule generally, see Negligence § 26.

¶ 347. It is not gross negligence by a railroad company to fail to stop a train where a seven-year-old boy is standing on the track. The engineer has a right to assume that the boy will get off the track before the train reaches him.—Trudell v. Grand Trunk R. Co., 126 Mich. 73.

¶ 348. An engineer of a freight train which is proceeding at a slow rate on the north or west bound track of a double track railroad near a station while a passenger train is passing on the south track, and while the gates are down, has the right to assume that a person standing in the middle of the north track exercised reasonable precaution to observe whether a train was approaching along the track on which he stood and would seasonably step aside, and, until it becomes apparent that such person will not do so, there can be no discovered negligence.—Bonner v. Grand Trunk Western Ry. Co., 191 Mich. 313.

¶ 349. The operation of an unlighted train in a sparsely settled community at a high and dangerous rate of speed, and without proper warning signals over tracks known by the company to have been frequented by pedestrians does not constitute gross negligence where the peril of a pedestrian using a path along the tracks has not been discovered.—Newell v. Detroit, G. H. & M. Ry. Co., 187 Mich. 697.

Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to trespassers by railroads, see note, 11 N. C. C. A. 463-482.

Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to licensees by railroads, see note, 11 N. C. C. A. 385-405.

§ 55. Actions for injuries; pleading.

Injuries at highway crossings, see post § 85.
For injuries beside or near tracks, see post § 116.
For injuries by or to animals, see post § 124.
For negligence causing fires, see post § 138.
General law as to pleading, see Pleading.
Venue of actions against railroads, see Venue.
Actionable death of person, see Death by Wrongful Act.

¶ 350. The declaration in an action for negligent injury averred that defendant at the time of the accident had at its station in a village side-tracks upon and across which at the point where plantiff was injured all persons lawfully being at said station, and having occasion to go to the principal business part of the village, or therefrom to said station, were accustomed, and were authorized by defendant, to pass and repass, and that plaintiff, while on his way to said station and while lawfully upon defendant's premises with its permission and by its invitation, stumbled and fell over one of the rails in its track and received the injury complained of. The point of injury was described as "in front of a certain drug store," no public street or way being mentioned. Held, that the declaration did not contain a specific and unequivocal statement of facts essential to a cause of action, the pleader having failed to state that defendant had provided the place of injury as one of ingress or egress, or that plaintiff was invited to enter and cross at that point, or that it was the usual way for the public to enter and leave.—O'Neil v. Duluth, S. S. & A. R. Co., 101 Mich. 437.

¶ 351. A declaration setting out the duty of a defendant railroad company to provide a freight car equipped with safe brakes, the breach of the duty and the injury to the plaintiff through this breach is sufficient to support a recovery on the theory that the defective brake was the cause of the injury. —Sheltrawn v. Michigan Cent. R. Co., 128 Mich. 669.

§ 56. Issues, proof and variance.

Issues, proof and variance in general, see Pleading.

¶ 352. In an action for personal injuries to one at work in constructing a warehouse in the railroad yard caused by being struck by a box car that had been "staked," although the declaration did not allege any negligence for failure to station a man on the box car it was not error to admit evidence that if a man had been stationed on the car he could have seen plaintiff and what was ahead of the car and what was between the building and the car and that there was no one on the car, where the court strictly confined the plaintiff to the negligence declared upon in the declaration, and the evidence was not offered to show a distinct act of negligence but in order to show the situation and surroundings at the time and place of the accident.—Helbig v. Michigan Cent. R. Co., 85 Mich. 359.

¶ 353. In an action against a railroad company for negligently running down plaintiff while crossing a track for the purpose of receiving the mail from one of defendant's trains, the declaration alleged that defendant was engaged in transporting the mail, and that it was customary for it to deliver the mail to plaintiff at the place where the accident occurred; while the proofs showed that the mail pouch was thrown from the train by a United States mail agent. Held, that the variance was immaterial.—Tubbs v. Michigan Cent. R. Co., 107 Mich. 108.

¶ 354. Where plaintiff, in an action for personal injuries against the owner of a transfer track, alleged that defendant allowed the track to remain in an unsafe condition through failure to furnish fish plates, proofs that defendant made the track unsafe by removing the fish plates, sufficiently supports the allegation.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 355. Decedent, a yardmaster, while bending over to turn a switch for the railroad employing him was struck by an engine of another railroad, the defendant, whose tracks ran alongside. The defendant's engineer testified that there was a space of only seven inches between his engine and the switch in question, this evidence being offered to show that defendant was negligent in not providing its engine with a lookout and a light. Held, it was not error to admit such evidence although no claim was made that the switch was too close to defendant's tracks.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 356. Plaintiff was injured while working at a coal tipple loading coal cars, through an act of defendant railroad in pushing empty coal cars against a car which he was endeavoring to move with a pinch bar and catching him between the loaded and empty cars; there was evidence that the trainmen had no actual notice that men were working about the loaded car or on the tracks, and that plaintiff had actual notice of the presence of the train from seeing it come in; and there was no evidence that any other notice was ever given or received. Held, that plaintiff could not recover upon a declaration based upon failure to give notice by signals or otherwise.—Jolly v. Michigan Cent. R. Co., 167 Mich. 185.

§ 57. Presumptions and burden of proof.

In actions for crossing injuries, see post § 86.

In actions for injuries to or by animals at large, see post § 125.
In actions for fires, see post § 139.
General law as to presumptions and burden of proof, see Evidence, II.
Presumption that person killed was careful, see Death by Wrongful Act § 18.

¶ 357. The negligence of a railway company will not be presumed in an action against it for personal injury, but must be shown; and there can be no recovery unless it appears to be the efficient cause of the injury without any contributory fault in the plaintiff.—Mitchell v. Chicago & G. T. Ry., 51 Mich. 236.

¶ 358. There can be no presumption from an implied license to the public to cross private railroad property that helpless infants, too young to understand danger, will be permitted by those responsible for them to wander, when regular trains are passing, unattended along or upon the railroad tracks.—Hoover v. D., G. H. & M. Ry. Co., 188 Mich. 313.

Application of doctrine of res ipsa loquitur in action to recover for injuries from various causes, see note, 5 N. C. C. A. 46-48.

§ 58. Admissibility of evidence.
In actions for crossing injuries, see post § 87.
In actions for injuries to or by animals, see post § 126.
In actions for fires, see post § 140.
Weight and sufficiency of evidence, see post § 59.
General law of evidence, see Evidence.
Admissions and declarations of officers, attorneys and agents as evidence against corporation, see Evidence, VII, C, D.
Acts and declarations of agents and trainmen as res gestæ, see Evidence § 483.
Evidence of custom as bearing on duty of care in management of trains, see Customs § 7.
Train records and freight records as evidence, see Evidence §§ 506, 507.
Proper scope and range of direct and cross-examination, see Examination of Witnesses.
Conflicting positive and negative evidence as to sounding of bells and whistles, see also Evidence §§ 605, 606.

¶ 359. There having been testimony that defendant's engineer was competent and skilful, it was proper to allow testimony that on several occasions he had run his engine past a station, as it would tend to rebut skilfulness; but it would not be proper to show that he was negligent by showing negligence at other times.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 360. Proof that a railroad company is in the habit of ringing its bell on approaching a station is not competent as bearing on the question of negligence by another company which uses the track of the first at that point as a side track.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 361. In an action for injuries received by falling into a turn-table pit in a railroad company's yard, evidence of accidents which happened to others in the same place is inadmissible.—Early v. Lake Shore & M. S. R. Co., 66 Mich. 349.

¶ 362. In an action for negligent injury suffered by a five-year-old boy in the yard of defendant railroad while riding an engine without permission plaintiff may show the condition of the locality and its surroundings and the absence of a fence between the place where the boy lived and the point where the injury occurred.—Hughes v. Detroit, G. H. & M. R. Co., 78 Mich. 399.

¶ 363. The method of moving cars by "staking" is not a matter that the general public have knowledge of; and it is competent for a plaintiff, who was injured by the moving of a car in that manner, to show that he was ignorant of such a practice, as bearing upon his own exercise of care.—Helbig v. Michigan Cent. R. Co., 85 Mich. 359.

¶ 364. A railroad company claimed to have abandoned a farm-crossing over its track at the time of an accident caused by its alleged nonrepair, and on the trial of a suit brought by the injured party to recover the consequent damages it became a material question whether defendant recognized the crossing at the time of the accident, and whether the circumstances were such from the appearances that plaintiff was invited to use it as a crossing. It appeared from the testimony of defendant's witness that a short time before the accident there were two planks between the rails at said crossing. Held, that plaintiff might show the custom of defendant in relation to farm-crossings, and its instructions to its trackmen as to keeping them in repair, in order to prove that it did maintain the crossing in question at the time of the accident.—Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315.

¶ 365. In an action by a yard conductor for personal injuries resulting from a defective transfer track leading from the tracks of the railway company employing plaintiff, to defendant's factory, an issue was whether there was an implied invitation on the part of defendant to the company employing plaintiff to use the transfer track. Held, that evidence that the transfer track was used by various railroad companies was admissible as bearing on the question of general railroad use, and of permission by defendant to such use.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 366. In an action against the owner of a transfer track for maintaining the track in an unsafe condition through failure to furnish fish plates, whereby plaintiff, a

yard conductor, was injured, evidence as to the usual warning given when tracks are in such condition is material as bearing on the question of negligence.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 367. Defendant railroad was engaged in carrying trains of cars upon a railroad bridge from which logs were unloaded into the river. Plaintiff was employed by a boom company in unloading the logs. Plaintiff was standing upon the back end of a car, when defendant started up the car, and plaintiff was thrown off and injured. Held, on the question whether defendant started up the train in an unusually sudden manner, evidence was admissible on plaintiff's behalf to show the customary manner employed by it in starting its trains at the bridge.—Morrill v. Detroit & M. Ry. Co., 159 Mich. 478.

¶ 368. Upon the question whether a brakeman was acting within the scope of his authority in ordering a boy to get off a moving freight train, where he was riding on same unlawfully, while the statement of the brakeman would not be evidence of express authority conferred upon him, it would be evidence that the act was done with a view to further the employer's interests, and not from a personal motive on the part of the brakeman to do the act on his own account. —Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 369. The deceased was killed by defendant interurban railway's northbound car at a private or farm crossing which was located some fourteen rods north of the public highway. Held, on the question of the contributory negligence of the deceased, it was admissible for defendant to show that the motorman sounded the whistle for the public crossing.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

Admissibility in evidence of rules of railroad or street railroad companies in actions for injuries to persons other than employees, see note, 7 N. C. C. A. 457-464.

§ 59. Weight and sufficiency of evidence.

Directing verdict, see post § 65.

¶ 370. The fact that the plaintiff in an action for a railway injury was hurt without his own fault or negligence does not of itself entitle him to recover, as it must further appear that the defendant is legally chargeable with the injury.—Henry v. Lake Shore & M. S. Ry. Co., 49 Mich. 495.

¶ 371. Proof that a heavily-loaded train of cars was running down a wharf, at the rate of from ten to fifteen miles an hour, without a locomotive, when people were landing from a steamboat, is sufficient proof of negligence. —Malmsten v. Marquette, H. & O. R. Co., 49 Mich. 94.

¶ 372. Negligence cannot be imputed to servants of a railroad in charge of a hand-car in not knowing of the deafness of a pedestrian near the track, and in not assuming that such pedestrian will ignore a warning given him, and where the evidence shows that a hand-car was being operated at a slow rate of speed, that a crew upon such car saw a pedestrian walking near the track, but at such a distance that the car could pass safely, that such crew shouted to the pedestrian as the car approached, several times, and that the pedestrian abruptly turned into the path of the car whereby his leg was injured and rendered useless, there is no negligence.—Piskorowski v. Detroit, G. H. & M. Ry. Co., 121 Mich. 498.

¶ 373. No negligence is shown on the part of a defendant railroad company where the testimony shows that plaintiff's decedent, a boy 10½ years old went uninvited and contrary to notices posted, into the defendant's railroad yard, where there were 18 tracks, crossed the tracks, went to a slip where the defendant's car ferries landed, crawled under a fence and was struck by a lever used in lowering and raising the apron to the slip. It is held that this is not a case of an attractive nuisance.—Bledsoe v. Grand Trunk R. Co., 126 Mich. 312.

¶ 374. The negligence of a railroad company in failing to provide freight cars on a private siding with proper brakes is shown by proof of a defective brake without requiring previous notice of the defect by the plaintiff who was an employee of the owner of the private siding.—Sheltrawn v. Michigan Cent. R. Co., 128 Mich. 669.

¶ 375. The fact that a railroad company and a corporation occupying leased premises on the railroad grounds took no steps to prevent children from crossing the premises on their way to school and playing on the leased premises other than to keep up the fences, is not sufficient to show permission or license.—Ryan v. Towar, 128 Mich. 463.

¶ 376. Plaintiff, a yard conductor of the M. Company while operating an engine on a transfer track of the H. Railway Company, leading from the track of the M. Company to defendant's factory, was injured by the spreading of the rails of the transfer track, and the ditching of the engine. Held, that in order to recover, plaintiff must show that the maintenance and repair of the transfer track was under the control of defendant, and that plaintiff was using the transfer road at the invitation or request of defendant for its purposes and benefit.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 377. Where there is testimony that it is the custom of brakemen to eject trespassers, such testimony does not suffice to prove authority so to eject unless it also

appears that such acts were not pursuant to the authority of the conductor.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 378. In an action for the death of a child killed in the yard limits of a railroad held that a proper lookout was maintained upon approaching the place of the accident, so as to relieve the railroad company from liability for negligence.—Hoover v. Detroit, G. H. & M. Ry. Co., 188 Mich. 318.

¶ 379. In an action to recover for the death of a child by being run over by a log on which it was playing alongside of a railroad track at a point on the bank three feet above a tract of land owned by defendant on which children were accustomed to play, where there was no evidence of a license to use the property of defendant, or that the depositing of the logs was a new use of the property, nor that the depositing of the logs created a peril affecting any customary use of the premises, evidence held insufficient to sustain a verdict for plaintiff.—Sandstrom v. Minneapolis, St. P. & S. S. M. Ry. Co., 198 Mich. 99.

¶ 380. Evidence held insufficient to show that children habitually played on logs along a railroad track or that any representative of the company knew of children playing on logs prior to the death of a child which was killed by being run over by a log while playing on the logs.—Sandstrom v. Minneapolis, St. P. & S. S. M. Ry. Co., 198 Mich. 99.

Validity of statute making occurrence of injury or damage prima facie evidence of negligence of railroad company, see note, 2 N. C. C. A. 243-249.

§ 60. ——As to wilful acts or gross negligence.

¶ 381. Plaintiff's team and sled loaded with logs had stuck fast upon a track at a private crossing. While his servants were trying to draw it off it was struck. The engineer could see the crossing for about one mile and he could not at first tell what the obstruction was. He did not at once signal for brakes. Signals were made to him to stop. There was no evidence that the engineer did not use every effort to stop his train as soon as he saw the danger. Held, that the engineer, in not trying to stop the train until some time after he saw the obstruction on the track or until he might have seen it if he had been keeping a lookout, did not render defendant guilty of gross negligence, for he was not called upon to check the speed of his train until he was signalled, or was near enough to see the danger himself.—Frost v. Milwaukee & N. R. Co., 96 Mich. 470.

¶ 382. Where the evidence showed that the train was running from twenty to twenty-four miles an hour, but the distance in which a stop was attempted was not clearly shown, an ex-engineer's opinion that such a train, running from eighteen to twenty miles an hour, could, after the engineer first learned of the danger, be stopped before reaching the crossing is not evidence of negligence.—Frost v. Milwaukee & N. R. Co., 96 Mich. 470.

¶ 383. Gross negligence on the part of an engineer and fireman is not shown sufficient to go to the jury by plaintiff's testimony that the deceased had been seen before the accident walking on the track with his back to the train but that at the time of the accident he was crossing the track and evidence that there was a sharp curve in the track making it impossible for the engineer to see the pedestrian, that the fireman's duty was to watch for signals at a nearby station, that smoke from another railroad obscured the view and that there was a possibility of the fireman's seeing the pedestrian only at one precise point of time.—Finnegan v. Michigan Cent. R. Co., 127 Mich. 15.

¶ 384. Plaintiff's deceased, while trespassing on defendant railway's track in a drunken condition, was run over and killed by defendant's train. The evidence indicated that the train was going from thirty-five to forty-five miles an hour when the engineer and fireman first observed the deceased about one-half mile away, and that as soon as it became apparent the deceased did not heed the signals every effort was made to stop the train and its speed was reduced to about fifteen miles an hour when the train struck the deceased. Held, the engineer and fireman had a right to rely on the assumption that the deceased would get out of the way until it became clearly apparent that he was not going to do so, and the facts did not present a case of negligence so gross as to create liability.—Holmes v. Detroit, G. H. & M. Ry. Co., 171 Mich. 633.

¶ 385. A railroad company is not guilty of gross negligence in failing to keep such a lookout on a backing freight engine in a populous part of a city as to have seen a sane adult, who was using the railroad track as a thoroughfare at a point customarily used by pedestrians, on a stormy winter day, where the speed was not excessive and all statutory signals were given, and the accident occurred at a curve on the opposite side of the engine from where the engineer was maintaining a lookout, and while the fireman was shoveling coal into the engine.—Wexel v. Grand Rapids & I. Ry. Co., 190 Mich. 469.

§ 61. ——As to contributory negligence.

Evidence that person did not stop, look and listen as rebutting presumption of due care by him, see Death by Wrongful Act § 18.

¶ 386. A person walking along a railroad where he had no right to be, and where

there were five parallel tracks on which trains passed both ways every few minutes, stepped from one track, to avoid a passing train, upon another track on which an engine was approaching from behind him, and, going on without looking about him, was run over and killed. Held, that he was guilty of such contributory negligence as to preclude any recovery.—Michigan Cent. R. Co. v. Campau, 35 Mich. 468.

¶ 387. Plaintiff in an action for damages caused by being struck by a train of cars must show not only that the defendant was negligent but that she herself was in the exercise of ordinary care; failing in which, her case is not helped by showing that she was rightfully on defendant's grounds at the time of the injury.—Pzolla v. Michigan Cent. R. Co., 54 Mich. 273.

¶ 388. A four-year-old colt, hitched to a wagon, while standing at a railroad station became restless from the noise of an approaching train not yet in sight, and those in charge of the animal attempted to hold it by the head instead of driving away as they could safely have done. Held, that they, and also a person who remained in the wagon instead of alighting, were negligent.—Flagg v. Chicago, D. & C. G. T. J. R. Co., 96 Mich. 30.

¶ 389. One who was injured by being struck by a passenger train was guilty of contributory negligence where although the gates were up, he knew where the train was standing when he left a house a short distance from the track, and that it stopped only long enough to accommodate travelers getting on and off, and that it was liable to start up any moment, and nevertheless started to cross in front of the track and walked faster without looking because he saw a friend, and paid no heed to the noise of the train which should have been sufficient warning even though no bell was rung.—Boutell v. Michigan Cent. R. Co., 133 Mich. 486.

¶ 390. Defendant railway's right-of-way ran north and south through a farm. The barn of the deceased on the west side of the right-of-way and the house on the east side were connected by a private road crossing defendant's track. The evidence indicated that defendant's motorman first saw the intestate as he was on the west side of the track and about to step on the track. The car was then about sixty feet away. The motorman blew the whistle, put on the emergency brake and reversed the car. The intestate jumped to the east after the whistle sounded and did not at any time look towards the car. By looking down the track in the daytime he could have seen the car approaching for a distance of a mile. At the time of the accident it was nearly dark, no headlight was upon the front end of the car, and no whistle sounded for the said private crossing. The interior of the car was lighted. A witness standing by the gate leading to the barn saw the lighted car approaching. Held, the evidence did not show the deceased guilty of contributory negligence as a matter of law.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

§ 62. Questions of law and fact.

In actions for injuries at crossings, see post § 95.
In actions for injuries to or by animals, see post § 128.
In actions for fires, see post § 142.
Directing verdict, see post § 65.
General law as to jury questions, see Trial, VI.

¶ 391. Whether the act of a brakeman, in ordering a boy riding illegally on a freight train to get off while a train was approaching on a nearby track, was the proximate cause of the boy's being run over, is a question of fact for the jury.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 392. A seven-year-old boy playing on a railroad track is a trespasser as matter of law.—Trudell v. Grand Trunk R. Co., 126 Mich. 73.

¶ 393. Where the trainmen running a train upon a spur into a factory are accustomed to stop outside, and give a warning to workmen inside, the fact that on the occasion in question the superintendent of the factory gave a warning to the workmen, does not operate as a matter of law as a waiver of the customary stop and warning.—Shall v. Detroit & M. Ry. Co., 152 Mich. 463.

¶ 394. In an action by a yard conductor employed by a railroad company against the owner of a transfer track, for injuries received from its negligence in allowing a track to become out of repair on which he alleged that he was an invited user, whether or not plaintiff was injured while engaged in work for the defendant's benefit was a question for the jury, where the evidence showed that at the time of the injury the plaintiff was returning to do the defendant's work over the only available track, after disposing of cars belonging to another company, which it was necessary to transfer before doing the defendant's work.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 395. It was proper to refuse to strike out evidence in an action for personal injuries received that plaintiff bought a ticket at the station and was injured by falling through a cattleguard on a railroad which defendant at the time of the trial was operating under a traffic arrangement with the company which owned the road, there was evidence to go to the jury upon the point that defendant was in possession of the road when the accident took place, though the

witnesses to those facts did not clearly distinguish between the time of testifying and the time of the accident.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

§ 63. ——As to negligence of defendant.

¶ 396. It is for the jury to determine whether it is not negligence in a railway company to omit means to prevent their cars from moving or being driven beyond the rails where these, if extended, would cross a passageway, left open by the company to give access to the depot.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

¶ 397. It is a question for the jury whether a special train can be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance.—Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 398. A railroad train ran over a child on the track. It appeared that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule. Held, that it was proper for the jury to consider the fact with other circumstances as bearing on the question of negligence.—Marcott v. Marquette, H. & O. R. Co., 470 Mich. 1.

¶ 399. Negligence in injuries inflicted by railroad trains upon individuals is a question that depends upon the circumstances, and can rarely, if ever, be absolutely defined as matter of law; and, in determining whether there has been negligence, all the circumstances must be considered together. —Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 400. The wife of a man who was employed by a railroad company, in taking her husband his dinner, had occasion to cross half a dozen busy tracks that lay side by side. In stepping out from behind some cars that stood on one of the tracks, she was struck and injured by an engine on the next track that was backing down in front of her and across her path. Held that, whether or not the railway company was negligent in running the engine at a prohibited rate of speed or in failing to ring its bell, the woman was not exercising ordinary care and could not recover for the injury to which she had contributed by her own negligence.—Pzolla v. Michigan Cent. R. Co., 54 Mich. 273.

¶ 401. A railroad company's neglect to fence its track is for the jury to consider as bearing on its liability for injury done to a child which got upon the track in consequence.—Keyser v. Chicago & G. T. R. Co., 56 Mich. 559.

¶ 402. Where, in an action against a railroad company for personal injuries, founded upon its alleged negligence in leaving certain cars uncoupled upon a side track, the uncontradicted testimony of defendant's witnesses is to the effect that the cars were left coupled to the main train, and it further appears that, from the manner in which the train was handled, the cars must have been so coupled when placed upon the track, the mere fact that the cars were found detached a few hours later, in consequence of which the injury was sustained, is insufficient to justify a submission of the case to the jury. —Jakoboski v. Grand Rapids & I. R. Co., 106 Mich. 440.

¶ 403. Whether a railroad company was guilty of negligence in backing its train across a private way, which was, with its acquiescence, in daily and common use, without looking to see if anyone was on the track, so as to render it liable for the killing of a child at such point, is a proper question for the jury.—Green v. Chicago & W. M. R. Co., 110 Mich. 648.

¶ 404. The questions of negligence of a defendant railroad company and of contributory negligence of the deceased were for the jury, in an action for the death of a workman by being pinched between the cars of such company engaged in switching; where it appears that the deceased was employed by a manufacturer to work upon a boiler which lay upon a railroad switch track in its yard, upon which switching was done daily, that at the time of the accident such servant was walking between the boiler and a car three or four feet away; and where there was testimony to show that the trainmen knew that such work on the boiler was going on, that they gave no signal of the approach of the train, and used no care to prevent the collision between the stationary car and the boiler.—Breeze v. MacKinnon Mfg. Co., 140 Mich. 372.

¶ 405. Plaintiff attempted to pass through an opening three feet wide between two freight cars, which, with several others, blocked a public street, and the cars came together, catching him between the bumpers and severely injuring him. Plaintiff testified that he did not notice that the cars were in motion, and that he saw no engine there. There was evidence that, a short time previously, cars had been brought from defendant's works, and shunted down upon the siding, without anyone upon the same to warn persons crossing or to manage the cars. About the time of the injury, the engine, under the control of defendant's engineer, was seen going away from the siding. Held, that there was evidence to go to the jury on the question of defendant's negligence.— Lehman v. Eureka Iron & Steel Works, 114 Mich. 260.

¶ 406. In an action for damages from being precipitated into a privy vault at a railroad station by the giving way of the floor, where an employee of the railroad testified that he had inspected it by tapping the timbers with a hammer, and that the stringers

were toenailed but he did not see the nails, and it also appeared that the nails were rusted off at the time the accident occurred a few weeks later, it was a question for the jury, in view of the construction of the building, whether or not a proper inspection had been made.—Howe v. Chicago, K. & S. R. Co., 139 Mich. 638. [Note.—The opinion does not reveal whether plaintiffs were passengers or licensees.—Editor.]

¶ 407. Where defendant railroad's brakeman orders in a fierce and threatening manner a boy to jump off a moving freight train upon which the boy was unlawfully riding, it cannot be said as a matter of law that the brakeman is not guilty of active negligence.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 408. Whether a brakeman, in ordering a boy riding illegally on a moving train to get off while another train is approaching on another track near by is negligent in the discharge of his duty, is a question of fact for the jury.—Verlinde v. Michigan Cent. R. Co., 165 Mich. 371.

¶ 409. Where a child two years and eight months old was struck and injured by a train at a point in a city where there was an unobstructed view of the track, and where for years with the knowledge of the company, the public had been suffered to make a thoroughfare of its tracks, and the child might have been observed by those in charge of the train in time to have avoided injuring it had they exercised reasonable care, the question of the degree of care required in operating the train under the circumstances, as well as the defendant's knowledge of the use of its tracks by the public, should have been submitted to the jury.—Huggett v. Erb, 182 Mich. 524.

¶ 410. A child two years and eight months old is not a trespasser as a matter of law in wandering on to a railroad track at a point constantly used by the public, with knowledge of the company, as a thoroughfare, so as to deprive it of redress for injuries sustained as the result of the negligence of the defendant's employees.—Huggett v. Erb, 182 Mich. 524.

¶ 411. Whether it was negligence for switchmen to move cars on a private coal trestle without giving warning as required by the rules of a railway company as well as by custom, to an employee of the owner of the trestle, who was working about the cars, held to be a question for the jury.—Wells v. Grand Rapids & I. Ry. Co., 184 Mich. 289.

§ 64. ——As to contributory or imputed negligence.

¶ 412. Whether the owner of a skittish team was guilty of contributory negligence in taking it into a railroad freight-yard and in close proximity to tracks over which cars were liable to pass at any time is a question for the jury.—Kalembach v. Michigan Cent. R. Co., 87 Mich. 509.

¶ 413. In an action against a railroad company for damages for personal injuries to the plaintiff's infant son whereby the plaintiff lost his services, the question of the contributory negligence of plaintiff and his wife in permitting their infant son to make a playground of defendant's tracks and yards is a question of fact for the jury.—Baker v. Flint & P. M. R. Co., 91 Mich. 298.

¶ 414. Whether a person whose duty it is to receive mail and express from a train is chargeable with contributory negligence in going upon the intervening track for that purpose, without looking to see whether another train is approaching, is a question for the jury, at least where he knows that it is the custom for trains not to pass at that point; and the fact that he enters upon the track before his own train has come to a full stop does not alter the rule.—Tubbs v. Michigan Cent. R. Co., 107 Mich. 108.

¶ 415. It cannot be said as a matter of law that an employee of the owner of a private siding is guilty of contributory negligence in stopping a runaway freight car by placing a piece of timber under the wheels and thereby causing logs to be jarred from the car to his injury.—Sheltrawn v. Michigan Cent. R. Co., 128 Mich. 669.

¶ 416. The question of plaintiff's contributory negligence was for the jury, where the injury was sustained as the result of the backing of the defendant's train against a car stationed at a point agreed upon by plaintiff with defendant's station agent, from which plaintiff was unloading his property, and where there was testimony that from the point where plaintiff was standing, an approaching car could not be seen.—Brown v. Pontiac, O. & N. R. Co., 133 Mich. 371.

¶ 417. In an action against a railroad company for personal injuries to a servant of a lumber company occasioned by the moving without warning of a car into which he was loading lumber, whether or not the plaintiff was negligent in pursuing his labor in reliance on receiving a customary warning from defendant's servants was a question for the jury.—Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194.

¶ 418. Defendant railway built a spur track into a sugar factory building for the purpose of hauling away the building as it was being taken down. Plaintiff's intestate was working between two cars standing on the spur within the building, as an employee of the company, tearing down the factory. Upon signal of the superintendent of the work, the trainmen backed their train rapidly into the building, and struck the cars within, crushing the plaintiff's intestate be-

tween them. There was much noise, and plaintiff had no timely warning. Held, that plaintiff's intestate was not, as a matter of law, guilty of contributory negligence.—Shall v. Detroit & M. Ry. Co., 152 Mich. 468.

¶ 419. Where a normal woman is walking down a path parallel to a railroad track where an engine is doing some switching which she knows about, and where the engine is moving practically no faster than a walk, and on approaching her the bell is being rung and the brakes under control so that the engine is stopped within a distance of ten feet after the woman has stepped in front of the engine, she is guilty of contributory negligence as a matter of law in stepping on the track.—Berry v. Harbor Springs Ry. Co., 173 Mich. 181.

¶ 420. A person who while walking in the nighttime beside a railroad track towards a platform, to which the carrier failed to provide other means of approach, in order to take an approaching gasoline motor car, on becoming aware that the car was not going to stop in response to her signal, is, as a matter of law, guilty of contributory negligence in failing to step far enough away from the track so as to avoid being struck by the passing car.—Wells v. Ann Arbor R. Co., 184 Mich. 1. (Moore and Kuhn, JJ., dissenting.)

¶ 421. A woman who crosses a side track in front of a stationary locomotive as a train was passing on the main track thirty-one feet distant is guilty of contributory negligence as a matter of law where she stepped back on the side track as a passenger on the passing train waived his hand at her, and was struck and injured by the starting without signal of the locomotive.—Beagle v. Pere Marquette R. Co., 184 Mich. 17. (Kuhn, Bird and Moore, JJ., dissenting.)

¶ 422. The driver of a team is guilty of contributory negligence, as a matter of law, where, after driving on a dark night in deep drifting snow on a highway which ran along an unfenced and unguarded railroad track, upon reaching a crossing instead of ascertaining whether or not he was safely across and that the team was following the road which continued in a parallel direction to the tracks on the other side thereof, trusted to the intelligence of the horses to follow the road, as a consequence of which they followed the railroad track, and the team was killed and the driver injured by a train coming from the same direction in which the team was proceeding and which was observed by the driver.—Dugas v. Munising, M. & S. E. Ry. Co., 189 Mich. 620.

¶ 423. A child two and a half years old is no such trespasser in going upon a railroad track as to forfeit redress for being run over and seriously injured by the recklessness or negligence of the engineer. Nor can the child be considered negligent. The question of its parent's negligence in permitting it to go is for the jury.—Keyser v. Chicago & G. T. R. Co., 56 Mich. 559.

¶ 424. The mother of a child two years old is not, as a matter of law, negligent in permitting it to wander out of her sight for a few minutes in company with other children, during which time it is killed by a train of cars.—Green v. Chicago & W. M. R. Co., 110 Mich. 648.

§ 65. ——Directing verdict.

General law as to directing verdict, see Directing Verdict.

¶ 425. Plaintiff, a shipper's employee, who was assisting in loading a box car with seeders or grain drills, remained, for the purpose of supporting the seeders, in the car, while it was pulled out from a spur track in order that some cars loaded with iron might be placed on that track, and while it was moved, unattended by a brakeman, back upon said track and down grade, so that it ran against the other cars with such force as to overturn the seeders upon him. Held, that he was not so clearly negligent in remaining in the car as to justify the court in taking the case from the jury.—Chadderdon v. Michigan Cent. R. Co., 100 Mich. 293.

¶ 426. A verdict for defendant should have been directed, where plaintiff's intestate, who was familiar with the surroundings, was killed while walking along defendant's track in the daytime without looking for the approach of a train, and where the engineer gave the crossing and station signals, and then after seeing deceased when he was about 300 feet off, gave the danger signal, whereupon the deceased appeared to move off and then when the train was about 10 rods off suddenly moved back.—Starbard v. Detroit G. H. & M. R. Co., 122 Mich. 23.

¶ 427. In an action for wrongful death, evidence that the deceased, a seven-year-old boy, knew and appreciated the danger, that a companion called to warn him of a train approaching from the north, that he called back that the train was on the other track, referring to a northbound track, and that as soon as he saw the other train he attempted to escape, necessitates a directed verdict for the defendant on the ground of contributory negligence.—Trudell v. Grand Trunk R. Co., 126 Mich. 73.

¶ 428. Directing a verdict for the defendant was error, where plaintiff was injured as a result of the backing of defendant's cars against a stationary car from which plaintiff was unloading his property, and where the car had been located at the point in question pursuant to plaintiff's agreement with the station agent having control of defendant's business at such point.—Brown v. Pontiac, O. & N. R. Co., 133 Mich. 371.

¶ 429. In an action brought for the negligent killing of plaintiff's horse where the plaintiff had been directed to drive into a narrow space between the track and freight-house because the snow was piled up so as to prevent unloading his freight upon the platform the question of the plaintiff's contributory negligence is properly left to the jury and it is not error to have refused to direct a verdict.—Bankman v. Pere Marquette R. Co., 142 Mich. 202.

¶ 430. Defendant's turntable was located near the intersection of two public streets, on private land considerably lower than the level of said streets. Near the table ran a private road. Plaintiff's intestate, a child, went by a way other than the private road to play on the turntable with other children. Before the table could be turned it had to be unfastened by removing a piece of iron, which the children on the occasion in question so removed. The defendant railroad knew that the children were accustomed to play there. Plaintiff's intestate while so playing was injured. Held, the intestate was a trespasser and the court properly directed a verdict for defendant.—Reid v. Harmon, 161 Mich. 51.

§ 66. Instructions.

In actions for injuries at highway crossings, see post § 110.

In actions for injuries to or by animals, see post § 131.

In actions for fires, see post § 146.

General law as to instructions, see Instructions.

Refusal of abstract and inapplicable instructions as to railroads' negligence, see also Instructions ¶ 165.

¶ 431. Where there is no statute requiring a railroad company to fence its track for the prevention of personal injuries, a charge that if a fence would have prevented such injury it was negligent not to have had it is all that can be asked in an action therefor against the company.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 432. A charge on the duty of the engineer of a train, when he sees a small object about two or three inches above the ties half a mile or more ahead of the engine, is properly refused when it states what is not the duty, but does not state what is the proper or necessary degree of caution under the circumstances.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 433. An instruction that there was no evidence to show too high a rate of speed is properly refused, where the proper speed depends on the facts that the track was not fenced and that plaintiff, a child, first appeared to the engineer's view as an obstruction on the track; and it is necessary that such facts should be given to the jury under proper instructions before charging on the rate of speed.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 434. In an action for injury to a child on the track at the crossing of a road, which the evidence showed was an old lumber road used privately and not a public road, requests pertaining to public roads was properly refused.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 435. In an action for injuries received by a five-year-old boy from being thrown under the wheels of defendant's engine, while riding on the foot-board in defendant's railroad-yard, defendant cannot complain of instructions that the jury, to find for plaintiff, must be satisfied by a preponderance of evidence—(a) that the boy was on the foot-board and was seen by the engineer, who after seeing him there started the engine without ascertaining whether the boy had got off; (b) that the engineer was guilty of gross negligence; (c) that the boy, by reason of his insufficient intelligence, was unable to comprehend the danger, and was not guilty of contributory negligence.—Hughes v. Detroit, G. H. & M. R. Co., 78 Mich. 399.

¶ 436. An instruction, in an action for negligence, that it was plaintiff's duty to use his eyes and ears, and watch and listen to see that a car standing near where he was at work did not move, is rightly refused where under the testimony there was nothing to suggest such moving or danger from any such source.—Helbig v. Michigan Cent. R. Co., 85 Mich. 359.

¶ 437. In attempting to cross, with a team and with a sled loaded with logs, a railroad track at a private crossing, the sled stuck upon the track. Those in charge of the team had ample time to go up the track and signal any approaching train, and to unhitch and remove the team after they saw the train approaching and after they had lost hope of moving the load from the track. Held, that it was error to instruct the jury that no duty devolved on those in charge of the team except to attempt to remove the load from the track, until they saw the approaching train, and that it was not then their duty to unhitch the horses.—Frost v. Milwaukee & N. R. Co., 96 Mich. 470.

¶ 438. In an action against a railroad company for personal injuries sustained by a pedestrian through the rolling of a steel rail on her foot, it is not error to instruct that the plaintiff cannot recover if she stepped over barriers erected to keep pedestrians away from that part of the track and was injured, where the plaintiff's theory of the case is that there were no barriers and all her evidence tends to show that she approached the track without the care imposed upon her by the warning of barriers.—Sosnofski v. Lake Shore & M. S. Ry. Co., 134 Mich. 72.

¶ 439. In an action against a railroad company for personal injuries sustained by a pedestrian through the rolling of a steel rail on her foot, it is not erroneous to instruct that the plaintiff cannot recover if she saw or as a reasonably prudent person should have seen that the repairs were going on and that the rail was being rolled along by workmen.—Sosnofski v. Lake Shore & M. S. Ry. Co., 134 Mich. 72.

¶ 440. Defendant railroad was engaged in carrying trains of cars upon a railroad bridge from which logs were unloaded into the river. Plaintiff was employed by a boom company in unloading the logs. Plaintiff was standing upon the back end of a car when defendant started up the car, and plaintiff was thrown off and injured. Held, an instruction was fair to defendant which stated that if the engineer in starting the train acted as an ordinarily prudent engineer would do, defendant was not guilty of negligence.—Morrill v. Detroit & M. Ry. Co., 159 Mich. 478.

¶ 441. In going from one street to the corresponding north and south street it was necessary for the public either to go by a roundabout way or else to cross the defendant's railway yard. The defendant kept up signs warning the public that its yard was not a thoroughfare. At one time it put up a fence, which was pulled down by travelers. The public had worn paths in crossing the yard. Plaintiff, an employee of defendant, while crossing the yard outside of working hours, was struck and injured by an engine. Held, the court erred in letting the case go to the jury on the theory of defendant's negligence to plaintiff as one of the public in failing to have the engine lighted and to sound a bell or whistle.—Winnie v. Lake Shore & M. S. Ry. Co., 160 Mich. 334.

C. COLLISIONS AND DERAILMENTS.

§ 67. In general; injuries through collisions.

[Note.—Injuries from collisions and derailments usually result to persons who are either passengers (see Carriers, IV) or to the property of shippers (see Carriers, II) or to servants of the railroad company (see Master and Servant, III). As to both these classes of persons special rules of duty and negligence apply, and the cases are treated accordingly in the topics parenthetically referred to. For this reason the cases on the duty towards other persons to avoid collisions and derailments are relatively few.]

¶ 442. A company that has a right of passage over another company's track is liable if, by its negligence, a collision occurs whereby a passenger in a train of the other company is injured.—Patterson v. Wabash, St. L. & P. R. Co., 54 Mich. 91.

¶ 443. A railroad company is liable for injuries to a passenger on the train of another road, resulting from the negligent misplacing of a switch by its employee, where both companies are using the tracks of a third company.—Patterson v. Wabash, St. L. & P. R. Co., 54 Mich. 91.

¶ 444. Plaintiff and her husband had a camp two miles north of defendant lumber company's headquarters at Bryan. Defendant's logging railroad connected the two places. The husband was an independent contractor, getting out material for defendant. Defendant arranged with the husband for the latter to use a hand car in going to Bryan for supplies. Plaintiff was injured by a collision with defendant's train while she and her husband were running the hand car to Bryan to attend church. Held, it was error for the trial court to submit the question of defendant's negligence to the jury on the theory that plaintiff was using the hand car on the occasion in question at the invitation of defendant.—Minor v. Escanaba Lumber Co., 167 Mich. 431.

§ 68. Injuries from derailments.

See note under preceding section.

¶ 445. In an action against a railroad company by an employee of the user of a private side track injured by the derailment of a car thereon due to the accumulation of sand on the track, it was shown that plaintiff, a teamster, on being notified by defendant's employees that the car was about to be moved, drove a short distance from the track, coming to a stand at a point which left the rear wheel of his wagon a distance of 3½ feet from the track where it was struck upon the car being derailed, held that his contributory negligence was for the jury.—Glappa v. Detroit, Grand Haven & Milwaukee R. Co., 179 Mich. 76.

¶ 446. A person who is in possession of a private side track on property owned by him, which was constructed under an agreement with a railroad whereby such owner agreed to keep such side track at all times clear of snow and ice, and fails to remove sand which had been washed from a pile alongside the side track over the track to a depth of several inches, and the railroad company which negligently moves its car over the track without first removing the sand, resulting in the derailment of cars and the injury of a person who is working in a wagon alongside the track, are joint tort feasors.—Detroit, G. H. & M. Ry. Co. v. Boomer, 194 Mich. 52.

¶ 447. Plaintiff, an employee of the user of a private side track, was injured by the derailment of a car on such track due to the accumulation of sand thereon. Held that the railroad company was liable notwithstanding plaintiff's employer in his contract with the railroad company agreed to keep

the track free from sand and other obstructions.—Glappa v. Detroit, Grand Haven & Milwaukee R. Co., 179 Mich. 76.

D. INJURIES AT HIGHWAY CROSSINGS.

§ 69. Duty and liability of railroad in general.

See also ante ¶ 246.

Construction and maintenance of crossings, see ante § 12.

Care and negligence of railroads in general, see ante § 40.

Gross negligence and last clear chance rule, see post § 54.

Injuries beside or near tracks, see post § 113.

Negligence towards passengers in running over crossings, see Carriers § 170.

Provisions as to bell signals at crossings, see Comp. L. 1915, §§ 8389-8393.

Provisions as to headlights on locomotives, see Comp. L. 1915, §§ 8378-8380.

¶ 448. A company which has permitted the public to use a railroad crossing as if it were in a public highway is estopped from denying that duties in relation thereto are the same as if the road were such highway.—Adams v. Iron Cliffs Co., 78 Mich. 271.

¶ 449. "Staking" cars across a public highway, to-wit, moving them by means of a beam set against the engine on one track to push a car on a parallel track, is not unlawful, nor is it negligence per se.—Kelley v. Michigan Cent. R. Co., 65 Mich. 186.

¶ 450. One traveling in a street does not, when he comes to a railroad track, become a trespasser merely by crossing it diagonally, or in walking upon it in getting off the street to a more direct route, so long as the track continues in the street.—Fehnrich v. Michigan Cent. R. Co., 87 Mich. 606.

¶ 451. It is the duty of a railroad company to maintain the sidewalk crossings over its tracks in a city in a reasonably safe and suitable condition for the usual and ordinary purposes of the public, including the driving of a snow plow for clearing sidewalks, and its failure to do so renders it liable to one injured by reason thereof while making a proper, reasonable, and necessary, though possibly an unusual or hazardous, use of the walk.—Jeffrey v. Detroit, L. & N. R. Co., 108 Mich. 221.

Liability for personal injuries in accidents at crossings, see note, 4 N. C. C. A. 718-731.

Liability for personal injuries in accidents to automobile at railroad crossing, see note, 4 N. C. C. A. 718-731; see note, 8 N. C. C. A. 1083-1050.

Liability for injury to vehicle stalled on railroad track, see note, 15 N. C. C. A. 183-194.

Liability for injury to person on railway crossing where safety gates fall after he has passed upon crossing in the exercise of due care, see note, 16 N. C. C. A. 157-165.

Liability for injury to person catching foot between planking and rail at crossing, see note, 16 N. C. C. A. 198-208.

Liability for injuries resulting from driving traction engine or like slowly moving vehicle over railway crossing, see note, 16 N. C. C. A. 415-427.

Liability of railroad company for injuries to city firemen on way to fire, see note, 6 N. C. C. A. 750-762.

§ 70. At overhead or undergrade crossings.

Injuries beside or near tracks, see post § 113.

¶ 452. There is no duty upon the part of a railroad engineer whose train is standing under a viaduct to observe whether anyone is crossing with horses, and if so, to refrain from starting the train until the traveler has an opportunity to get across.—Doston v. Michigan Cent. R. Co., 187 Mich. 650.

¶ 453. A railroad company is not relieved from liability for its own negligence by the fact that a right of action in maintaining sidewalks at crossings may also exist against a city for the same injury.—Jeffrey v. Detroit, L. & N. R. Co., 108 Mich. 221.

Liability of railroad company for injuries occurring through its construction, maintenance or use of overhead or subway crossings of highways, see note, 16 N. C. C. A. 257-270.

§ 71. Obstruction of highway crossing.

Crossing highway where view is obstructed, see post § 74.

Obstruction of highway as proximate cause of injury, see post § 77.

Duty and care of persons crossing tracks where sight obstructed, see post § 80.

Jury questions as to obstruction of highway, see post § 95.

Power to prohibit obstruction of streets by trains, see Municipal Corporations § 90.

Power to enact ordinance adding to penalty provided for statute for blocking crossings by standing trains, see Municipal Corporations ¶ 398.

Provisions as to obstruction of highways, see Comp. L. 1915, § 8311.

¶ 454. The right of the public in a highway crossing a railroad is simply a right of passage across the railroad. The right-of-way and of use, when not used or required for the purpose of passage across the railroad, belongs to the railroad company, and may be used by it in the same manner as if no street-crossing was there.—Kelley v. Michigan Cent. R. Co., 65 Mich. 186.

¶ 455. A box freight car left standing at a highway crossing is not of itself an object that would naturally frighten horses of ordinary gentleness; and an action resting on an assumption that it would do so cannot be maintained.—Gilbert v. Flint & P. M. Ry. Co., 51 Mich. 488.

¶ 456. An individual can sue a railroad company for the personal damage caused by leaving its cars standing across a highway longer than is allowed by How. St., § 3323. —Patterson v. Detroit, L. & N. R. Co., 56 Mich. 172.

¶ 457. If an injury results from the neglect of a railroad company to observe the statutory rule that it shall not leave cars standing across a highway more than five minutes at a time (How. St., § 3323, subdiv. 5), the company is guilty of negligence and liable for the injury if the person who suffered was not in fault.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 458. Where a car that had been left for three or four days in a highway crossing too near the traveled part of the way in consequence of which the whiffletrees struck the car and frightened a horse attached to a passing wagon, so that the driver was hurt, the company was held liable for obstructing the highway.—Peterson v. Chicago & W. M. R. Co., 64 Mich. 621.

Liability of railroad company for personal injury at crossing where view is obstructed by cars or other thing or object on right-of-way, see note, 6 N. C. C. A. 288-311.

Injuries at railroad crossings where highway has been obstructed longer than period allowed by statute or ordinance, see note, 6 N. C. C. A. 826-833.

Invitation or permission by brakeman to pedestrian to climb over cars obstructing crossing, see note, 2 N. C. C. A. 338-345.

§ 72. Defects in sidewalk, street or approaches to crossing.

As proximate cause of injury, see post § 77.

Admissibility of evidence as to condition of crossing, see post § 87.

Sufficiency of evidence as to defects in highway at crossing, see post § 89.

Jury questions as to defects, see post § 95.

¶ 459. A railroad company crossing a public highway is liable for an injury occasioned to a traveler by a want of repair in the approaches to the crossing, and it makes no difference that the traveler knew of such want of repair; he had a right, notwithstanding, to use the highway.—Maltby v. Chicago & W. M. Ry. Co., 52 Mich. 108.

¶ 460. A railroad company is not relieved from liability for an injury caused by the company's failure to repair a highway by the fact that the person injured knew of the dangerous condition of the highway.—Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

¶ 461. Where a railroad company acting under a notification of the common council of a village constructs a sidewalk in a street across its track, and for years assumes the duty of keeping such walk in repair, it thereby invites people to pass over the walk, and is bound to keep it in a reasonably safe condition for public travel.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

Liability for injury to person catching foot between planking and rail at crossing, see note, 16 N. C. C. A. 198-208.

§ 73. Management and speed of trains at or near crossings.

Speed and stopping of trains in general, see ante § 43.

Provisions as to stopping trains at crossings, see Comp. L. 1915, § 8303.

¶ 462. A high rate of speed at a common highway crossing is not of itself negligence. —Klanowski v. Grand Trunk Ry. Co., 64 Mich. 279.

¶ 463. Though there is no statute limiting the speed of railroad trains when crossing a public street, yet where the crossing is made dangerous because the view of the track is obstructed by buildings and freight cars, the speed should be consistent with the degree of care and prudence required for the safety of the lives and property of the persons rightfully approaching and traveling over such crossing.—Guggenheim v. Lake Shore & M. S. Co., 66 Mich. 150.

¶ 464. Railroad companies are not required to slacken the speed of their trains at the numerous highway crossings in the country which they are usually passing every few minutes, nor when cattle are in the highway near the track.—Robinson v. Flint & P. M. R. Co., 79 Mich. 323.

¶ 465. While it is not necessarily negligent to run a train over a highway crossing at the usual rate, or at forty miles an hour, it is negligent to maintain such rate without giving the usual danger signals to warn the public of the train's approach.—Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

¶ 466. Running a regular passenger train at 25 miles an hour over a crossing in the edge of a city of 17,000 people and subject to considerable travel cannot be considered negligence as matter of law, where though embankments of four or five feet high had been left on the roadside and there were bushes near by which momentarily obstructed the view, yet the track was visible for over 1,300 feet from a point 35 feet away from the rails and a portion of the approaching train at all times of approach.—Tobias v. Michigan Cent. R. Co., 103 Mich. 330.

¶ 467. A steam railroad company is not obliged to slacken the speed of its trains approaching country crossings, until some danger is apparent.—Tucker v. Chicago & G. T. R. Co., 122 Mich. 149.

¶ 468. If passengers are bound to take notice of the lawful rate of speed at which

trains may cross a public highway, they may also take notice of limits fixed upon such rates of speed within a city, and such limitation has some bearing upon the question as to the point at which one approaching a crossing in the city must make his observations for moving trains.—Beck v. Ann Arbor R. Co., 156 Mich. 252.

§ 74. Crossing highway where view is obstructed.

Obstructions of crossings, see ante § 71.

¶ 469. If a railroad company, by placing freight cars on a side track, obstructs the view of its track at a public crossing, it is bound, irrespective of statute, to take extra care to guard against accidents.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 470. Whether the piling of wood by a railroad company by the side of its track, adjacent to a road crossing the track, in such manner as to obscure the view of crossing trains, imposes upon the company the duty of great care or caution in running their trains, or making use of extra means of notifying those about to cross when trains are approaching, quære.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

§ 75. Gates, flagmen and warning signals at crossings.

Warnings and signals in general, see ante § 45.
Warning signals on trains, see post § 76.
Omission to station flagman at crossing as evidence of negligence, see post § 87.
Weight and sufficiency of evidence as to warnings and signals, see post § 91.
Jury questions as to warnings and signals, see post § 98.
Provisions as to flagmen and gates at crossings, see Comp. L. 1915, §§ 3026, 8143, 8291-8293.
Provisions as to signal boards at crossings, see Comp. L. 1915, § 8302.
Provisions as to automatic bell signals at crossings, see Comp. L. 1915, §§ 8389-8393.

¶ 471. A railroad company is not, as matter of law, under obligation to station a flagman at a road-crossing in the country, because of the approach to it being partially concealed by embankments or otherwise.—Haas v. Grand Rapids & I. R. Co., 47 Mich. 401.

¶ 472. The absence of a flagman at a street-crossing of a railroad is not necessarily evidence of negligence on the company's part, unless the necessity for stationing and maintaining such flagman there has been required by the railroad commissioner.—Battishill v. Humphreys, 64 Mich. 494.

¶ 473. Although the crossings at which watchmen or flagmen are required to be kept are determined by the commissioner of railroads, yet when a railroad company so obstructs its track that its trains cannot be seen by those approaching, and so that bell and whistle are not sufficient to warn the traveler, some additional warning must be given, and a flagman may be necessary to acquit the company of negligence.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 474. If a railroad track crosses a city street at such a point on an upgrade that an engine drawing loaded cars must cross at an accelerated speed it is the duty of the railroad company to station a flagman there to give warning to approaching trains, although the railroad commissioner may not have ordered the same.—Freeman v. Duluth, S. S. & A. R. Co., 74 Mich. 86.

¶ 475. Where at a crossing, a railroad passenger train going south collided with a street railway car going east, and upon which the plaintiff was riding when injured, and at the crossing the railroad company maintained gates, the passenger train was due and on time, and a street car going west had just crossed the railroad track, when the gateman shut the east gate down behind it, and when it passed the west gate he started to close that, but the car which was going east ran under it so that he could not get the gate down lower than the trolley, and left it there, he saw the passenger car coming with headlight burning, and raised the east gate to "give them a chance to get through" and the street car was struck when both gates were up and the plaintiff injured, the railroad company was not negligent, because raising the east gate was the only avenue of escape for the car to get through.—Renders v. Grand Trunk R. Co., 144 Mich. 387.

¶ 476. It is not ordinarily negligence to neglect to have a flagman at a crossing in the absence of an order from the commissioner of railroads, and yet circumstances of the particular case may be evidence of negligence.—Barnum v. Grand Trunk W. R. Co., 148 Mich. 370.

¶ 477. The failure to erect a caution board at railroad crossings, as required by the statute, does not necessarily make the railroad company responsible for damages occasioned by a collision with one of its trains at the crossing.—Haas v. Grand Rapids & I. R. Co., 47 Mich. 401.

¶ 478. It is not negligence for a brakeman seeing a man approaching tracks at a crossing, who can and presumably will stop before he walks within a line of danger, to fail to signal for a stop of the train.—Graf v. Chicago & N. W. R. Co., 94 Mich. 579.

¶ 479. In an action against a railway company for the negligent killing of plaintiff's

intestate at a crossing, the failure or neglect to display a flag as a danger signal cannot be said to have been an invitation to one to attempt to cross the track, where the evidence shows that in fact a flag had never been used although the commissioner of railroads had directed that one should be used. —Peck v. Grand Trunk Western Ry. Co., 155 Mich. 430.

Failure of automatic bell to give alarm at railroad crossing, see note, 12 N. C. C. A. 219-241.
Liability for injury to person on railway crossing where safety gates fall after he has passed upon crossing in the exercise of due care, see note, 16 N. C. C. A. 157-165.

§ 76. Warning signals, or lookouts on trains or cars.

Duty of railroad in general as to warning signals and lookouts, see ante §§ 44, 45.
Evidence as to warnings and signals, see post §§ 87, 91.
Sufficiency of evidence as to warnings and signals, see post § 91.
Jury questions as to signals, warnings and lookouts, see post § 98.
Provisions as to sounding whistles at crossings, see Comp. L. 1915, § 8302.

¶ 480. The neglect of a railroad company to ring a bell, as required by statute when approaching a crossing, will make it liable for any injury resulting from such neglect. —Chicago & N. E. R. Co. v. Miller, 46 Mich. 532.

¶ 481. Where the view of a railroad track as it crosses a public street is obstructed by buildings and freight cars, the company is not relieved from the duty of giving warning, by whistle or otherwise, of the approach of trains by the absence of a statute requiring such warning.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 482. Failure to ring the bell is not material where the traveler made no attempt to drive across, having seen the approaching train while 55 feet away from the track, but the horses became frightened and ran upon it.—Stahl v. Lake Shore & M. S. R. Co., 117 Mich. 273.

¶ 483. It is not ordinarily negligence to neglect to have a flagman or lookout at the rear of a car being backed across a way, and yet circumstances of the particular case may be evidence of negligence.—Barnum v. Grand Trunk W. R. Co., 148 Mich. 370.

¶ 484. It is negligence for a railway to run its train thirty miles an hour across the country at night, without a headlight, with only a red lantern to warn persons at crossroads.—Gorton v. Harmon, 152 Mich. 473.

¶ 485. A person crossing a railroad track rightfully assumes that approaching trains will have a headlight and will give the usual warnings.—Morgan v. Pere Marquette R. Co., 162 Mich. 573.

¶ 486. Where plaintiff was driving across defendant's tracks and his horse, frightened by the whistle of an approaching train, stopped so that the train strikes the rear wheel of the wagon; held, that the blowing of the whistle was not negligence.—Cavanaugh v. Michigan Cent. R. Co., 175 Mich. 156.

¶ 487. Negligence cannot be predicated on the failure of those in charge of a locomotive to maintain a lookout, where the danger of a person who drove onto a railway crossing could not have been discovered by the exercise of due care, in time to have avoided striking him.—Braley v. Grand Trunk Ry. Co., 185 Mich. 606.

¶ 488. There is no statutory duty upon an engineer to give any particular signals upon starting his train under a crossing.— Doston v. Michigan Cent. R. Co., 187 Mich. 650.

¶ 489. There is no statutory obligation upon the part of a railroad engineer to give signals for a highway crossing after he has passed it.—Doston v. Michigan Cent. Ry. Co., 187 Mich. 650.

Duty of railroad company as to lookout and signals on approaching private or farm crossing, see note, 16 N. C. C. A. 983-1007.
Liability for injuries inflicted by car or train not equipped with electric headlight as required by statute or ordinance, see note, 6 N. C. C. A. 1032-1041.

§ 77. Proximate cause of injury.

Of injury to licensees and trespassers, see ante § 51.
Contributory negligence of injured person, see post § 78.
Evidence as to cause of injury, see post § 90.
Jury questions as to cause of injury, see post § 96.
Of injury to persons beside or near to tracks, see post § 115.
General law as to proximate cause, see Negligence, III.

¶ 490. A caution board at a railroad crossing is for the purpose of a notification to those who are passing along the road; and where a party is familiar with the crossing, and has frequently been over it, and had it in mind on the occasion in question as he approached it, he cannot be said to have been injured by the failure to set up the caution. —Haas v. Grand Rapids & I. R. Co., 47 Mich. 401.

¶ 491. Where, while plaintiff is driving across defendant's tracks and when almost across, his horse becomes frightened and stops so that a train strikes the rear wheel of the wagon, the proximate cause of the

accident is the fact that the horse became frightened and not the excessive speed of the train.—Cavanaugh v. Michigan Cent. R. Co., 175 Mich. 156.

¶ 492. Plaintiff's intestate was driving along the highway in the direction of a railroad crossing, and had reached a point about 100 feet distant therefrom, when the thills became detached from the buggy upon one side, and dropped down, causing the horse to jump and run, and at the same time preventing the buggy from being drawn straight. The plank roadway at the crossing was but fourteen feet in width, and the surface of the planks was lower than the top of the rails. On reaching the crossing, the wheels of the buggy came in contact with the projecting rails, and slid off the end of the planking, and the intestate was thrown out and killed. Held, that the improper planking of the crossing was not the proximate cause of the accident, and that the railroad company was not liable.—Murphy v. Michigan Cent. R. Co., 107 Mich. 627.

¶ 493. The illegal obstruction of a highway by a freight train standing across it is not the proximate cause of the injury which a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there.—Selleck v. Lake Shore & M. S. Ry. Co., 58 Mich. 195.

§ 78. Care and contributory negligence by injured person.

Of injured licensees, see ante § 52.
Of persons injured beside or near tracks, see post § 115.
Of owner of injured cattle, see post § 123.
Of persons suing for negligent fires, see post § 136.
Imputed negligence, see post § 83.
Evidence as to care or negligence of injured person, see post §§ 88, 93.
Presumptions as to care or negligence of injured person, see post § 86.
Jury questions as to contributory negligence of persons injured at crossings, see post § 101 et seq.
Instructions as to contributory negligence, see post § 111.
General law as to contributory negligence, see Negligence, IV.

¶ 494. One cannot recover for an injury caused by the collision of a locomotive with the wagon in which she was riding, if her own negligence contributed directly or proximately to the injury, though the negligence of the railroad company may have concurred.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 495. A man was killed while trying to drive across a railway track. Held, that in the absence of any knowledge as to what was in his mind, he could not be conclusively found negligent unless no sensible explanation of his conduct was reasonably possible. He had a right to suppose that the railroad company would not violate any legal duty and would not fail to take reasonable measures to prevent mischief. He could not be blamed for doing as seemed best under the circumstances, and it would not necessarily be reckless to go forward rapidly.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

¶ 496. It is negligent to approach a railway crossing with a team so closely as to involve apparent danger, either of direct collision or of the team's being so frightened by the passage of the train as to become unmanageable and likely to get upon the track in spite of the attempt to check it.—Rhoades v. Chicago & G. T. Ry. Co., 58 Mich. 263.

¶ 497. A man approached a railway crossing at an acute angle in a buggy drawn at an easy trot by a horse and a mule. A regular fast train, coming at the same time, and in full sight for a considerable distance if he had turned his head, whistled sharply close by the crossing and frightened his team, so that it became unruly and ran upon the track, and the man was killed. The man, who knew the neighborhood, was apparently ill, and drove absent-mindedly, without noticing the train until he was close to the crossing, though several witnesses saw the danger he was running into. Held, that he was guilty of contributory negligence.—Rhoades v. Chicago & G. T. Ry. Co., 58 Mich. 263.

¶ 498. If a person approaches a railway crossing without reasonable caution and care, particularly when a fast train is due and approaching, and by reason thereof his team becomes unmanageable, goes upon the track, and injury results; there is such contributory negligence as will prevent a recovery.—Brady v. Toledo, A. A. & N. M. R. Co., 81 Mich. 616.

¶ 499. A person familiar with a railroad crossing, having been frequently over it, and knowing its location, when approaching the same is under the highest possible obligation to observe such precautions as are needful to avoid a collision; and failure so to do is contributory negligence that will prevent recovery for damages, if any accrue.—Brady v. Toledo, A. A. & N. M. R. Co., 81 Mich. 616.

¶ 500. The doctrine of comparative negligence does not prevail in Michigan, and cannot be applied to the case of a person injured while crossing a railroad track.—Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

¶ 501. The rule that a railroad track is a warning of danger applies as well to a side track as to the main line.—Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

¶ 502. In an action for damages for personal injuries received by a pedestrian as

the result of being struck by an engine while crossing a railroad track the plaintiff is shown to be guilty of contributory negligence if the accident occurred to him in walking upon a railroad crossing where there were several tracks, and in stepping back—to avoid an engine on one of the tracks—without looking to see whether the track behind was clear.—Gebhard v. Detroit, G. H. & M. R. Co., 79 Mich. 586.

¶ 503. A train standing upon a highway with an engine attached is of itself notice of danger; and where a woman twenty-seven years old, in order to take an incoming train, tried to climb over the coupling between two freight cars with engine attached standing across a highway, and was killed by the sudden starting thereof, there could be no recovery in the absence of a special assurance on defendant's part that she might cross safely, even though employees of the company have frequently assisted persons in so crossing.—Bird v. Flint & P. M. R. Co., 86 Mich. 79.

¶ 504. A man fifty years old, of good health and sound in mind and body, his hearing and sight not defective, who, being perfectly familiar with a locality, drives upon a crossing where looking in but one direction when a train is approaching from another, although, when within one hundred and twenty feet of the track, he had a clear, unobstructed view of the track for a long distance, is guilty of contributory negligence if run over by the approaching train.—Grostick v. Detroit, L. & N. R. Co., 90 Mich. 594.

¶ 505. A stranger to the vicinity who alights from a railroad train at a street crossed by the tracks of several different companies, and proceeds, without looking or listening, to cross the track of another road in front of an engine whose headlight is plainly visible, is guilty of such contributory negligence as will prevent a recovery for his death, although it does not appear that he knew of the existence of the second track, and though there was obscuring smoke and some noise.—Bannister v. Lake Shore & M. S. R. Co., 113 Mich. 580.

¶ 506. A railroad track being in itself notice and warning of danger, it is the duty of a person who approaches a crossing to look and listen before venturing upon it; and failure, when within five feet of a track, to look in the direction of an approaching train, when the view was unobstructed for 250 feet, is such negligence as bars recovery for an injury, nor would the diversion of plaintiff's attention by a switch engine's bell and steam puffing, excuse such failure.—Gardner v. Detroit, L. & N. R. Co., 97 Mich. 240.

¶ 507. Contributory negligence prevents a recovery for a railway injury, even though defendant was negligent in not exhibiting a light or in failing to ring a bell on approaching a street-crossing.—Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93.

¶ 508. One who was driving toward a railroad crossing saw, when fifty-five feet distant, an approaching train, whereupon his team became frightened and ran across the track, causing a collision. Held, that no recovery could be had, as the fright of the horses and the consequent injury were caused by plaintiff's failure to take proper precautions in approaching the crossing, not by defendant's running its train at a rate of speed slightly in excess of that allowed by the ordinance, or omitting the customary signals.—Stahl v. Lake Shore & M. S. R. Co., 117 Mich. 273.

¶ 509. The rule which precludes the defense of contributory negligence by a railroad company which "kicks" its cars across a street without the presence of a trainman does not apply to a case where the negligence of the injured party arises after the act is done.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 510. A pedestrian who, upon reaching a point six feet from a railroad track, has an approaching train in plain view and yet attempts to walk across the track is contributorily negligent.—Braudy v. Detroit, G. H. & M. R. Co., 107 Mich. 100.

¶ 511. In an action against a railway company for the negligent killing of plaintiff's intestate at a crossing, the evidence showed that at a distance of seventy-five feet from the track a person could see a train coming in either direction about a quarter of a mile away, that when decedent was sixty yards away from the track a pedestrian warned him of the approach of the train, that the pedestrian had just heard the train whistle when he gave this warning, that the automatic electric signal bell was ringing at the time of the accident, and could be plainly heard, and that the station agent also signaled with his arms to decedent, warning him to stop. Held, that decedent was chargeable with contributory negligence.—Peck v. Grand Trunk Western Ry. Co., 155 Mich. 490.

¶ 512. One approaching a railway crossing may rightfully assume that trains will be operated in a lawful manner.—Rouse v. Blair, 185 Mich. 632, 10 N. C. C. A. 1033. (Brooke, C. J., Ostrander and Steere, JJ., dissenting.)

¶ 513. Where the plaintiff returning from the village, driving a span of horses hitched to a sleigh, on a road which in some places was not more than 6 or 8 feet from the railroad track and in others 25 feet, the night being dark, stormy, and cold with the snow blowing and drifting, not being able to guide his horses from the bottom of his sleigh let

them pretty much have their own way in following the road, at a point in the highway where the railroad crossed it diagonally, the team diverged from the road and followed the track for some distance and plaintiff was struck by a train, he was guilty of such contributory negligence as barred a recovery.—Dugas v. Munising, M. & S. E. R. Co., 189 Mich. 620.

¶ 514. The defendant railroad's failure to construct fences and cattle guards at a crossing was not such negligence as would permit plaintiff to recover damages for personal injuries where the injuries were brought on the plaintiff by his own contributory negligence in allowing his team at a crossing to turn and follow the track.—Dugas v. Munising, M. & S. E. R. Co., 189 Mich. 620.

¶ 515. Plaintiff who was injured by an engine on defendant's tracks, being deaf and of mature age, is guilty of contributory negligence in standing upon the railroad track for several seconds in such a position that he could not see all trains approaching at a crossing on which he knew there was much traffic; knowing that the watchman was not present to warn him of danger.—Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 216.

¶ 516. Recovery cannot be had for the negligence of a railway company, when the deceased, who was familiar with the locality and knew that trains passed frequently and that they ran irregularly, stood on the track at nightfall, stupefied and confused with liquor, before the approaching headlight of a slowly-moving locomotive.—Marquette, H. & O. R. Co. v. Handford, 39 Mich. 537.

Attempt to pass between coupled cars at street crossing as negligence, in actions involving injuries due to movement of cars without warning, see note, 12 N. C. C. A. 985-1009.

Attempt to pass over protected crossing, in reliance upon fact that gates are up, as contributory negligence as a matter of law, see note, 16 N. C. C. A. 110-140.

Lack of familiarity with conditions at railway crossing as bearing upon alleged contributory negligence of traveler injured or killed thereat, see note, 16 N. C. C. A. 358-378.

Liability for collision with vehicle stalled on railroad track, see note, 7 N. C. C. A. 538-545.

§ 79. ——Duty to stop, look and listen.

Jury questions as to negligence of vehicle users in failing to stop, look and listen, see post § 103.

¶ 517. Plaintiff was guilty of contributory negligence in attempting to cross a railroad track without looking to see if a train was approaching, where his opportunities for seeing the train being as good as those of witnesses who saw plaintiff drive upon the track when the train was approaching without stopping to look or listen for the train.—Guta v. Lake Shore & M. S. R. Co., 81 Mich. 291.

¶ 518. Where plaintiff, without stopping and without taking care to see whether a train he knew to be due was near, urged his hesitating horses across a railroad track at a crossing with which he was familiar, and which was so obstructed by intervening objects that he could not see an approaching train until within a few feet of the crossing, and then only for a few rods up the track, and where a mill in the vicinity and also his wagon made considerable noise, and the wind was blowing in a direction to take the sound of a whistle away from him, he was guilty of contributory negligence.—Brady v. Toledo, A. A. & N. M. R. Co., 81 Mich. 616.

¶ 519. One who when driving toward a railroad track at a point familiar to him would, had he looked, have seen an approaching train in time to stop his horse before reaching the track, is, in case of an accident resulting, guilty of such contributory negligence as prevents a recovery.—Freeman v. Duluth, S. S. & A. R. Co., 74 Mich. 86.

¶ 520. A man who, in the full possession of his faculties, walks in broad daylight toward a railroad crossing in a city street, and who, when he reaches the crossing, looks toward an approaching train and walks for thirty feet in plain view of it without slacking his speed and without looking again, is guilty of such contributory negligence as prevents a recovery for an injury resulting in his death.—Graf v. Chicago & N. W. R. Co., 94 Mich. 579.

¶ 521. It is contributory neglect for the driver of a team approaching a track at a walk to look at a distance of 90 or 100 feet and then without stopping drive upon the track past intervening obstructions, though with no risk he might have stopped at a point 20 feet from the track and had an unobstructed view of the approaching train; and that fact that he was then looking in the other direction does not excuse the failure to do so.—Shufelt v. Flint & P. M. R. Co., 96 Mich. 327.

¶ 522. A pedestrian who has passed an open gate at a railroad's crossing over a city street, and who, after walking forty-eight feet while she could have seen an approaching train 425 feet away if she had looked in the direction from which it was coming, crosses the track, is guilty of such contributory negligence as precludes recovery for an injury to her by such train, unless the failure to let down the gate excused her from exercising care in crossing the track; and such failure cannot so excuse her where she testifies that she thought the gates did not fall for a yard engine, since

if she was looking for a yard engine she could as easily have seen the train.—Dawe v. Flint & P. M. R. Co., 102 Mich. 307.

¶ 523. A decedent who drove his sleigh onto a railroad crossing with which he was familiar, without apparently hearing or seeing boys who called loudly to him to stop, and who could have seen an approaching train over a fence had he tried, was guilty of contributory negligence.—Stewart v. Michigan Cent. R. Co., 119 Mich. 91.

¶ 524. A plaintiff was not entitled to recover for the result of a collision of his buggy with a railroad train, where he approached a country crossing with which he was familiar, where trains were visible for a distance of over 1,000 feet at a point 75 feet from the highway, and where plaintiff did not look after passing the 93-foot point, and his 15-year-old daughter who rode with him, must have seen the train had she looked.—Tucker v. Chicago & G. T. R. Co., 122 Mich. 149.

¶ 525. A plaintiff, whose vehicle was struck at a crossing, was guilty of contributory negligence, where he knew that he was approaching a dangerous place where the train was at any time liable to cross, but after stopping about thirty feet or more from the track to look and listen, went on without continuing to look and listen for the entire distance, although he saw a light shining on the track, which in fact was from the headlight on the engine, although he stated that he thought it was from an electric lamp about 400 feet away.—Britton v. Michigan Cent. R. Co., 122 Mich. 359.

¶ 526. Where plaintiff's intestate stopped his buggy about 50 feet from a railroad crossing and looked and listened for a train, and then as he started up, looked out of the glass at the back of his buggy from which he could see a few rods of the track, and then passed onto the track without looking any further in the direction of an approaching train, he was guilty of contributory negligence.—Proper v. Lake Shore & M. S. Ry. Co., 136 Mich. 352.

¶ 527. Since a railway track is evidence of danger, it is the duty of a traveler to stop, look and listen before crossing it.—Braley v. Grand Trunk Ry. Co., 185 Mich. 606.

¶ 528. The rule requiring a person to stop, look and listen before crossing a railway track, held a rule of conduct and not of evidence.—Braley v. Grand Trunk Ry. Co., 185 Mich. 606.

¶ 529. One about to pass a railroad track is bound to recognize the danger and use the sense of hearing as well as of sight, to learn before trying to cross whether a train is dangerously near. Neglect to do this is legal negligence, and absence of mind does not excuse it.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 530. While it is a wholesome precaution for persons approaching the track of a railroad to look both ways and to listen for approaching trains, and while this is what is generally required, it is not a rule of universal application. Each case must depend upon its own circumstances.—Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261.

¶ 531. While one who is about to cross a railroad track is required to look and listen for an approaching train even when none is due, he is not required to do so as carefully as he would be were a train due, the time of the coming of which was known to him.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 532. In an action for the value of a horse and carriage, destroyed by collision with an engine, where it appears that the company was at fault in not having a flagman at a street-crossing, and the driver of the plaintiff's horse contributed to the injury complained of, by failing to look out for trains, the plaintiff cannot recover unless the defendant was guilty of such reckless negligence in the premises as to acquit the driver of fault.—Freeman v. Duluth, S. S. & A. R. Co., 74 Mich. 86.

¶ 533. A railroad track is a perpetual menace of danger, and a traveller is not excused in neglecting to keep his eyes and ears open up to such a distance of it that he may stop if he can see or hear an approaching train.—Freeman v. Duluth, S. S. & A. R. Co., 74 Mich. 86.

¶ 534. A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing and sight to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk; and such conduct should be pronounced negligence by the courts, as matter of law.—Brady v. Toledo, A. A. & N. M. R. Co., 81 Mich. 616.

¶ 535. It is not under all circumstances absolutely necessary for a person approaching a railroad crossing to look both ways and to listen for approaching trains.—Richmond v. Chicago & W. M. R. Co., 87 Mich. 374.

¶ 536. A person about to cross a railroad track is bound to recognize the danger, and make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at

his own risk.—Grostick v. Detroit, L. & N. R. Co., 90 Mich. 594.

¶ 537. Unless one has an uninterrupted view of a railroad track for so great a distance as to make it certain, he should not assume that he can drive his team a considerable distance and cross before a train passes; and failure to stop and listen for a fast train known to be due, while driving after dark 196 feet in approaching a railroad crossing when the view of the track is obstructed, is negligence.—Houghton v. Chicago & G. T. R. Co., 99 Mich. 308.

¶ 538. The rule which excuses one for acts which, under ordinary circumstances, would constitute contributory negligence, because they were committed in a sudden emergency in an effort to escape from imminent peril, does not apply where the perilous position was due to the negligence of the person committing such acts. So held where plaintiff's intestate was killed in an attempt to cross a railroad track in front of a train, the approach of which, by the exercise of due care, she would have discovered by looking before her situation became perilous.—Richfield v. Michigan Cent. R. Co., 110 Mich. 406.

¶ 539. A railroad crossing is, in itself, a warning of danger, and a person approaching it is bound to recognize the fact, and to make use of the sense of hearing, as well as the sense of sight, to enable him to avoid injury; and, if either sense cannot be rendered available, the obligation to use the other is the more clear.—Phillips v. Detroit, G. H. & M. R. Co., 111 Mich. 274.

¶ 540. Listening for signals is not alone enough, the traveler about to cross should be alert and pay attention to the track.—Stahl v. Lake Shore & M. S. R. Co., 117 Mich. 273.

¶ 541. A woman partly deaf who, while driving in a covered buggy where she can see the track plainly, does not stop to listen although she hears a train, but who, after checking the horse and looking through an opening in the curtains of the buggy, drives upon the track, is guilty of such contributory negligence as prevents her recovering for injuries.—Bond v. Lake Shore & M. S. R. Co., 117 Mich. 652.

¶ 542. The duty of travelers to look and listen for trains approaching country crossings is not lessened by the fact that the schedule time of a train is past, as they are charged with notice of the fact that trains are often behind time.—Tucker v. Chicago & G. T. R. Co., 122 Mich. 149.

¶ 543. A person crossing a railroad on a highway owes no duty to stop in order to look and listen, if the outlook is such that approaching trains may be seen without doing so.—Gorton v. Harmon, 152 Mich. 473.

¶ 544. A person who crosses a railroad track without looking in both directions or listening for the approach of a train, at a time when he knows that a train is about due, upon a stormy day, and at a place where it is difficult to stop a team after descent upon the track is begun, cannot be held free from contributory negligence.—Schwartz v. Mineral Range R. Co., 153 Mich. 40.

¶ 545. A pedestrian in full possession of his sight and hearing, who crosses, on a dark and stormy night, a railroad track at a street-crossing with which he is well acquainted, at a rapid gait without stopping to look or listen or slacking his pace and is killed by a train, is guilty of such contributory negligence as precludes a recovery of damages, though the defendant company is guilty of negligence in moving its train.—Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93.

Attempt to pass between coupled cars at street crossing as negligence, in actions involving injuries due to movement of cars without warning, see note, 12 N. C. C. A. 985-1009.

§ 80. ——Where sight or hearing is obstructed.

¶ 546. A team collided with a railway train at a road-crossing and the driver was killed. The railroad and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. The driver was familiar with the crossing; but except that he checked his team for a moment, some four rods from the crossing, he did not appear to have observed any precaution. The engine whistle was duly sounded when the crossing was approached. Held, that the driver of the team was chargeable with negligence directly contributing to the collision.—Haas v. Grand Rapids & I. R. Co., 47 Mich. 401.

¶ 547. Ordinarily, when a traveler drives upon a railway track without stopping to listen, where his view is obstructed, and in consequence thereof is injured, he is under the law guilty of contributory negligence, but the rule that he shall stop is not imperative under all circumstances.—Morgan v. Pere Marquette R. Co., 162 Mich. 573.

¶ 548. The fact that the approach of a railroad to a highway crossing is obscured by embankments or otherwise imposes upon travelers by the highway, as well as upon the railroad company, special care to avoid collisions.—Haas v. Grand Rapids & I. R. Co., 47 Mich. 401.

¶ 549. When a railroad company is required to sound an alarm, or is in the habit of blowing whistles and ringing bells, a traveler about to cross the track has a right

to rely somewhat upon the observance of this custom or duty; and if the track is obstructed temporarily by freight cars, ordinary care does not require that, after he has looked and listened, and heard no warning, and no train is expected at the time, he should stop his team and go on foot upon the track simply because he cannot determine with certainty by sight alone that a train is not approaching.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 550. Neglect to look and listen before venturing upon a railroad track approached at an oblique crossing where trees obstructed vision and the driver sat sidewise bringing his back towards the train, is such contributory negligence as prevents recovery for defendant's neglect to give signals at a highway crossing.—Matta v. Chicago & W. M. Ry. Co., 69 Mich. 109.

¶ 551. Where one who is driving a team is unable to see an approaching train for a distance of 128½ feet from the crossing, his driving that distance and attempting to cross the track without stopping to listen is contributory negligence.—Jensen v. Michigan Cent. R. Co., 102 Mich. 176.

¶ 552. The rule that one should stop and listen before venturing upon a railroad track at a point where the view of an approaching train is cut off is inapplicable to a case where the driver of a horse is at a distance from the track, and injury results from the horse's taking fright at the train and running away.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 234.

¶ 553. A deaf man who, without stopping to look for an approaching train, drives upon a railroad track, is guilty of such negligence as will preclude a recovery for injuries, although another vehicle 175 feet ahead of him has crossed safely, and although it is unusual for a train to pass the crossing at the particular day and hour; and he is not excused from taking proper precautions by the fact that this view of the track is obstructed, especially if by standing up in his vehicle he could get a clear view for a long stretch of track.—Phillips v. Detroit, G. H. & M. R. Co., 111 Mich. 274.

¶ 554. One who, because of the sun, cannot see whether a train is coming, should stop and listen before driving across a railroad track; and is negligent in approaching when the engine is only 20 feet from the crossing, whereas others heard it and saw it for one mile.—Osborn v. Detroit, G. H. & M. R. Co., 115 Mich. 102.

¶ 555. Decedent's contributory negligence in attempting to cross the track, although the automatic electric signal bell was ringing, is not excused by evidence showing that a freight train was standing on a track near by, and that the bell was sometimes rung when freight trains passed, as supporting an inference that decedent took the signals to mean that the freight train was about to change its position.—Peck v. Grand Trunk Western Ry. Co., 155 Mich. 430.

Impediments to hearing, other than physical impairment, as excusing duty to look and listen before crossing railroad track, see note, 6 N. C. C. A. 946-952.

§ 81. ——Automobilists, bicyclists, and drivers of self-propelling vehicles.

Weight and sufficiency of evidence, see post § 94.

Jury questions as to negligence of automobilists and bicyclists, see post § 104.

¶ 556. The operator of an automobile upon approaching a railroad track should be held to the same degree of care which must be exercised by a pedestrian under like circumstances.—Sanford v. Grand Trunk Western Ry. Co., 190 Mich. 390.

¶ 557. The operator of a steam roller in crossing an electric railway track on a highway crossing, failing to send a person in advance of the roller as required by Act No. 71, Pub. Acts 1903, is guilty of contributory negligence where the roller is struck by a car going fifty miles an hour.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1.

¶ 558. An operator of an automobile who is himself a railroad engineer of long experience and is thoroughly familiar with a railroad crossing which he is approaching, is guilty of contributory negligence where he fails to look down the railroad at a point 10 to 15 feet from the track, at which point his view of the track is unobstructed for 1,000 feet, and operates his car at such a speed upon reaching such point that he cannot stop his car before it reaches the track.—Sanford v. Grand Trunk Western Ry. Co., 190 Mich. 390.

§ 82. ——Of children.

Jury questions as to contributory negligence of children, see post § 107.

General law as to care required of children, see Negligence § 20.

¶ 559. A boy nine years and six months of age was accustomed to cross defendant's railroad track in going to and from school. On leaving school he proceeded southward and stood on defendant's north track watching an eastbound passenger train on the south track. While waving his hands at the passengers he was struck by a westbound blind baggage train and killed. From where he stood he had a clear view to the east of a quarter of a mile, but did not glance in that direction before stepping upon the track. He was a bright boy, standing high in his studies, acquainted with the running

of the trains, and accustomed to crossing the tracks in peddling newspapers. Held, an action by his administrator was barred as a matter of law by his contributory negligence.—Mollica v. Michigan Cent. R. Co., 170 Mich. 96.

§ 83. Imputed negligence.

Imputed negligence of driver to occupant of vehicle or of parent to child, see generally Negligence, IV.

¶ 560. In an action against a railroad company for injuries caused by the collision of its locomotive with the wagon in which the plaintiff was riding, the latter's right to recover was affected as much by the negligence of the person owning and driving the team as by her own.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

§ 84. Wilful acts or gross negligence; last clear chance rule.

¶ 561. It is gross negligence to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flag-man at the crossing, even though the rate of the train is but little faster than a person walks; where three parallel tracks had been blocked and as the furthermost pulled out another followed in backing as the traveler crossed. —Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261.

¶ 562. A traveler on a highway, injured at a railroad crossing through his own contributory negligence, cannot recover where the negligence of the railroad, if any, occurred before its discovery of the traveler's negligence, and there is nothing to show that the engineer acted maliciously, or failed to do all that a reasonable man could do to avert the collision after discovering the concurring negligence of the traveler.—Strong v. Grand Trunk Western Ry. Co., 156 Mich. 66.

¶ 563. It is not gross negligence for the engineer to fail to stop or to fail to gain complete control of a train of cars merely because persons are seen approaching the track upon a highway, on foot or with vehicles.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 564. To run a train of twenty-two cars backwards over a village street crossing without signals or warnings, at twenty-five to thirty miles an hour, is not such gross negligence as will relieve one struck by the train from his contributory negligence in driving onto the crossing without the exercise of due care to discover the approach of the train.—Rouse v. Blair, 185 Mich. 632, 8 N. C. C. A. 1033. (Brooke, C. J., Ostrander and Steere, JJ., dissenting.)

Presumption that traveler on street or highway will take notice of railway crossing, warning signals or approaching train, as limiting application of last clear chance rule, see note, 16 N. C. C. A. 291-326.

Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to drivers of vehicles at railroad crossings, see note, 11 N. C. C. A. 127-148.

Necessity for actual discovery of peril as condition to application of last clear chance doctrine in actions for injuries to pedestrians at railroad crossings, see note, 11 N. C. C. A. 306-319.

§ 85. Actions for injuries at crossings; pleadings.

In actions for injuries to licensees and trespassers, see ante § 55.

Improper argument in actions against railroads, see Argument of Counsel.

General law as to pleading, issues and variance, see Pleading.

Amendments of pleadings in crossing cases, see Pleading, VI, especially ¶ 594.

Venue of actions against railroads, see Venue.

¶ 565. A declaration against a railway company for negligent injury states a good cause of action in alleging that defendant, in placing its cars so as to obstruct a highway crossing and in leaving them there, has so negligently conducted itself as to cause the injury.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 566. In an action against a railroad company for negligent injury to plaintiff while crossing defendant's track, a declaration, in which the negligence is confined by the allegation to the single assertion that defendant, by its servants, "so carelessly and improperly managed the said locomotive and train" that by and through "their negligence and improper conduct" the train struck the sleigh, failed to allege defendant's duty in the premises and its neglect to observe such duty.—Schindler v. Milwaukee, L. S. & W. R. Co., 77 Mich. 136.

¶ 567. A declaration alleging that defendant railroad company with notice of the fact that plaintiff in the exercise of due care was crossing its tracks, and having a duty resting upon it not to move its locomotive then standing still so as to collide with him, negligently and carelessly by its servants and agents disregarded its duty, started its engine, and ran into plaintiff's wagon, contains a sufficient allegation of a breach of duty.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

¶ 568. In a declaration for a railway injury, an averment that defendant negligently and carelessly drove a certain locomotive upon the railroad up to, upon and across a certain public highway at the crossing of the same and the said railroad, with-

out giving the necessary statutory signals, viz., ringing a bell or sounding a whistle, was a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury, and it entitled plaintiff to support it by evidence, under defendant's plea to the general issue.—Chicago & N. E. R. Co. v. Miller, 46 Mich. 532.

¶ 569. Testimony in an action for personal injuries caused in a collision at a crossing, that plaintiff stopped his horse, leaned forward and looked out at the side of his enclosed carriage before starting to cross, is a variance from a declaration alleging that plaintiff looked and listened for an approaching train, slowed his horse to a very slow walk and continued to look and listen as he approached the crossing when it was so dark that he could not see and that his view was obstructed by freight cars; and its admission after objection for variance and after plaintiff had been given leave to amend and refused to do so, was reversible error.—Britton v. Michigan Cent. R. Co., 122 Mich. 359.

¶ 570. Where trains are required by law to come to a full stop before crossing a railroad track, it seems that their neglect to do so, though not averred in a declaration for injury to persons crossing their tracks, has nevertheless some bearing on the question of the speed at which they were running near such crossing.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

§ 86. Burden of proof and presumptions.

In actions for injuries to licensees and trespassers, see ante § 57.
In actions for injuries to or by animals, see post § 125.
In actions for fires, see post § 139.
Weight and sufficiency of evidence, see post § 89.
General law as to burden of proof and presumptions, see Evidence, II.

¶ 571. It is to be presumed that deceased killed while driving across a railroad crossing on a dark night exercised the precaution of an ordinarily prudent man and stopped, looked, and listened, before attempting to cross, where there were no eyewitnesses to the killing, but the testimony shows that the engine failed to give the statutory signals upon approaching the crossing and that it was running backward at high speed with the tender in front and the only light displayed in the direction it was going was a red light hanging on the tender.—Schremms v. Pere Marquette R. Co., 145 Mich. 190.

¶ 572. The presumption that a person killed at a railroad crossing stopped, looked, and listened before attempting to cross and was free from contributory negligence applies only where there is no direct evidence to the contrary.—Baker v. Delano, 191 Mich. 204.

¶ 573. Contributory negligence cannot be presumed where a traveler was killed at a railroad crossing on a dark night by being struck by the tender of an engine running backwards at high speed; where, although there were no eyewitnesses to the killing, the testimony shows that the statutory signals of warning were not given as the locomotive approached the crossing and the only light displayed in the direction it was going was a red light hanging on the tender.—Schremms v. Pere Marquette R. Co., 145 Mich. 190.

Presumption that traveler on street or highway will take notice of railway crossing, warning signals or approaching train, as limiting application of last clear chance rule, see note, 16 N. C. C. A. 291-326.

§ 87. Admissibility of evidence.

In actions for injuries to licensees and trespassers, see ante § 58.
In actions for injuries to or by animals, see post § 126.
Weight and sufficiency of evidence, see post § 87.
In actions for fires, see post § 140.
Removal of obstruction to view of crossing as admission, see Evidence ¶ 2120.
Admissibility of evidence that witness to failure to signal was attentive and would have heard, see Evidence § 81.

¶ 574. A freight train lay on a siding to await a coming express, and at a point where a highway crossed the siding the train was divided. The cars on both sides of the road somewhat encroached upon the traveled part of the highway, and a person crossing in a cutter was injured because the driver was obliged in consequence to turn sharply so as to avoid the cars, and as the horse then sheered, the cutter struck a rail and was upset. Held, (1) that it was proper to show by the testimony of a bystander that there was room enough on the siding to accommodate the train without encroaching on the highway—which was not a question for an expert; (2) that the testimony was relevant as rebutting the presumption that the railroad company had done its full duty in putting the cars where they ought to be, since its failure to do so might not be negligence in itself but only under the circumstances of the case.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 575. Where there was a conflict as to whether defendant's train ran over a crossing at excessive speed, and some testimony that it ran as fast as during ten days previous to the accident, it is proper rebuttal to show what the running rate was during that ten days.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647.

¶ 576. In a personal injury case for injuries received in a collision between an engine and plaintiff's wagon it was competent for the plaintiff to show the condition of the crossing at the time of the accident, where it tended to show that the approaches to the crossing were not in a safe condition.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 577. In an action for personal injuries sustained at a grade crossing of a railroad the admission of a municipal ordinance limiting the speed of trains is not erroneous on objection that it was incompetent and irrelevant with a full charge to the jury on the question of negligence, making such question depend on whether the speed was exceeded and the ordinance a mere circumstance in evidence.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

¶ 578. In an action against a railroad company for personal injuries sustained by a pedestrian through the rolling of a steel rail on her foot, the fact that other people passed over the same place furnishes no evidence that the crossing was in a reasonably safe condition.—Sosnofski v. Lake Shore & M. S. Ry. Co., 134 Mich. 72.

¶ 579. In an action for injuries received at a railroad crossing, evidence of prior accidents at such crossing is admissible for the purpose of proving negligence as well as for the purpose of showing defendant's knowledge of the conditions at the place of the accident.—Woodworth v. Detroit United Ry., 153 Mich. 108.

¶ 580. Where a steam road roller in crossing an electric railway track on a highway crossing is struck by a car, evidence that the roller had stopped on the crossing on a prior occasion and that a collision was narrowly averted is not admissible as notice requiring the company to decrease the speed of its cars in such locality.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1.

¶ 581. Where a steam roller in crossing an electric railway track on a highway crossing is struck by a car, refusal of the court to allow the plaintiff to show changes in the premises after the accident is not error, as it is immaterial unless the jury were permitted to view the scene, and no direct request was made for such view, and if request had been made and refused error could not be assigned on such a discretional matter.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1.

¶ 582. Where it was contended that the engine which struck plaintiff carried no lights, evidence that an unlighted engine was seen in the vicinity is admissible where the court instructs that the jury must determine whether such engine was the one that struck plaintiff.—Amanta v. Michigan Central R. Co., 177 Mich. 280.

¶ 583. The omission to station a flag-man at a dangerous crossing may be taken into account as evidence of negligence, even though the company has not been ordered by the railroad commissioner to station a flag-man at such crossing.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

§ 88. ——As to care or negligence of injured person.

Care and contributory negligence of injured person, see ante § 78.

Weight and sufficiency of evidence as to contributory negligence, see post § 101.

Competency of witness to testify of his own ability to see or hear, see Evidence § 238.

¶ 584. In an action for a railroad injury resulting from crossing defendant's track, the care or want of care of the person injured in crossing at the same point at other times is immaterial.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 585. The testimony of a witness on the trial of an action for an injury caused by defendant's train at a highway crossing that on the day of the accident he was at work east of the crossing; that the wind was blowing from the northwest; that the train was running south, and that, although he had heard the train whistle every day at the crossing, he heard nothing at all on the day in question, was admissible.—Sanborn v. Detroit, B. C. & A. R. Co., 99 Mich. 1.

¶ 586. In a suit by a boy to recover for injuries resulting from a collision with defendant's engine at a crossing while coasting down the hilly street leading thereto, it is proper to permit the plaintiff on the question of contributory negligence to show that it was customary for the boys thus to coast on that and previous winters, where defendant knew of this custom and had at times placed a flag-man at the crossing to warn the boys of trains.—Imus v. Ann Arbor R. Co., 172 Mich. 292.

§ 89. Weight and sufficiency of evidence.

In actions for injuries to licensees or trespassers, see ante § 59.

In actions for injuries to or by animals, see post § 127.

In actions for negligent fires, see post § 141.

Weight of opinion evidence as to safety of given practice at crossings, see also Evidence ¶ 2946.

¶ 587. Evidence that the planking between the rails at a crossing was allowed to go without attention for a much longer time than would ordinarily wear it out, that the plank next to the rail was split and left a space in which plaintiff's foot

caught, that the defect was such as readily to be seen if looked for, and that no proper inspection was made, is sufficient to charge a railroad company with liability for the defect.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 588. The testimony of witnesses that they were giving attention to the approach of an engine, and were listening for the whistle, and that no whistle was sounded or bell rung, is positive and certain in its character, and, if believed by the jury, warrants them in finding that the signals were not given.—McDuffie v. Lake Shore & M. S. R. Co., 98 Mich. 356.

¶ 589. In an action against a railroad company for personal injuries sustained in a grade crossing accident, testimony that the plaintiff who was riding in a buggy stopped, looked and listened before crossing the track, that he was struck by a passenger coach which had been "kicked" down the track without signal, lights, or trainman to warn of its approach, controverted by testimony for the defendant, is sufficient to support a verdict for the plaintiff.—Monroe v. Lake Shore & M. S. R. Co., 129 Mich. 309.

¶ 590. In an action against a railroad for the death of a person struck by an engine which followed over a crossing closely after a train, negligence cannot be inferred from the fact that the engine followed immediately after the train.—Barnum v. Grand Trunk W. Ry. Co., 137 Mich. 580.

¶ 591. In an action for the negligent killing of plaintiff's intestate where a caboose was left standing on the track in the street of a public highway the fact that it was struck suddenly by an engine with another caboose attached and backed up, so that it struck the deceased unawares is negligence.—Davis v. Michigan Cent. R. Co., 142 Mich. 382.

¶ 592. In an action against a railroad by a pedestrian for damages for personal injuries sustained as the result of being struck by one of defendant's trains while his foot was caught between a rail and a plank outside the rail at a crossing, evidence held sufficient to warrant a verdict for plaintiff.—Angel v. Grand Rapids & I. Ry. Co., 198 Mich. 9.

¶ 593. That a train is drawn by a reversed engine is not, by itself evidence of negligence.—Battishill v. Humphreys, 64 Mich. 494.

¶ 594. While the violation of a speed ordinance of a city by a railroad is admissible as evidence tending to show negligence in a personal injury suit, it is not, standing alone, negligence which will justify recovery, or upon which an action can be based.—Mollica v. Michigan Cent. R. Co., 170 Mich. 96.

¶ 595. The absence of a flagman at a railroad crossing may be evidence of negligence upon the part of a railroad company in causing the death of the driver of a buggy, although the railroad commissioner, acting under How. St. § 3301 has not ordered a flagman stationed at such crossing.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

¶ 596. The running of railroad trains within the limits of a city at a speed greater than is allowed by an ordinance of such city is a circumstance from which negligence on the company's part may be inferred by the jury.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

§ 90. ——As to cause of injury.

Proximate cause of injury at crossings, see ante § 77.

¶ 597. A railroad car was left for three or four days at a highway crossing so near the traveled part of the way that a wagon could not pass without the wheels or whiffletree coming in contact with the bumper of the car. The car frightened a horse attached to a passing wagon, and the driver was injured. Held that, in the absence of testimony that the horse was vicious or unusually excitable, or that the driver failed to use due care, the position of the car was the proximate cause of the injury, and the company was liable.—Peterson v. Chicago & W. M. R. Co., 64 Mich. 621.

¶ 598. A finding of the jury, in an action against a railroad company for personal injuries to plaintiff at a crossing, that such injuries resulted from a collision with defendant's train and not from a runaway occurring after defendant's train had passed, was supported by the evidence; where it appeared that as plaintiff and her husband approached such crossing, and a short distance therefrom, they stopped, looked and listened, that cars standing upon a siding of defendant obstructed their view of the approaching train, and where the testimony of disinterested witnesses tended to prove that the injury to plaintiff and her husband was reported to the police authorities earlier than it would have been reported had that injury resulted from a runaway occurring after the train had passed.—Hintz v. Michigan Cent. R. Co., 140 Mich. 565.

¶ 599. In an action for wrongful death of a child found near a railroad crossing where it is alleged that an engine struck her and that the engineer and fireman failed to keep a proper lookout, the evidence does not support a finding that she was struck as a direct consequence of failure to maintain such lookout where no one saw the accident and the engineer and fireman testified that they did keep a careful lookout and did not see the child or know that she was struck, and from the injuries it is not

a necessary inference that she was struck and if it is a reasonable inference it does not follow from the physical surroundings of the crossing that she could or should have been discovered by one maintaining a proper lookout.—Bowsher v. Grand Rapids & I. Ry. Co., 174 Mich. 339.

§ 91. ——As to warnings and signals.

See also ante ¶ 588.

Duty to give warnings and signals, see ante §§ 44, 45, 75, 76.

Jury questions as to signals and warnings, see post § 98.

¶ 600. Testimony of persons who were near a railroad crossing at the time of an accident, and whose attention had been directed to an approaching train, that they did not hear the train whistle for the crossing, is sufficient to justify a finding that the whistle was not sounded, although other witnesses testify positively that the signal was given.—Crane v. Michigan Cent. R. Co., 107 Mich. 511.

¶ 601. Testimony of plaintiff and his companion in a vehicle, that they stopped about two rods from a crossing and listened but heard no warning of an approaching train, was not sufficient to overcome the positive testimony of five railroad employees that the crossing signals were given, and the testimony of a disinterested witness who stood in front of his store about 200 feet away, that he saw the vehicle come along, heard the train, heard the whistle blow and watched the parties until they were struck at the crossing.—Britton v. Michigan Cent. R. Co., 122 Mich. 359.

Weight of positive and negative testimony as to signals, see note, 10 N. C. C. A. 571-617.

§ 92. ——As to gross and wanton negligence; last clear chance.

Gross negligence and last clear chance, see also ante §§ 54, 84.

Jury questions as to gross negligence, see post § 100.

¶ 602. Plaintiff, a child three months old, was run over by a railroad train at a crossing in a suburb of Detroit, in the daytime. There was nothing to interrupt the view of the crossing from the train, which could have been stopped before reaching the child had she been seen, as she ought to have been. The trainmen, however, testified that they were on the lookout and did not see her. Held, that there was evidence to sustain an allegation of reckless negligence, and that the question of plaintiff's contributory negligence was thereby eliminated, even conceding that it could be imputed to one so young.—Battishill v. Humphreys, 64 Mich. 514.

¶ 603. A finding of gross negligence on a railroad company's part is warranted by evidence that its employees operating a freight train shunted three cars without any one thereon over a crossing without any signal or warning, though they knew that the driver of a team was approaching the crossing.—Schindler v. Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

¶ 604. Gross negligence, excusing contributory negligence on the part of plaintiff was not established, where the record failed to show that the engineer, whose train was going at about 12 to 18 miles an hour, knew that plaintiff stood on the track in the nighttime waiting for cars on another track to be switched, and where even had he seen her, he had no reason to suppose that she would not hear the sounding of the bell or blowing of the whistle, and would not step aside in time to avoid any danger from the passage of the train; and where he did nothing indicating an entire or intentional disregard of consequences.—Buckley v. Flint & P. M. R. Co., 119 Mich. 583.

¶ 605. In an action against a railroad company for personal injuries sustained by a pedestrian through the rolling of a steel rail on her foot, gross negligence is not made out so as to overcome contributory negligence of the plaintiff by conflicting evidence as to whether barriers were placed across the sidewalk, evidence for the plaintiff that she had passed over the same place a few minutes before and had noticed that repairs were being made, that she observed no signs of danger and received no warning, and evidence for the defendant that the workman did not see the plaintiff until too late to prevent the accident.—Sosofski v. Lake Shore & M. S. Ry. Co., 134 Mich. 72.

¶ 606. Defendant's engineer was about one hundred feet from the crossing when he saw plaintiff's deceased approaching same on a bicycle, twenty-five or thirty feet from the track. The train was going twenty miles an hour. The engineer put the brake lever into the emergency position and opened the sand box. The whistle had been blown for the crossing and was not again used before the boy was struck and killed. Held, there was no evidence of defendant's gross and wanton negligence such as to entitle plaintiff to recover despite the boy's contributory negligence.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

¶ 607. Plaintiff was riding with her husband in a wagon which became cramped on a railroad track, the horses becoming unmanageable. An approaching train, running at from 4 to 6 miles an hour, struck the wagon, injuring plaintiff. Held, that though plaintiff was guilty of contributory negligence, as matter of law, a verdict finding defendant guilty of subsequent negligence would be affirmed.—Fike v. Pere Marquette R. Co., 174 Mich. 167.

¶ 608. In an action by a street sweeper for damages for personal injuries sustained as a result of being struck near a station by one of plaintiff's westbound freight trains while he was standing in the middle of the westbound or north track, after he had passed under lowered crossing gates, and was waiting for an eastbound passenger train, which he had observed to pass on the south track, evidence held insufficient to sustain a finding that defendant was guilty of gross negligence in not stopping its freight train after observing plaintiff on the track.—Bonner v. Grand Trunk Western Ry. Co., 191 Mich. 313.

§ 93. ——As to contributory negligence of pedestrians.

Jury questions as to contributory negligence of pedestrians, see post § 105.

¶ 609. One passing along the sidewalk of a public street has a right to expect some warning before any sudden movement across it of a standing train of cars, and when injured by the sudden backing of one, without warning, across the walk, there would have to be very positive proof of negligence on his part to defeat his right of recovery. —McWilliams v. Detroit Central Mills, 31 Mich. 274.

¶ 610. Decedent was seen about to cross a railway track in a village, at a time when a train was approaching from one direction, and one backing towards her from the other direction. She was soon after found dead outside the street limits on railroad grounds, having been run over by the backing train. Held, that her being found where she was, outside the street limits, did not of itself make out against her a case of contributory negligence.—Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205.

¶ 611. Plaintiff's intestate was killed while attempting to walk across a railroad track in a city street on a dark, rainy night, at a point where the view was unobstructed, and where the headlight of the locomotive which struck him lighted up the track at least a block. There was no witness of the accident. The noise of the train was audible. Held, that he must have been guilty of contributory negligence, and that there could be no recovery, though the train was run at a speed far beyond that allowed by city ordinances, and though the evidence failed to disclose whether any bell was rung or not. —Kwiotkowski v. Grand Trunk Ry. Co., 70 Mich. 549.

¶ 612. A workman while on his way home in the evening stood talking with a companion by a railway track where three roads ran side by side, and where, by daylight, the track could be seen for two miles. He had drunk two glasses of beer. He was forty years old and familiar with the locality, and he also knew that a train was due. A well-illuminated passenger train which had broken its headlight, and had substituted an ordinary lantern therefor approached, and was seen by several persons in the neighborhood. The workman, however, did not see it, but heard a rumbling which he supposed came from some vanishing train on one of the other tracks. He stepped on the track nearest him, with his companion, and both were struck, the latter being killed. Held, that he did not exercise due care.—Mahlen v. Lake Shore & M. S. Ry. Co., 49 Mich. 585.

§ 94. ——As to contributory negligence of vehicle users and drivers and bicyclists.

¶ 613. To establish negligence on the part of a person who drives upon a railroad track when a train is approaching, it is not enough that he was told the train was coming; it should also appear that he heard and understood what was said to him.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 614. In an action by a mother as administratrix of the estate of her minor son for his death caused by a buggy in which he was riding with his father being struck by a railroad train, held, that the father was guilty of such contributory negligence as would preclude recovery, where if he was driving upon the crossing upon a walk, and deliberately drove against the train, or if he was driving his horse fast in an attempt to drive across the track before the train reached the crossing; and in the absence of any testimony showing that the horse was frightened or an attempt was made to stop him to let the train pass in front, there can be no recovery.—Apsey v. Detroit, L. & N. R. Co., 83 Mich. 432.

¶ 615. Where all the evidence in an action for a negligent injury to plaintiff's intestate by defendant's train tended to show that one approaching the track could see the train, with its headlight burning, more than 1,300 feet before it reached the crossing, it is clear that deceased if he had looked might have seen the train in time to avoid the accident, and the fact that he drove upon the track is conclusive evidence that he did not look.—Tobias v. Michigan Cent. R. Co., 103 Mich. 330.

¶ 616. A bicyclist whose view of a third railroad track is obstructed to within a few feet of the track by cars on two nearer tracks is guilty of contributory negligence in failing to dismount to ascertain if the third crossing is safe, and he cannot recover for an injury caused by collision with an engine, though the trainmen failed to give the signals required by the statute.—Lau v. Lake Shore & M. S. R. Co., 120 Mich. 115.

¶ 617. Evidence in an action against a railroad company for the death of a person killed by being struck by a backing train as he was crossing the tracks slowly on a bicycle did not demonstrate he was not

listening; where five witnesses testified that they heard the whistle of the approaching train, though they were twice as far from the engine as deceased, but where it appeared that from the direction from which deceased was coming his ability to hear was lessened by large lumber piles intercepting the sound, while the witnesses had a clear, open space.—Potter v. Pere Marquette R. Co., 140 Mich. 362.

¶ 618. A motorman who, having stopped his car thirty-five or forty feet from a railroad crossing to see whether a train is approaching, attempts to cross the track without again looking for a train until four to six feet from the track, although, from a point ten feet from the center of the track, a train might have been seen for a distance of 576 feet, is guilty of contributory negligence, precluding a recovery for injuries received by a collision at the crossing.—Vreeland v. Cincinnati, S. & M. R. Co., 109 Mich. 585.

§ 95. Questions of law and fact.

In actions for injury to licensees and trespassers, see ante § 62.
In actions to or by animals, see post § 128.
In actions for fires, see post § 142.
Weight and sufficiency of evidence, see ante § 89.
Directing verdict, see post § 108.
General law as to questions of law and fact, see Trial, VI.
Reasonable safety of crossing as conclusion for jury and not witness to draw, see Evidence § 229.

¶ 619. It cannot be said, as matter of law, that a highway crossing is not obstructed by cars when a space of only sixteen feet is left open; it is a question for fact for a jury, depending on the circumstances.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 620. Whether an encroachment upon the planked portion of a highway crossing by the drawbar of a car standing beside it was or was not a negligent obstruction of passage was a question for the jury.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 621. Two railroad tracks controlled by the same company crossed a highway near each other, one on a bridge and the other on a level. A flag-man employed for the latter track had for years been in the habit of warning travelers upon the highway of the approach of trains to cross the bridge on the other. In so doing his signals once misled a person driving, so that the latter advanced at the wrong time, and the horse was frightened by a train passing over the bridge. The driver was thrown out and injured, and sued the company, which defended on the ground that the flag-man was not acting in the line of his employment. Held, that it was for the jury to say whether the flag-man, who was a servant of the defendant, did not act by its consent, express or implied, or under its direction, in flagging for the bridge.—Peck v. Michigan Cent. R. Co., 57 Mich. 3.

¶ 622. Where a defect in a sidewalk maintained by a railroad company in a street crossing its road is shown to have existed for several months, to have been noticed by many persons, and to have caught several persons, the jury is justified in finding that the company should have known of it, even though there was no actual notice.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 623. In a personal injury case, where the plaintiff was injured by a collision between defendant's train and a top buggy driven by plaintiff, the latter's testimony cannot be entirely discredited as being opposed to the fact, clearly established by other testimony, that the approaching train was clearly in view when the second observation and stop was made to see if the train was approaching; where the jury might find from all the testimony that the train was hidden from view by intervening buildings, excavations, and other obstructions and that after the second observation the train was running at a very rapid rate and it came from some point beyond those obstructions and struck plaintiff before he got entirely across the crossing, which was unusually a long one, the question being one for the determination of the jury.—Corbs v. Michigan Cent. R. Co., 144 Mich. 73.

¶ 624. A man driving a democrat wagon along a city street tried to cross a railway track at a point where his view of the track before crossing was shut off by standing cars and by sheds, and he was killed by a train that was two hours behind time and came at high speed from a direction opposite to that in which he was looking. Several persons testified that they heard no warning signal. Held, that the question of liability for his death should go to a jury.—Guggenheim v. Lake Shore & M. S. R. Co., 57 Mich. 488.

¶ 625. When there is a conflict in the evidence in a personal injury case as to whether or not a passenger train and the freight train which followed it and struck the team which was being driven by the plaintiff, ran in immediate proximity contrary to custom, the question is one for the jury, though train records, if true, make the opposed testimony impossible.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 626. Under Comp. L. 1897, § 6234, sub. 3, providing that a railroad shall not obstruct any public highway or street by cars or trains more than 5 minutes at any one time, a court cannot as a matter of law say that because the tender of an engine was within the limits of a highway, it obstructed the crossing.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 627. Whether ordinary care or reasonable prudence requires a railway company

to keep a flag-man stationed at a crossing which is particularly dangerous is a question of fact for the jury to determine under all the circumstances of the case.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

§ 96. ——As to cause of injury.

Proximate cause of injuries at crossings, see ante § 77.

Weight and sufficiency of evidence as to cause of injury, see ante § 90.

¶ 628. Where the plaintiff, in a personal injury case, has shown that while he and his team were waiting to cross a highway which a freight-train was obstructing in violation of the statute, a passenger-train came along enveloping the freight-train in smoke and steam, and his horses, though ordinarily gentle and used to trains, were frightened and ran away, causing the injury, it is proper to submit to the jury the question whether the obstruction of the road by a freight-train was the proximate cause of the injury.—Sellick v. Lake Shore & M. S. R. Co., 93 Mich. 375.

¶ 629. A verdict in favor of plaintiff in an action against a railroad for personal injuries will be set aside where plaintiff's testimony that the runaway resulting in the injury was caused by a collision with defendant's train, was controverted by the testimony of the trainmen that no collision occurred and by that of several persons who were near the crossing who testified that the runaway began long before the crossing was reached, and by that of one witness who stated that the train had passed before the crossing was reached by the vehicle, and it was also shown that packages such as plaintiff had in the vehicle were scattered along the road before the railroad track was reached, and where it was a tax on credulity to believe plaintiff's evidence.—Hintz v. Michigan Cent. R. Co., 132 Mich. 305.

§ 97. ——As to negligence of defendant generally.

Duty of railroad at crossings, see ante § 69 et seq.

¶ 630. In an action for fatal injury to a person crossing a railway track the jury may properly consider whether the railroad company should not, apart from any statutory requirement, have set up special safeguards at the point where the injury took place, if at that point there were several tracks running side by side, and little opportunity to see a coming train and much noise and confusion.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

¶ 631. A railroad company, in order to enable the public to pass over a bridge which it had erected over a cut at a point where its road crossed a public highway, constructed an approach to said bridge from dirt taken from the cut. Said approach was built as steep as the dirt would lie, was about sixteen rods long, and, at the place where plaintiff received the injury complained of, was twelve and one-third feet wide, and thirteen and one-third feet high from the natural level of the ground on either side. Before the building of the bridge and approach, the highway was perfectly safe for public travel. Held, that it was a question for the jury to determine whether barriers were or were not necessary to make the crossing suitable for passage.—Gage v. Pontiac, O. & N. R. Co., 105 Mich. 335.

¶ 632. The question of the negligence of the railroad company in failing to provide some method for giving notice of approaching trains, at a city crossing, in view of the presence of its freight cars upon a siding, projecting on both sides into the street and leaving only 10 to 18 feet for a passageway should have been submitted to the jury.—Willet v. Michigan Cent. R. Co., 114 Mich. 411.

¶ 633. In an action for personal injuries sustained by one riding in a buggy which was struck by a railroad car, "kicked" along a track in a street; it is for the jury to decide as to the want of care of the defendant in not sending a trainman along with the car and whether such a servant could have prevented the accident by stopping the car after the horse became frightened and backed the buggy upon the track.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

¶ 634. In an action by a traveler in a vehicle who was injured as the result of his horse becoming frightened through the emission of steam from an engine stationed at the crossing in question, where the defendant claimed that the emission was through an automatic safely valve and therefore not negligence, but where there was evidence that the emission could have been prevented by appliances under control of defendant's engineer and that the latter could have foreseen the emission and provided against the consequences by moving his engine farther from the crossing; there was evidence from which the jury might infer negligence.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 635. Whether the defendant was negligent, or the deceased was guilty of contributory negligence, were questions for the jury, in an action for the death of one who, while riding his wheel very slowly across defendant's tracks, was run into by a backing train; where the evidence showed that the gates were not closed, and the view of the approaching train was obstructed in the direction from which deceased was approaching, though the other usual warnings of the approaching train were given.—Potter v. Pere Marquette R. Co., 140 Mich. 362.

¶ 636. A combination of several omissions, to wit, failure to have a flagman on a backing car, failure to have a flagman at a crossing,

and the obstruction of view of the crossing, may be evidence of negligence to go to the jury, though no one of them alone would have warranted it.—Barnum v. Grand Trunk W. R. Co., 148 Mich. 370.

¶ 637. Plaintiff's horse, while crossing defendant's tracks, became frightened by the steam escaping from defendant's approaching engine, backed up, and plaintiff's deceased was killed. The evidence showed that the steam escaped from the cylinder cocks, which were opened by defendant's engineer to let off the flush. Held, there was evidence to go to the jury on the question of the negligence of defendant's engineer in opening the cocks.—Rademacher v. Detroit, G. H. & M. Ry. Co., 158 Mich. 552.

¶ 638. Plaintiff testified that upon approaching a railroad crossing she found the bars up, and saw defendant's engine standing still a short distance up the track. She drove upon the track, and then saw that the engine was approaching. Her horse got frightened and backed up, and her husband was killed. Held, it was proper to submit to the jury, on the question of negligence and contributory negligence, the evidence that the bars were up.—Rademacher v. Detroit, G. H. & M. Ry. Co., 158 Mich. 552.

¶ 639. Plaintiff's intestate, a child of twenty-seven months of age, was killed at a street crossing by defendant's train. Decedent's parents lived 165 feet from said crossing in a house fifty-five feet from the street. The father, who shortly before the accident was left in charge of the child, was returning with the child from a field back of the house. The father was lame and the child started ahead toward the house through a hedge of corn and was hidden from sight. Upon reaching the house the father discovered the child was gone and looking toward the crossing of the railroad saw him on defendant's track, and before he could reach him the child was struck by a train and killed. There was evidence that the engineer could have seen and did see the child in time to realize the danger and stop the train; that instead of checking the train he only sounded the danger signals and kept on. Held, there was sufficient evidence of defendant's liability to permit the case to go to the jury.—Morse v. Detroit, G. H. & M. Ry. Co., 168 Mich. 99.

¶ 640. Evidence that defendant's locomotive was at a standstill in full and unobstructed view of a highway crossing, and that while plaintiff's wagon was approaching the track upon which it stood and was on parallel tracks of defendant at the crossing, the engine was started towards the crossing, and that neither the fireman nor engineer looked towards the crossing for some distance before reaching it, is sufficient evidence of negligence to go to the jury.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

¶ 641. Testimony by plaintiff, in an action for personal injuries, that defendant's passenger train collided with the vehicle in which she was riding causing the horses to run away, that defendant's employees in charge of the train failed to give the signals required by statute, and that plaintiff and her husband stopped, looked and listened before attempting to cross, make a proper case for the jury.—Hintz v. Michigan Cent. R. Co., 132 Mich. 305.

§ 98. ——As to signals, warnings and lookouts.

Duty of railroad in respect to signals and warnings, see ante §§ 44, 45, 75, 76.

Weight and sufficiency of evidence, see ante § 91.

¶ 642. Where a train which has been standing across a highway has backed down to the cattle-guard for the apparent purpose of letting people pass, it is not per se negligence for one who has been waiting to attempt to drive by in front of the engine if his horse is steady; but it is a question for the jury whether it was negligence in the railroad company not to have seen the person so trying to cross, and to have blown off steam while he was crossing.—Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589.

¶ 643. A man crossing a railway track after dark in a wagon was struck by a passing train and killed. Whether the train was hidden from view by intervening shrubbery, and whether any signal of its approach was given, were disputed questions of fact. Held, that so far as these facts involved the legal duty of the railroad company, they must go to the jury.—Klanowski v. Grand Trunk R. Co., 57 Mich. 525.

¶ 644. Whether signals were given for a crossing is for the jury on conflicting evidence.—Battishill v. Humphreys, 64 Mich. 514.

¶ 645. Where, in an action against a railroad company for a negligent injury based upon the failure to give the statutory signals before reaching the crossing near which the accident occurred, plaintiff and her husband testify that it was a calm day, that they had brought their horse to a walk, and were listening for the signals, and heard none, and one of plaintiff's witnesses, who was a passenger on the train, testifies positively that the signals were not given, while defendant's witnesses aver that such signals were given, the testimony is conflicting, and the question should be submitted to the jury.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 284.

¶ 646. In an action for the death of plaintiff's intestate, caused by a collision at a railroad crossing, the testimony tended to show that a freight train had parted near the middle, apparently without negligence on the

part of the defendant; that the flagman stationed at the crossing, after the first section of the train had passed, signaled that the track was clear; that the deceased thereupon attempted to drive across the track, and was struck by the second section of the train which was following the first at a distance of about 100 feet; that it was very dark at the time; that it was the custom to maintain lights at the rear of a train, and that there were none upon the last car of the first section. It further appeared that the flagman had been employed at such crossing for two years, during which time no train had parted; and that, upon the occasion in question, almost immediately after giving the signal to cross, he discovered the approach of the second section, and did all that he could to prevent the accident. Held, that the question of the flagman's negligence was for the jury.—Steele v. Chicago & G. T. R. Co., 107 Mich. 516.

¶ 647. The testimony of the engineer, fireman, and brakeman of a train that the whistle was blown and the bell rung for a crossing is not sufficiently contradicted to warrant the submission of the question to the jury, by the testimony of plaintiff who was partially deaf and was in a closed buggy, that she heard neither whistle nor bell, and by the testimony of a ten-year-old boy, whose attention was not directed to the matter, that he cannot tell whether the train whistled or not.—Bond v. Lake Shore & M. S. R. Co., 117 Mich. 652.

¶ 648. Where witnesses for the plaintiff injured at a crossing testify positively that the whistle on the colliding train was not blown and the trainmen testify positively that it was blown, the question is one for the jury.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 649. In an action for personal injuries sustained at a highway crossing where testimony given by plaintiff and witnesses as to whether statutory signals were given is contradicted by witnesses for the defendant a question peculiarly within the province of the jury is presented.—Line v. Grand Rapids & I. R. Co., 143 Mich. 163.

¶ 650. Evidence that a train approaching a crossing failed to give signals required by statute is sufficient to take the question of negligence towards a traveler to the jury.—Corbs v. Michigan Cent. R. Co., 144 Mich. 73.

¶ 651. In a suit for personal injuries to a plaintiff struck by defendant's engine while crossing a railroad track in a buggy, there was evidence by plaintiff and five of his witnesses that the night was dark, which evidence was disputed by an equal number of witnesses for defendant; that the train was running backwards and without a headlight except the hand lantern on the tender; that there was no lookout or watch ahead; that the engine was running at an excessive rate of speed, which evidence was disputed by defendant; and that plaintiff and his witnesses heard no signals while listening for them, which evidence was disputed by defendant's witnesses with respect to the ringing of the bell, but not with respect to the sounding of the whistle. The witnesses of plaintiff, other than himself, were stationed at a house some three hundred feet from the point of the accident and based their testimony on what they saw and heard as to lights and signals from that point. Held, the question of defendant's negligence was properly left to the jury.—Tietz v. Grand Trunk Ry. Co. of Canada, 166 Mich. 205.

¶ 652. Where it is alleged that a child one and one-half years of age was struck by an engine at a crossing and that the signals required by statute were not given, it cannot be said as a matter of law that such signals would not have affected the child, but it is for the jury to determine if the signals were not given, whether the failure was a material fact.—Bowsher v. Grand Rapids & I. Ry. Co., 174 Mich. 339.

¶ 653. In an action against a railroad for damages on account of the death of one who was driving a wagon across defendant's tracks when he was struck by a train, where the testimony concerning the sounding of crossing signals was conflicting, although that of the defendant was "positive" to the effect that such signals had been given, and plaintiff's evidence was "negative" or in denial of that fact, held, the evidence nevertheless presented a question of fact proper for the consideration of the jury.—Cinadar v. Detroit, G. H. & M. Ry. Co., 193 Mich. 38.

§ 99. ——As to speed, distances, visibility and hearing.

¶ 654. Question of negligence and contributory negligence are for the jury where plaintiff stopped to look and listen before crossing railroad track on a smoky and foggy evening and was struck by a handcar, the evidence as to its speed and the giving of warnings being conflicting.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 655. In an action for personal injuries sustained at a grade crossing the question of negligence and contributory negligence is properly left to the jury where the plaintiff testified that he stopped his horse and looked and listened at a point 50 feet from the track where he could get the best view, and the questions whether a whistle or bell was sounded, and whether the train could be seen at the point of observation is disputed, and there was testimony to show that the train was late and moving at an excessive speed.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

§ 100. ——As to gross or wilful negligence.

Weight and sufficiency of evidence as to gross negligence, see ante § 92.

In actions for injuries to or by animals at large, see post § 129.

¶ 656. The submission of the question of gross negligence in running a train at 25 miles an hour in an action for causing the death of a traveler in a sleigh at a street crossing, was error where the testimony was conclusive that the train while going on a downgrade, stopped within a distance indicating that it had been going at no greater rate than 12 miles an hour.—Stewart v. Michigan Cent. R. Co., 119 Mich. 91.

¶ 657. There is not sufficient evidence to justify the trial court in submitting to the jury the question of the gross negligence of the defendant in inflicting the injury, where it appeared that the engine approached the crossing at a speed of not more than 6 miles per hour, that the bell was constantly ringing, and that the engineer kept a constant lookout till his view was cut off by the tender.—Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 216.

¶ 658. Plaintiff in driving a wagon along a highway was obliged to turn over upon the tracks occupied by defendant interurban railway in order to avoid the snow piled up by defendant in the wagon road. He testified that upon catching sight of a car approaching over a hill he was unable to turn out in time. The motorman had a clear view of plaintiff for six hundred feet and with his car going some forty miles an hour could have stopped his car in time to avoid the collision had he acted as soon as he discovered plaintiff in distress. Instead he struck it with such force as to kill the plaintiff's animals and carry them several rods beyond the place of the collision. Held, the negligence of defendant's motorman was a question for the jury under this evidence.—Hibbler v. Detroit United Ry., 172 Mich. 368.

¶ 659. A boy of nine years and six months stepped in broad daylight upon the north track of defendant railroad at the crossing and stood watching an east-bound passenger train on the south track, waving his hands at passengers and taking no notice of trains on the north track. The engineer on defendant's blind baggage train approaching from the east at 20 miles an hour noticed the boy while the latter was some 15 or 20 feet from the north track and while the baggage train was some 450 feet away. When 300 feet away the engineer saw him standing on the track and immediately shut off the power and made every effort to stop his train in addition to blowing his whistle. The boy was struck and killed. Held, the trial court properly refused plaintiff's request to leave to the jury the question whether defendant was not guilty of such gross negligence as to entitle plaintiff administrator to recover despite the boy's contributory negligence.—Mollica v. Michigan Cent. R. Co., 170 Mich. 96.

¶ 660. Where, in an action resulting from an electric car striking a steam road roller crossing the track on a highway crossing, there is evidence of the contributory negligence of the operator of the roller in attempting to cross without sending a person in front of his machine, and there is evidence that the operator did look, and also as to the high rate of speed the car was going and the opportunity of the motorman to avoid the accident, the question of whether the company was guilty of gross negligence is a proper question for the jury.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1.

¶ 661. In an action for the death of a pedestrian who was killed by a train on a quiet night while attempting to pass over a lighted railroad crossing, held that there was no evidence of gross negligence of the defendant's crew after seeing decedent so as to necessitate a submission of such question to the jury.—Baker v. Delano, 191 Mich. 204.

§ 101. ——As to contributory negligence generally.

Care and contributory negligence of person injured, see also ante § 78 et seq.
Weight and sufficiency of evidence, see ante §§ 93, 94.
Instructions as to contributory negligence, see post § 111.

¶ 662. A traveler need not under all circumstances stop before crossing a railroad track if his view is obstructed from one direction; he must take such care as an ordinarily prudent man would under like circumstances, and whether he did so is generally a question for the jury.—Richmond v. Chicago & W. M. R. Co., 87 Mich. 374.

¶ 663. In an action for the negligent killing of plaintiff's intestate by a caboose that had been standing still unattached in the street and been struck by an engine, where the evidence showed that deceased had looked before stepping on the tracks at the crossing the fact that he had stopped for a few seconds to turn and call his dog does not make him guilty of contributory negligence as a matter of law, but it is a question for the jury.—Davis v. Michigan Cent. R. Co., 142 Mich. 382.

¶ 664. One approaching a railroad crossing is not guilty of contributory negligence as a matter of law where he stops, looks, and listens, before attempting to cross, and fails to discover an approaching train because his view is obstructed by cars on a side track.—Beck v. Ann Arbor R. Co., 156 Mich. 252. (Grant, J., dissenting.)

¶ 665. Where plaintiff's cattle were being driven along the highway by his two sons, and stopped to drink in a pond near the railroad crossing, the boys waiting until they

had finished and then proceeding to drive them over the crossing, when they were struck by a wild engine which approached without giving any warnings, and it was claimed by defendant that the engine could have been seen for a distance of two miles and that if the boys had been at the track they could have avoided the injury to the cattle, the question whether the drivers were negligent is for the jury.—Brunick v. Ann Arbor R. Co., 132 Mich. 219.

§ 102. ——As to contributory negligence of vehicle users.

¶ 666. Whether one who, while driving across a railway track, had watched the engine go by, and was hurt by its backing down on him without warning while he was watching out for further dangers in the rear, was guilty of contributory negligence, held a question of fact for the jury.—Palmer v. Detroit, L. & L. M. R. Co., 56 Mich. 1.

¶ 667. In a case against a railroad company for injuries received by the plaintiff while driving toward the track where the highway had not been restored to as good a condition as before the railroad was constructed, and where the whistle on defendant's engine was not blown at the statutory distance of forty rods from the crossing, but was blown near the crossing, the question of contributory negligence is for the jury.—Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

¶ 668. A woman who, being familiar with a railroad crossing, started crossing the tracks in the nighttime and upon observing that switching was being done stopped upon what she supposed was a place of safety but was in fact one of the tracks, and was struck by an incoming train, was guilty of negligence as a matter of law, although her vision was obscured by escaping steam and there was considerable noise.—Buckley v. Flint & P. M. R. Co., 119 Mich. 583.

¶ 669. Defendant railroad was running its train at night, with engine going backwards, thirty miles an hour across the country. Only a red lantern was on the engine, and an automatic bell was ringing. The cars were lighted, but the smoke may have obscured their light. Plaintiff's wife was struck and killed while plaintiff and she were driving on the highway across the tracks. Plaintiff testified that he looked before crossing. Held, plaintiff was not contributorily negligent, as a matter of law; it was a question for the jury.—Gorton v. Harmon, 152 Mich. 473.

¶ 670. Plaintiff testified that upon approaching a railroad crossing she found the bars up, and saw defendant's engine standing still a short distance up the track. She drove upon the track, and then saw that the engine was approaching. Her horse got frightened and backed up, and her husband was killed. Held, she was not as a matter of law guilty of contributory negligence.—Rademacher v. Detroit, G. H. & M. Ry. Co., 158 Mich. 552.

¶ 671. It was proper to submit to the jury the question of contributory negligence of plaintiff in approaching a crossing, where the evidence was conflicting as to his management of his horse and his own conduct, and where if his testimony was believed they could properly find that he was not negligent.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 671a. Where in an action for personal injuries sustained at a highway crossing the plaintiff claimed that he was not guilty of contributory negligence, that the morning was dark and stormy, that within thirty feet of the track he stopped, looked, and listened and saw and heard nothing, that he continued to listen, and as he got upon the crossing, without any warning whatever of its approach, there suddenly appeared out of the darkness and storm the locomotive attached to a logging train, running at a great rate of speed, and before he could get out of its way, he was struck, it was proper to present this claim against defendant's theory of contributory negligence, and testimony as to the rate of speed might be considered as bearing upon the question of what a reasonable man would do under such circumstances.—Line v. Grand Rapids & I. R. Co., 143 Mich. 163.

¶ 672. In an action against a railroad for the death of a person killed at a crossing by an engine which followed immediately after a gravel train which had just passed, where it appeared that deceased was riding in a covered bakery wagon and the evidence was conflicting as to the giving of signals, the speed of the engine, and the presence of a switchman, the question of contributory negligence was for the jury.—Barnum v. Grand Trunk W. Ry. Co., 137 Mich. 580.

¶ 673. It is negligence as a matter of law for a person who sees a handcar approaching, to urge his horse on so as to attempt to cross the track in front of the car.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 674. In an action for personal injuries caused by being struck by an engine at a street crossing where the view was obstructed, where it appeared that plaintiff stopped his wagon within 30 feet of the crossing until assured that there was no danger, and in proceeding toward the track passed men who were in a position to see any engine which might be approaching, but who said nothing to him, he was not guilty of contributory negligence as a matter of law in failing to ask such persons if there was any danger.—Coffee v. Pere Marquette R. Co., 139 Mich. 378.

¶ 675. The husband of plaintiff was not guilty of contributory negligence, which may

be imputed to her, as a matter of law, because upon a cold, stormy night, late in October, he did not stop his horse at a point where the horse's head was within 10 or 12 feet of where it would be struck by a passing train, and so avoid the accident which caused the injuries for which she claimed damages; where the evidence showed that the driver as he approached from the south stopped the horse at a distance of about 35 or 40 feet from the crossing and leaning forward in the carriage, looked around the curtains toward his right and the rear; that after her husband started the horse again the plaintiff continually looked through the window in the back curtain toward the right, this being the direction from which the train would come; that neither she nor her husband saw or heard anything indicating the approach of the train until the horse, which was afraid of the cars, was upon the right-of-way; even though at this crossing the railway track runs west of north and east of south at an acute angle with the highway; and the right-of-way to the south was obstructed by trees, so that, at a point 21 feet south of the south rail one could see a train approaching in the daytime, according to some of the witnesses, 12 or 15 rods away, and according to other witnesses, 40 rods; and the question of contributory negligence is one of fact for the jury.—Wilbur v. Michigan Cent. R. Co., 145 Mich. 344.

¶ 676. It is contributory negligence as a matter of law for a person to drive onto a railway crossing in the belief that an approaching train, which gives the statutory crossing signals, was a passenger train then due, that would stop at a station before crossing the street, but which was a belated train not scheduled to stop at the station, running at a high rate of speed on the time of the regular train.—Braley v. Grand Trunk Ry. Co. of Canada, 185 Mich. 606.

¶ 677. An old man, who was somewhat deaf, while driving a span of colts towards a railway track down a narrow road from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on, and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up, and tried to cross the track, and the rear of the buggy was struck by the locomotive. Held that, in an action for the resulting injury, the question whether plaintiff was guilty of contributory negligence was for the jury.—Chicago & N. E. R. Co. v. Miller, 46 Mich. 532.

¶ 678. Where a railroad car was negligently left in a highway crossing close to and obstructing the usual traveled part of the way, the question whether plaintiff used due care in attempting to pass with a wagon and horses, one of which shied at the car just before reaching the track, after which plaintiff urged the horses believing he could cross, was held to be one of fact for the jury.—Peterson v. Chicago & W. M. R. Co., 64 Mich. 621.

¶ 679. A man and his wife, riding in a cutter, were approaching a railway track by a road which crossed the track at an acute angle. A freight train on the track lay, apparently, across the road; but, after waiting ten minutes for it to move, the travelers came nearer and found that a space of sixteen feet was left open. The cars, however, on both sides projected somewhat over the traveled part of the road, and, in avoiding them, the man who was driving had to turn his horse so as to cross the track at a right angle, but the horse sheered and the cutter left the planking and was upset and the woman was injured. Held, that it could not be said, as a matter of law, that she was guilty of contributory negligence.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 680. The contributory negligence of a person injured in trying to drive across a railway track is not conclusively shown by the fact that others had just crossed it safely; the fact may tend to prove it, but the question is for the jury.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 681. A driver who stopped his team when within twelve feet of a railroad crossing, and at a point from which, had he looked, he could have seen an approaching engine but for the smoke and steam emitted by another engine standing on a side track near by, which obstructed his view, and who testifies that he looked and listened, and neither saw the approaching engine nor heard the ringing of its bell or sounding of its whistle, cannot be said, as matter of law, to have been guilty of contributory negligence in attempting to make the crossing.—McDuffie v. Lake Shore & M. S. R. Co., 98 Mich. 356.

§ 103. ——Failure of vehicle users to stop, look and listen.

Duty to stop, look and listen, see ante § 79.

¶ 682. The question of contributory negligence was for the jury in a case where plaintiff's vehicle was driven on a very dark night upon a railroad track at a sharply oblique crossing of a highway, leaving the approach of the train to the left and rear of the driver, the evidence showing that the horses approached the crossing on a walk, that no stop was made to listen before crossing, that the driver and those in the vehicle looked and listened but saw and heard nothing, and that defendant's engine was moving backwards, the testimony as to whether there was any light at the rear end of the engine's cab being conflicting.—Van Auken v. Chicago & W. M. R. Co., 96 Mich. 307.

¶ 683. Plaintiff was injured by being thrown from a cutter, in which she and her husband were riding, by reason of the horse's

taking fright at one of defendant's trains, and running away. The train was several hours late. The highway ran for about three-quarters of a mile nearly parallel with the railroad track, varying in distance therefrom from 35 to 200 feet, and finally crossed the track, near the place where the accident occurred, at an angle of about forty-five degrees. All view of trains approaching the crossing from the opposite direction was cut off, until within thirty-five feet of the track, by a hill, around which the road passed on a sharp curve. Plaintiff's husband, who was driving, testified that he waited in a neighboring village for two hours to make sure that the train had passed, and on his way home was informed that it had passed, which information he believed to be true; that he was approaching the crossing, and, just as he reached the line of the right-of-way, the train came into view, distant less than 300 feet from the crossing, and that his horse turned about and ran away, upsetting the cutter, and injuring plaintiff. Plaintiff and her husband both testified that they were listening, the horse having been brought to a walk, and that they heard no signals. Held, that it was for the jury to say whether or not plaintiff's husband was negligent in driving within thirty-five feet of the track without stopping to listen.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 234.

¶ 684. Plaintiff, accompanied by another woman, was driving upon the highway in a populous part of a city. When they were fifteen or twenty rods from a railroad crossing, they looked for a train, and neither saw nor heard one. They drove slowly towards the track, continuing to look and listen as they approached. Just before driving upon the track, they stopped the horse, stood up in the buggy, and looked and listened for trains. The view was obstructed by freight cars standing upon a side track, but some of the cars were low enough so that a small portion of the smokestack of the engine approaching on the main track would be visible from the place where plaintiff stopped her horse. Plaintiff drove upon the track, was struck by a train, and injured. Held, that it could not be said, as a matter of law, that she was negligent in failing to see the train.—Willet v. Michigan Cent. R. Co., 114 Mich. 411.

¶ 685. In an action for injuries caused by being struck by an engine at a street crossing where the view was obstructed, where it appeared that plaintiff stopped his wagon within 30 feet of the track until satisfied that it was safe to proceed, he was not guilty of negligence as a matter of law in failing to stop again, before driving onto the track, there being nothing to excite his apprehension.—Coffee v. Pere Marquette R. Co., 139 Mich. 378.

¶ 686. In a personal injury case where the plaintiff was injured by a collision between defendant's train and a top covered buggy driven by her, it cannot be said as a matter of law that plaintiff was negligent in failing to stop and make another observation before crossing a track, where on approaching she stopped and looked twice, once at the foot of the approaching embankment, and the second time at a point where the nearest rail of defendant's track was only 10 or 12 feet from the plaintiff and 42 feet from the crossing, and 91 feet from a point where she would be safely across and out of danger; the highway and the railroad track at the place of the accident intersecting at a very acute angle.—Corbs v. Michigan Cent. R. Co., 144 Mich. 73.

¶ 687. Where, in an action for the killing of plaintiff's intestate at a railroad crossing, there is no evidence that decedent looked or listened at any point, a finding in favor of plaintiff can be sustained only on the ground that in the absence of any testimony as to decedent's conduct in approaching the crossing, the jury might be justified in finding that he took proper precaution to ascertain whether a train was approaching.—Schwartz v. Mineral Range R. Co., 153 Mich. 40.

¶ 688. A traveler on a highway who, on approaching a railroad crossing at which he has an unobstructed view for some 450 feet along the track, drives directly upon the track without stopping to listen or glance along the track to observe an approaching train, is guilty of contributory negligence as a matter of law.—Strong v. Grand Trunk Western Ry. Co., 156 Mich. 66.

¶ 689. In an action for injuries resulting from being struck by an engine at a street crossing where the view was obstructed, where it appeared that plaintiff heard the puffing of an engine when approaching the crossing, but was told by one familiar with railroads that the puffing was from an engine on another track, he was not guilty, as a matter of law, of contributory negligence in not waiting long enough before driving onto the crossing to make sure that the engine was not approaching on defendant's track.—Coffee v. Pere Marquette R. Co., 139 Mich. 378.

¶ 690. In an action for wrongful death the evidence showed that the deceased, riding in a wagon with another, who knew the general situation of the crossing, tried to cross a railroad yard at night where there were more than twenty tracks, and on which there were many cars standing, when they were stopped by a freight train passing on the second from the last track they had to cross. As soon as this freight train passed they tried to cross the other tracks and drove the horse in front of a passenger train approaching at the rate of fifty miles an hour. Such speed was in violation of an ordinance limiting the speed to six miles an hour. They were killed. There was some evidence

that they were warned of the approach of the train, but it was not conclusive. The train had whistled when a mile from the crossing. There was evidence that the cars on the tracks were moving the greater part of the 24 hours, and engines and trains passing very frequently, and a person crossing would have to look for cars from each way, because cars were backing up and going forward all the time. Under these facts it cannot be held that the men were as a matter of law guilty of contributory negligence.—Welch v. Michigan Cent. R. Co., 147 Mich. 207.

¶ 691. In an action for damages against a railroad on account of the death of one who was driving a wagon across defendant's tracks when he was struck by a train, the questions bearing upon decedent's contributory negligence in failing to stop, look and listen, and whether he was in a position from which he could have seen the approaching train, held, under the evidence, to have been proper matters for the jury.—Cinadar v. Detroit, G. H. & M. Ry. Co., 193 Mich. 38.

¶ 692. Plaintiff was injured by defendant's train while crossing the track on a highway in a buggy. Plaintiff's evidence was that upon approaching defendant's track she stopped the buggy at the only place offering a view of defendant's track, and looked and listened; that she then approached, still looking and listening, her view being obstructed by a depot and other buildings; and that defendant did not give the statutory signal and was running sixty miles an hour. Defendant gave evidence that there was an open view of its track for a space of forty feet at a point before the crossing, and contended that plaintiff was therefore guilty of contributory negligence as a matter of law. Held, the evidence on contributory negligence being conflicting, the question was for the jury.—Hinkley v. Wabash Ry. Co., 162 Mich. 546.

¶ 693. In a suit for personal injuries suffered by plaintiff while crossing defendant's track in a buggy, there was evidence that plaintiff stopped his horse some ten or twelve feet from the crossing and looked and listened; that no signals were given by the approaching train; that there was no headlight on the engine; and that the night was dark. This evidence was disputed. Held, the trial court properly refused to find plaintiff guilty of contributory negligence as a matter of law.—Tietz v. Grand Trunk Ry. Co. of Canada, 166 Mich. 205.

¶ 694. Defendant railroad's track ran north and south. Michigan avenue, running east and west, crossed it at right angles. Some distance north of said avenue two spur tracks led off from the main track and crossed said avenue about two hundred feet west of the main track. On the west side of the main track a growth of willows and underbrush obscured more or less the view from Michigan avenue of approaching trains from the north. Plaintiff, at 6 a. m., driving his milk wagon east on said avenue, slowed down and looked and listened just before reaching each of the spur tracks, but saw and heard nothing. He then proceeded to cross the main track without stopping and was struck and injured by a train carrying laborers. The engine was running backward without headlight or lookout, and the engineer's view of the track was obscured. The speed was in excess of the city ordinance. Held, plaintiff was not as a matter of law guilty of contributory negligence.—Morgan v. Pere Marquette R. Co., 162 Mich. 573.

¶ 695. The question of contributory negligence was for the jury, in an action against a railroad company for personal injuries to plaintiff at a crossing, where, plaintiff testified that as she and her husband approached such crossing, and a short distance therefrom, they stopped, looked, and listened; that cars standing upon a siding of defendant obstructed their view of the approaching train; and where other witnesses testified that immediately after passing such box cars on the siding, one seated in a vehicle, his team being within 15 or 20 feet of the track, could see in the direction from which the train came only 175 or 200 feet, and where it was claimed by defendant that even if the siding were full of box cars that the view of an approaching train would be unobstructed at a point 30 feet from the track, and certain photographs were introduced in support thereof.—Hintz v. Michigan Cent. R. Co., 140 Mich. 565.

§ 104. ——As to contributory negligence of motor vehicle users and bicyclists.

Weight and sufficiency of evidence, see ante § 94.

¶ 696. Whether the failure of the plaintiff to stop his automobile before driving onto a railway crossing in a village, is a question for the jury where his view of the track was slightly obstructed, and after looking for trains and seeing a passenger train pass, drove slowly onto the track and was struck by a backing work train running without signals or warning twenty-five or thirty miles an hour.—Rouse v. Blair, 185 Mich. 632, 8 N. C. C. A. 1033. (Brooke, C. J., and Ostrander and Steere, JJ., dissenting.)

¶ 697. In an action by the owner of an automobile to recover damages for personal injuries and for injuries to his automobile sustained in a highway crossing accident at night, where it appeared that the freight train which struck plaintiff's car was running backward without light or signal at the end, that the headlight of the engine, which was some distance away, was not visible at the crossing, that there was a clear view except for the darkness for half a mile in each direction, and that plaintiff kept look-

ing for trains and did not see any until he had crossed two tracks and was on the third and last one, held that it was a question for the jury whether plaintiff was guilty of contributory negligence.—Mills v. Waters, 198 Mich. 637. (Steere, Fellows and Brooke, JJ., dissenting.)

¶ 698. Plaintiff's deceased, a boy of eleven years, was riding a bicycle along the west side of a street in a southerly direction, towards defendant railroad's tracks. For a distance of seventy feet he had a clear view of defendant's approaching trains. He was riding slowly, was familiar with the vicinity, and accustomed to go about the city alone. He was a normal lad and on the occasion in question there was nothing to distract his attention. He was struck by defendant's car and killed. Held, plaintiff's intestate was guilty of contributory negligence as a matter of law, precluding recovery.—Knickerbocker v. Detroit, G. H. & M. R. Co., 167 Mich. 596.

§ 105. ——As to contributory negligence of pedestrians.

Weight and sufficiency of evidence as to negligence of pedestrians, see ante § 105.

¶ 699. The ordinary method of using railroad tracks is not such that one familiar with such use may, as a rule, expect one train or cars upon the same track to be closely following another; hence where a person familiar with the surroundings attempted to cross a track, upon the sidewalk, after seeing a train pass over it, and has been run over and killed by detached cars following said train, it is for the jury to say whether he took that care and caution, under all of the surrounding circumstances, that a prudent man, exercising ordinary caution, should have exercised.—Breckenfelder v. Lake Shore & M. S. R. Co., 79 Mich. 560.

¶ 700. In an action for injury at a railroad crossing, occurring on a foggy night, if the evidence goes not wholly to show that in the circumstances the plaintiff should have been aware of the proximity of the train, it is sufficiently conflicting to require the submission of the question of contributory negligence to the jury.—Thompson v. Toledo, A. A. & N. M. R. Co., 91 Mich. 255.

¶ 701. A traveler having crossed over retraced his way upon a crossing when an approaching train was about six hundred feet away, and he would have had time to pass over had his foot not been caught in a hole in the walk which it was the company's duty to repair. He had seen the train pass there every day for years, and knew the rate of speed it was going. He did not notice where he set his foot, but surmised it must have been on the rail and have slipped off. Held, that whether he was negligent in attempting to re-cross, or in not looking where he stepped, was a question for the jury.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 702. Plaintiff approached the railroad crossing at 7:20 in the evening, when it was dark, and he knew a train was due about that time. He testified that he looked in both directions, that he saw a headlight of an engine apparently standing still, that the gates were up, that no bell was ringing. Plaintiff ventured on the track, and was struck by the train. Held, that as a matter of law, plaintiff was not guilty of contributory negligence, and was entitled to have his case go to the jury.—Beauerle v. Michigan Cent. R. Co., 152 Mich. 345.

¶ 703. In an action for personal injuries it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence where he testified that before starting to cross a street on which ran the cars of the defendant railroad company that he looked and listened and could see freight cars at some distance to the west but could not see that they were moving, that he looked again when about half way to the track and while he could see the cars he could not see that they were moving, that there were no lights on the cars he saw, that he listened and heard no signals until just as he got on the track when he was struck, that the electric street light was burning dimly and that the locomotive attached to the cars was backing them down the street from the west at a speed of from 18 to 20 miles an hour, without ringing the bell, without signal lights, and without any man on the cars to warn persons lawfully crossing the street of the approaching train.—Garran v. Michigan Cent. R. Co., 144 Mich. 26.

¶ 704. Where a section hand, while on his way from work, walking in a public street along a main railroad track crossing such street, stepped near a side track in order to get out of the way of a train on the main track after having looked back to see if a train was coming on the side track, and was struck by a train backing up on the side track without a lookout and without ringing a bell or giving any other signal; the question of contributory negligence was for the jury.—Smith v. Pere Marquette R. Co., 136 Mich. 224.

¶ 705. A pedestrian who, on a quiet night, attempts to pass over a lighted railroad crossing, over which double tracks run, without looking for an approaching train, although he has an unobstructed view for 500 feet, and is struck by a train, is guilty of contributory negligence as a matter of law.—Baker v. Delano, 191 Mich. 204.

¶ 706. Plaintiff was injured while crossing defendant's tracks at dusk by an engine running backwards. The evidence was conflicting as to whether the engine carried lights, and as to the degree of darkness.

Two trains had just passed and the air was filled with smoke and dirt. Held that the question of plaintiff's contributory negligence was properly submitted to the jury.—Amanta v. Michigan Central R. Co., 177 Mich. 280.

§ 106. ——As to contributory negligence of street-car employees.

¶ 707. Plaintiff's intestate, a street-car driver, was killed at a street-crossing by a collision with defendant's train. The flagman was not at his usual post and gave no warning until the horse was upon the crossing. The driver could not have seen the approaching cars until within about twenty feet of the crossing, and he did not look in the direction from which the cars were approaching. Held, that the question of his contributory negligence was for the jury, who were to determine whether and how far, under the circumstances, the driver could rely upon the flag-man's absence from his post and the want of any signal of danger from him as an assurance of safety; and if they found that if an ordinarily prudent man would have acted as the driver did, plaintiff could recover damages for his death.—Richmond v. Chicago & W. M. R. Co., 87 Mich. 374.

¶ 708. Plaintiff, a street-car driver, who was injured at a railroad crossing, testified that he was signalled to "come on" by one whom he supposed to be the gate-keeper, but who was not a servant of the railroad company, and who denied giving such signal, and testified that he warned plaintiff not to attempt to make the crossing. The gate was open at the time, and the gate-keeper was temporarily absent for the purpose of attending a switch near by. Held, that the conduct of the stranger, as found by the jury from the conflicting testimony, was proper to be considered by them as bearing upon plaintiff's contributory negligence; that an open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger or the protests of a bystander; and that an assurance of safety, although given by a stranger, would be entitled to consideration and weight in explanation of the conduct of one to whom such assurance was given.—Evans v. Lake Shore & M. S. R. Co., 88 Mich. 442.

§ 107. ——As to contributory negligence of children.

Care required of children at crossings, see ante § 82.

¶ 709. Where the evidence is conflicting as to whether a child eleven years old, in passing over a dangerous railroad crossing, had crossed and come back onto the track or was yet waiting until the crossing was clear, the question whether she used such care as a child of that age should have used under the circumstances is for the jury, she having been struck by one train following another.—Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261.

¶ 710. In the case of a child suing a railroad company for a negligent injury, it is for the jury to judge of plaintiff's capacity and ability, and the manner in which he used the same at the time of the injury, and also whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the accident.—Baker v. Flint & P. M. R. Co., 68 Mich. 90.

¶ 711. Contributory negligence of a seven-year-old boy at a crossing is for the jury on evidence that he had been playing there and at the time was seeking to cross following his companions, that he could have seen the train approaching for 400 feet if he had looked, that he knew it was dangerous to cross in front of an approaching train, that the train was approaching on a curved track with obstructions to a longer vision, that he did not know that any train was due and did not hear its signals or otherwise become aware of its approach though he tried to retreat when too late, and that he was accustomed to cars and to playing about them.—Baker v. Flint & P. M. R. Co., 68 Mich. 90.

¶ 712. Plaintiff, a fourteen-year-old boy of average intelligence, while walking in the middle of a street, saw, as he approached a railroad crossing, an engine standing on the side of the street. While crossing the tracks he changed his mind, deciding to go from the street to another street by way of the depot platform, and turning his back on the engine took two or three steps up the track in that direction. Suddenly the engine backed up without warning, and, being frightened, the boy was unable to escape unhurt. Held, that the question of his contributory negligence was for the jury.—Fehnrich v. Michigan Cent. R. Co., 87 Mich. 606.

¶ 713. Plaintiff's intestate, a boy twelve years of age, was killed at a railroad crossing, while attempting to drive across the track. The testimony tended to show that by reason of obstructions between the highway and the railroad, which ran parallel for a considerable distance, an approaching train could not be seen from the highway, for a distance of several hundred feet from the crossing, until the horse was within two feet of the track; that the statutory signals were not given upon the approach of the train; that, although the deceased was notified when at some distance from the crossing that a train was coming, and remarked that he would have to hurry if he made the crossing, he was afterwards seen driving slowly along, in the apparent exercise of due care, and that a train passed shortly after such conversation, before the deceased reached the crossing. There was no testimony as to decedent's conduct immediately before entering upon the track. Held, that the question of his contributory negligence

was for the jury.—Crane v. Michigan Cent. R. Co., 107 Mich. 511.

¶ 714. Where the plaintiff in a personal injury case, a boy thirteen years old, was so injured that he remembered but little of what occurred, and there was evidence that he did his best to hold back the team he was driving down a hill towards the tracks of the defendant; that it was difficult to drive down the hill; that he had stopped on top for a passenger train and that, contrary to custom, the freight train which struck the team followed the passenger train closely, and where the noise of the passenger train might have interfered with the ability to hear the freight train, the question of contributory negligence is for the jury.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 715. Defendant railroad, upon elevating its tracks, was given permission by the city to leave one surface track for switching purposes, provided it would supply a flagman at the cross-street whenever using same. It was the custom of defendant to maintain a flagman at the crossing to warn boys who were in the habit of coasting down the hill in the street and across the tracks of approaching cars. The boys knew this and relied upon it. Plaintiff before starting to coast looked and listened and discovering no train behind the viaduct coasted down and was injured by collision with defendant's engine, no flagman being on duty. Held, plaintiff was not guilty of contributory negligence as a matter of law.—Imus v. Ann Arbor R. Co., 172 Mich. 292.

¶ 716. A boy eleven years old who is thoroughly familiar with a railroad crossing is guilty of contributory negligence, as a matter of law, in driving his horse on the crossing, where, when 90 feet from the track he looks on one side and is unable to see an approaching gasoline car owing to an obscured view, and confines his attention to the track on the other side because of the fact that his view is obscured all the way to the track, and does not look in the other direction before going on the track, and he could have seen the approaching car at any point within 70 feet of the track.—Otto v. Ann Arbor R. Co., 189 Mich. 463.

¶ 717. A bright, intelligent boy 9½ years old, who is thoroughly familiar with the crossing of a railroad which has three tracks, including a switch track, having used the crossing daily in going to and from school, and, after waiting behind a high snow bank, which was five feet away from the nearest or northbound track, and which temporarily obstructs his view to the south, for the passage of a southbound train on the middle track, starts from behind the bank without looking to the south, although he has an unobstructed view for a long ways, and is struck by a lone engine as he is nearly across the northbound track, is guilty of contributory negligence, as a matter of law.—Henry v. Michigan Cent. R. Co., 189 Mich. 45.

¶ 718. A boy ten years of age, possessing fair intelligence, who is injured as a result of a freight train, which was standing on a highway crossing, moving while he was attempting to crawl between two cars, is guilty of contributory negligence as a matter of law, although no bell was rung before the car started, as had happened on former occasions, and although the school bell was ringing and the boy was afraid he would be late to school.—Lahnala v. Mineral Range Ry. Co., 192 Mich. 460.

§ 108. Directing verdict.

In actions for injury to licensees and trespassers, see ante § 65.
Questions of law and fact, see ante § 95.
Weight and sufficiency of evidence, see ante § 89.
In actions for fires, see post § 145.
General law as to directing verdict, see Directing Verdict.

¶ 719. Where a horse becomes frightened and beyond control, and runs away, and by reason thereof collides with an object in the highway, such fright is the proximate cause of an injury to the driver from the collision. Accordingly, where, in an action against a railroad company for injuries sustained in consequence of the collision of plaintiff's carriage with a freight car alleged to have been negligently permitted to encroach upon the highway, it appeared that plaintiff's horse had taken fright, and had run for a block or more, and that plaintiff saw the car, but was unable to prevent the horse from running the carriage against it, it was held that verdict was properly directed for defendant.—Lambeck v. Grand Rapids & I. R. Co., 106 Mich. 512.

¶ 720. Where a railway street-car collided with a railroad passenger train while attempting to cross the latter's track and did not stop the car and the operators failed to go ahead and ascertain if the road was clear, and the evidence showed that the train was approaching in plain view with a headlight burning, the question of negligence is for the jury, and it was not error to refuse to direct a verdict.—Renders v. Grand Trunk R. Co., 144 Mich. 387.

¶ 721. In an action for the recovery of damages for injuries against a railroad company where the plaintiff was riding with others upon spring seats placed in a wagon box, upon a bob sled, and was thrown out by the upsetting of the sleigh just after crossing defendant's railroad track, which crossed the highway at an acute angle, where the cause of the upsetting was not conclusively shown and there was conflicting evidence thereupon it was not error for the trial court to refuse to direct a verdict.—Logan v. Lake Shore & M. S. R. Co., 148 Mich. 603.

¶ 722. In an action for personal injuries against a railroad company on a sidewalk over a crossing it was error to direct a verdict for defendant, where the proofs sustained the allegations of the declaration, except that there was no proof to sustain an allegation that the defendant tore up and removed the sidewalk, it being an immaterial fact as to who did take up the sidewalk, because the defendants later undertook to replace it with dirt, gravel, cinders, and boards and were liable for its negligent discharge thereof.—Hopkins v. Grand Rapids & I. R. Co., 147 Mich. 339.

§ 109. ——On ground of contributory negligence.

Care required of persons passing crossings, see ante § 78.

Weight and sufficiency of evidence as to contributory negligence, see ante § 93 et seq.

Jury questions as to contributory negligence, see ante § 101 et seq.

¶ 723. While a railway track was being raised at a highway crossing plaintiff led his horse across the rails. A hind wheel of his buggy scraped the second rail and the horse became frightened, ran away and injured plaintiff. He sued the company and showed that although, in anticipation of danger, he slowly led the horse across the first rail to prevent the wheel from sliding, it did not occur to him to check the horse in crossing the second. Held, that the averment in his declaration that he "took the horse by the bits and attempted to lead him gently and carefully over said railroad at said crossing" is not a sufficient averment that he was in the exercise of ordinary care and free from negligence contributing to the injury; held, also, that by his own showing his negligence was such as to contribute to the injury, and the case should have been taken from the jury and a verdict ordered for defendant.—Thompson v. Flint & P. M. R. Co., 57 Mich. 300.

¶ 724. An error in taking a case of railway injury from the jury upon a particular question may be rendered nugatory by such evidence of contributory negligence as would render that course necessary.—Rhoades v. Chicago & G. T. Ry. Co., 58 Mich. 263.

¶ 725. A person approaching a railway crossing rode for nearly fifty rods along a highway, which was for all that distance not far from the track and from which the track was in full view. He was drawn by a double team driven by another man and another double team was in front. The forward team crossed the track safely in front of a coming train; but a blast of the whistle started the rear team and the driver let them go, thinking it the safest way. The team was struck, however, and personal injuries inflicted. Held, in an action against the railroad company by the person riding, that he was grossly negligent and the case should be taken from the jury.—Potter v. Flint & P. M. R. Co., 62 Mich. 22.

¶ 726. An action for a railway injury may be taken from the jury if the undisputed facts clearly show plaintiff was guilty of contributory negligence.—Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93.

¶ 727. In an action for injuries caused by a collision with a train while plaintiff was crossing a railroad track, where the track was in plain view for a long distance, so that no one who paid any attention could fail to see the approach of the cars, it was held by a divided court that the case was properly taken from the jury on the ground of contributory negligence.—Straugh v. Detroit, L. & N. R. Co., 65 Mich. 706. [The dissenting justices contended only that the case ought to have gone to the jury.]

¶ 728. Where in an action based upon defendant's negligence in running a train at a high rate of speed across a highway without giving the signals required by statute, no evidence was offered to show due care by plaintiff's intestate, but defendant's fireman testified, without being contradicted, that he saw her when about fifty feet from the track "slashing" her horse with the lines as if trying to cross ahead of the train, and that he immediately notified the engineer, who at once applied the air-brakes and stopped the train, it was proper to direct a verdict for defendant on the ground of contributory negligence.—Underhill v. Chicago & G. T. R. Co., 81 Mich. 43.

¶ 729. Plaintiff's decedent went upon defendant's tracks at a highway crossing, with which he was familiar, just as the gates in use at that point were going down. There were at this point many tracks, and a passenger train was approaching from the west on the second or third track from decedent as he entered, going north. He saw the train, and, instead of stopping, ran in front of the engine when it was about fifteen feet from him, stopped in the center of the next track, turned around, and stood watching the passing train. While thus standing he was struck in the back by an approaching train, which was running at more than usual speed. Held, that decedent was chargeable with notice of the danger, and with the knowledge that trains were liable to pass at any time, and was guilty of such contributory negligence as to call for the direction of a verdict for defendant.—Duvall v. Michigan Cent. R. Co., 105 Mich. 386.

¶ 730. A directed verdict in favor of a railroad company, in an action for injuries sustained by a driver of a vehicle at a crossing, is proper where the evidence shows that the driver approached the crossing at a slow rate of speed, saw the smoke of an approaching train, but thought it was a train on another track, and proceeded to cross the railroad, although he had an unobstructed

view of the track, as in such case the driver could have averted the accident with but slight precaution and was guilty of contributory negligence because of failure to look and listen. Since it also appeared that the bell upon the engine of the approaching train was ringing, the fact that the railroad had placed an electric bell at the crossing, did not relieve the driver of his duty to look and listen.—Brinker v. Michigan Cent. R. Co., 121 Mich. 283.

¶ 731. In an action for personal injuries by reason of a collision between a construction train on defendant's road and plaintiff's wagon at a street crossing, where the evidence showed that plaintiff was familiar with the crossing and knew the defendant was doing construction work on the tracks in the vicinity, and that when at least 70 feet from the crossing he heard the whistle of an approaching train and saw the smoke therefrom, but on account of an embankment could not see the train and deciding to cross ahead of it whipped up the horses and without stopping to look and listen attempted to cross, thinking the train was far enough away, the court should have instructed a verdict for the defendant on the ground that the evidence failed to observe any precautions whatever.—Storrs v. Grand Trunk W. Ry. Co., 142 Mich. 375.

¶ 732. Where it is alleged that plaintiff was contributorily negligent in endeavoring to beat an engine across a crossing, a motion to direct a verdict for defendant is properly refused where there is evidence that the crossing consisted of five parallel tracks, that plaintiff before entering upon the crossing saw defendant's engine standing still, that it did not start until he had crossed two main tracks, and he at once hastened to get across, and the jury found specially that plaintiff did not try to beat the engine across the crossing.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

¶ 733. Plaintiff's decedent was killed by defendant's train at the intersection of the railroad and the street along which plaintiff's decedent was driving. Plaintiff's decedent was thoroughly familiar with the neighborhood. The crossing was a level one. The night was very dark. The defendant's engine was equipped with a powerful headlight, which was lighted, and was hauling a brilliantly lighted passenger train, the rumble of which could be heard several blocks away. At a distance of fifty-six and one-half feet from defendant's track decedent had an unobstructed view of the approaching train for a distance of 370 feet. At a distance of forty-six and one-half feet and at twenty-six and one-half feet his unobstructed view was for 530 feet and 1,500 feet respectively. The whistle was duly blown and the bell was ringing. Plaintiff offered no evidence that decedent stopped, looked and listened for the approaching train. With decedent going four miles an hour and the train forty, when decedent was thirty feet from the track, the train was three hundred feet away. Held, a verdict should have been directed for defendant.—Guntermann v. Michigan Cent. R. Co., 168 Mich. 87.

¶ 734. At the first trial of a suit against a railway for causing the death of plaintiff's decedent, a verdict was directed for defendant on the ground that deceased had a clear view of from 400 to 500 feet to the west in approaching defendant railway's track, on the second trial the evidence was the same except that a new witness had testified that the deceased had an unobstructed view of the tracks for a distance of only 217 feet. Held, taking into account the evidence as to measurements and distances, and the other testimony of the record, the witness' testimony should not be construed as disproving or modifying the otherwise undisputed testimony that the deceased had a view of the tracks for a distance much more than 217 feet, and a verdict on the ground of contributory negligence should have been directed at the second trial.—Folkmire v. Michigan United Rys. Co., 170 Mich. 425.

¶ 735. Plaintiff's decedent was killed at a crossing by being run over by a train that was engaged in a switching operation on a side track. There was no eyewitness but a witness testified that he saw an opening between the cars, that someone screamed, that he heard a crash and immediately thereafter found the body. He testified that there were no lights on the cars, that there were no trainmen about and that the whistle was not blown nor the bell rung. Held, a directed verdict for the defendant was erroneous, since the question of plaintiff's negligence should have been submitted to the jury.—Wisniewski v. Detroit, Grand Haven & M. Ry. Co., 177 Mich. 481.

¶ 736. One should exercise as much caution about remaining upon a railroad track as in crossing it, and where plaintiff took no care to see that he was traveling on the railroad track but had left the matter entirely to the knowledge or instinct of his horses, which he was not justified in doing, the trial court properly directed a verdict for the defendant, although plaintiff testified that he had looked for a train on arriving at the crossing where his horses had entered upon the tracks, but did not thereafter ascertain whether or not he had crossed the tracks.—Dugas v. Munising, M. & S. E. Ry. Co., 189 Mich. 620.

§ 110. Instructions and requests for charges.

In actions for injuries to trespassers and licensees, see ante § 66.

In actions for injuries to or by animals at large, see post § 131.

In actions for fires, see post § 146.

General law as to instructions, see Instructions.

¶ 737. In an action for damages resulting from a train's striking a team at a railroad crossing, the court, after charging that there could be no recovery if the proper signals were given, left it to them to determine whether there were any unusual circumstances which made speed unreasonable. There was nothing in the pleadings or proofs to show that there were any exceptional circumstances, or that this crossing was more dangerous than others. Held, that the charge was contradictory and erroneous.—Klanowski v. Grand Trunk R. Co., 64 Mich. 279.

¶ 738. In an action for injuries caused by the collision of defendant's engine with plaintiff's wagon it was proper to refuse an instruction that the question of the speed of the engine was immaterial, because the question of speed might be material in considering defendant's negligence, as for example if defendant failed to observe the requirements of the statute in giving signals when approaching a crossing, or approached without a headlight burning, in which cases the speed would be a material fact in determining defendant's negligence.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 739. In an action for injuries sustained by a collision of plaintiff's wagon with defendant's engine, where the declaration does not allege in any count that the reckless and negligent act of the defendant consisted alone in running the engine at a high rate of speed without a headlight burning, but in each instance this negligence, where alleged, is coupled with the neglect to sound the whistle or ring the bell, it is improper for the court to single out in his charge a single act of negligence and tell the jury that if they found there was no headlight on the engine the plaintiff was entitled to recover, where there was testimony that the whistle was sounded, and the bell was continuously ringing.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 740. An instruction, in an action brought against a railroad company for an injury from a defect in a sidewalk maintained by it across its track, that defendant was not liable if the defect was one that ordinary care on its part would not discover, but was liable whether having actual knowledge or not, if by careful management the defect should have been discovered, and that defendant was bound to take such precautions as the nature of its business required, and was not an insurer, etc., was correct.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 741. It is not error to charge that whistling and ringing the engine bell a mile away from a crossing would afford no warning to travelers about to cross the track, where in connection the jury is told that it must be done a reasonable distance away; ·l where appellant had requested a similar ·ge coupled with one that the statutes ·not require the whistle to blow within 40 rods, but not less than that and a reasonable distance away.—Van Auken v. Chicago & W. M. R. Co., 96 Mich. 307.

¶ 742. Where, in an action for a personal injury against a railroad company, one of plaintiff's witnesses testifies positively that the statutory signals were not given before reaching the crossing near which the accident occurred, but does not testify that he was listening for the whistle, and, being a passenger, could not have been looking for the train, and none of plaintiff's remaining witnesses, though several of them were within hearing distance, is allowed to testify that he could and would have heard the signals if given, it is error to instruct the jury that some of plaintiff's witnesses have testified that they were looking and listening for approaching trains, and that if the signals had been given they would have heard them.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 234.

¶ 743. Where, in an action for the negligent killing of plaintiff's intestate it appears that decedent, who was struck by a train and killed while attempting to drive over defendant's tracks at a city street crossing, deliberately drove upon the crossing, either because he did not see or hear the train, or, seeing it, attempted to cross ahead of it and miscalculated its speed, it is not error to instruct the jury that the fact that the street may not have been restored to its original condition as near as might be has no bearing in the case.—Tobias v. Michigan Cent. R. Co., 103 Mich. 330.

¶ 744. In an action against a railroad company for causing death at a street crossing, an instruction that under the undisputed evidence the jury must find that the whistle was sounded and the bell rung, was improperly refused, where the conductor, engineer and fireman testified positively that the whistle was blown and the bell sounded continuously, and where they were supported by two of plaintiff's witnesses, and where of the three opposing witnesses, the testimony of one, a child eleven years old, was confused and uncertain and the testimony of the other two was negative, both being within buildings and with faculties otherwise directed.—Stewart v. Michigan Cent. R. Co., 119 Mich. 91.

¶ 745. In the case of a collision between a freight train and a team driven by the plaintiff, a boy of thirteen, at a dangerous crossing where obstructions intervened, and the plaintiff claimed that the accident occurred through the running of the freight train in too close proximity to a passenger train for the passing of which the boy had waited, an instruction is not erroneous which states that although statutory signals are ordinarily sufficient, the circumstances might impose an increased duty upon the railroad to exercise additional care in approaching, and if the trains are run so close together

as they cross the highway that the noise of the first train would drown the sound of the whistle or bell on the second train, and render the statutory warning unavailing, such circumstances would make it the duty of the company to approach the crossing with greater care than if there was nothing to prevent the signals from being heard.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 746. In an action for personal injuries sustained by a traveler while crossing railroad tracks in a vehicle at a highway crossing, where his horse was frightened by the emission of steam from an engine which had been on the crossing in excess of the 5-minute period fixed by statute, it was error to charge that defendant was responsible for injuries resulting from an emission of steam, regardless of negligence in such emission if the engine was on the highway more than five minutes.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 747. In an action for personal injuries where the court has instructed the jury in the language of the statute as to the duty of the defendant to restore the highway to its former condition, if more specific instructions as to the construction of the statute in so far as the duties of restoration of the highway were desired counsel should have requested them.—Logan v. Lake Shore & M. S. R. Co., 148 Mich. 603.

¶ 748. Where in an action for injuries caused by the upsetting of a sleigh at a crossing it was claimed by the defense that the accident was not caused by a defective highway, but by the dropping of the short tongue connecting the two bobs, through the failure of the bolt attaching the short tongue and reach together, causing the rear bob to lift up and overturn the sleigh, the fright of the horses contributing thereto, and there was evidence to support this theory, it was not error to refuse to instruct the jury to find for the defendant in case they find this theory to be true, where there was also evidence to the effect that the road was not in proper condition as required by the law and it is by no means certain that had it been the short tongue would not have passed safely over the rail by reason of a want of opportunity for it to get under the ball of the rail.—Logan v. Lake Shore & M. S. R. Co., 148 Mich. 603.

¶ 749. In an action to recover damages for injuries sustained from the upsetting of a sleigh on an alleged defective highway crossing a request to charge "The undisputed evidence in this case shows that the sleigh in which plaintiff was riding was not upset because of any narrowness of the roadbed on defendant's right of way" should have been granted, but the addition to the charge "The question in the case as to the width of the roadbed is of no importance" is fatal, because while the narrowness could not be said to have been the cause of the upsetting, the injuries may have resulted from it and therefore the width of the road was of some importance.—Logan v. Lake Shore & M. S. R. Co., 148 Mich. 603.

¶ 750. In an action for personal injuries caused by the running away of a team frightened by a box car which obstructed a highway for more than five minutes, the declaration, not alleging upon which track the offending car stood, and there being a conflict of evidence as to whether the highway was obstructed by one or two cars and if so which of the cars caused the horses to take fright, it was held that the court properly refused to charge that in order for plaintiff to recover, the jury must find that the team was frightened by a specified car.—Brush v. Grand Trunk Ry. Co. of Canada, 179 Mich. 512.

§ 111. ——As to care and contributory negligence of persons crossing tracks.

Care required of persons at crossings, see ante § 78.
Weight and sufficiency of evidence as to contributory negligence, see ante §§ 93, 94.
Jury questions as to contributory negligence, see ante § 101 et seq.

¶ 751. It is error to charge that persons approaching a railroad track in a wagon are required to exercise only such care as "persons of their situation or condition in life" would ordinarily exercise under like circumstances. Such considerations do not affect the question.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 752. It was error to refuse to charge on the effect of cars on a side track having been an obstruction to the sight of plaintiff, about to cross, and to charge merely that such facts would show the plaintiff not contributively negligent.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647, per Sherwood, C. J., and Morse, J. (Long, J., concurring in the result); Campbell and Champlin, JJ., dissenting on the ground that the request ignored plaintiff's ability to hear or otherwise know of the danger, and on the ground that it assumed responsibility without regard to negligence from the mere fact that cars on side tracks obstructed the view.

¶ 753. In an action for injuries caused by a collision of defendant's engine with plaintiff's wagon it was error to refuse to charge that the track itself is a warning of danger to those who go upon it, and persons about to cross a track are bound to recognize the danger, and to make use of their sense of hearing as well as of sight, and to ascertain before crossing whether a train is in proximity.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 754. In an action for personal injuries caused by defendant's engine colliding with

plaintiff's wagon a request to charge that if the jury find that the headlight on the engine was burning, or that the engine made such a noise that plaintiff could have heard if he had stopped and listened then it would be contributory negligence if he had attempted to cross without stopping and listening is properly refused because all the facts and circumstances may be considered by the jury, and it did not take into consideration whether there had been any signals given on approaching, and whether the headlight on the engine was burning.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 755. Where defendant, for a considerable time before the injury to plaintiff's intestate, had maintained an electric bell at the crossing to give warning of the approach of its trains, the court erred in not instructing the jury, as requested by plaintiff, that if it found that deceased, who had been in the habit of crossing the track at said crossing, knew of this signal, and that on the night of the accident the bell did not sound its usual alarm on the approach of the train, and that deceased did not at that time know of any fault in the condition of the bell, such facts might be considered by them, together with all the other facts in the case, as bearing upon the question of whether or not deceased was free from contributory negligence.—Tobias v. Michigan Cent. R. Co., 108 Mich. 330.

¶ 756. Plaintiff's intestate was killed by a train at a highway crossing at which an electric bell rung automatically by passing trains was maintained by the company. Upon the occasion in question, however, the bell was out of repair, and did not ring; but an approaching train could be seen for a long distance. In an action against the company, the jury was instructed that, if the deceased had looked, he could have seen the train, and that his failure to look would, if it were not for the question of the bell, constitute contributory negligence precluding a recovery; that it was the duty of the deceased to be cautious and careful in approaching the crossing, and that the presence of the bell did not diminish the care required; and that it was for the jury to say, in view of all the circumstances, how far, if at all, he was authorized to rely upon the bell. Held, that the instructions were not open to the objection that the right of the deceased to rely in any degree upon the ringing of the bell was eliminated.—Tobias v. Michigan Cent. R. Co., 110 Mich. 440.

¶ 757. An instruction charging the jury to carefully scrutinize the testimony to determine whether the act of plaintiff in driving across the railroad track in question was a foolhardy act or not, was erroneous in permitting the jury to infer that though plaintiff was negligent and such negligence contributed to the injury, if his act was anything less than foolhardy, he might recover.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 758. In an action against a railroad for personal injuries sustained at a highway crossing, where plaintiff disavows any claim of damage because of the speed of the train, and evidence thereof was admitted simply as bearing upon the question of whether plaintiff was guilty of contributory negligence, a charge of the court telling the jury that such evidence as to speed was introduced in determining the question of plaintiff's contributory negligence and that it might be a material fact as to whether he was guilty of negligence and was not introduced to show negligence on the part of the defendant, and limiting the effect of the evidence as to the rate of speed as aforesaid, and stating further that the negligence of the plaintiff if they were traveling at an undue rate of speed, that of itself, independently, would not be negligence on the part of the defendant, is not open to the objection that the court gave the question of the undue rate of speed an important bearing upon the plaintiff's contributory negligence, where there was in fact some evidence of an undue and unusual rate of speed.—Li[illegible] v. Grand Rapids & I. R. Co., 143 Mich. [illegible].

¶ 759. Where plaintiff was injured by being struck by a switch engine upon a five-track highway crossing, and after he had crossed two main tracks, an instruction as to the duty of plaintiff to have stopped after seeing the approaching engine instead of attempting to cross in front of it, is properly modified by inserting the qualification that plaintiff might have stopped at a point of safety.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

§ 112. Verdicts and findings.

Weight and sufficiency of evidence, see ante § 89 et seq.

In actions for injuries to or by animals, see post § 132.

General law as to verdict and findings, see Verdicts.

¶ 760. Where, in an action against a railroad company, the jury finds specially that only one of the signals required by statute was given before the train crossed a highway (the bell was rung but the whistle was not blown), defendant's negligence is established.—Jensen v. Michigan Cent. R. Co., 102 Mich. 176.

E. INJURIES BESIDE OR NEAR TO TRACKS.

§ 113. In general; duty and liability of railroad.

Injuries to licensees and trespassers, see ante §§ 46, 49.

Injuries at highway crossings, see ante § 69.

Injuries at overhead or undergrade crossings, see ante § 70.
Injuries to or by animals at large, see post § 117.
Fires caused by negligence of railroad, see post § 133.

¶ 761. The act of 1847 (Comp. L. 1857, § 628), precluding damages for injury done on unfenced lands, does not apply to a railroad company's right of way.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 762. A railroad company which, in building its road on its right of way near plaintiff's house, has raised an embankment eighteen feet high, in order to cross another railroad at grade, thus leaving the house in an angle formed by the two embankments, wherein a pond of water is formed, by reason of a heavy rain-storm, in another angle formed by the embankments, opposite the house, into which pond, a day or two afterward, the plaintiff's eight-year-old boy, who has climbed over this embankment, falls into the water, and is drowned, is not guilty of negligence, although the pool may not have been guarded in any way, and no means may have been provided to carry off the water if thus suddenly accumulated.—Charlebois v. Gogebic & M. R. Co., 91 Mich. 59.

¶ 763. Under the franchise of a railway company providing that on the construction of the tracks the grade should be made to conform as near as practicable with the grade of the highways which they might cross, and containing no specifications as to methods of construction or the erection of barriers if excavations should be made in the highway, the company was liable for an accident resulting from an excavation so near the traveled portion of the highway as to be dangerous and left without protection, it appearing that no requirements outside the ordinance had been made by the township.—Kaiser v. Detroit & N. W. Ry. Co., 136 Mich. 541.

¶ 764. Under the franchise of a railway company providing that on the construction of the tracks the grade should be made to conform as near as practicable with the grade of the highways which they might cross, and containing no specifications as to methods of construction or the erection of barriers if excavations should be made in the highway; the company was liable for an accident resulting from an excavation so near the traveled portion of the highway as to be dangerous and left without protection; and the failure of the township authorities to protect against such construction was not a ratification of the act so as to relieve the company from liability for the dangerous construction.—Kaiser v. Detroit & N. W. Ry. Co., 136 Mich. 541.

Liability for injuries to persons other than employees or passengers struck by missiles or objects thrown or falling from cars, see note, 6 N. C. C. A. 859-871.
Liability of railroad company for injuries to persons other than passengers, employees, or others authorized to be on train, and to persons in proximity to track, by wreck, see note, 10 N. C. C. A. 897-915.
Liability of railroad company for injuries caused by mail bag thrown from car by government clerk, see note, 16 N. C. C. A. 875-878.

§ 114. Frightening horses near by.

¶ 765. While a railroad company is not liable for injuries resulting from the frightening of a horse at noise or the ordinary operation, use or situation of its engines and cars, it may become liable if it does anything unusual or unnecessary, naturally calculated to frighten ordinarily well-broken and gentle horses.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 766. A railroad company is not liable for injuries due to the fright of horses resulting from the ordinary use, movements, or situations of its engines, cars, or trains, and has a lawful right to make all such noises as are necessarily connected therewith.—Doston v. Michigan Cent. R. Co., 187 Mich. 650.

¶ 767. The right to use a public highway, even though it is in a dangerous condition, cannot be abridged by neglect to repair it.—Thayer v. Flint & P. M. R. Co., 93 Mich. 150.

Liability of railroad company for unnecessary ringing of crossing bell, frightening horse, see note, 15 N. C. C. A. 130.
Liability of steam railroad company for personal injury caused by frightening animals, see note, 7 N. C. C. A. 770-797.

§ 115. Proximate cause and contributory negligence.

In actions for injuries to licensees and trespassers, see ante §§ 51, 52.
In actions for injuries at highway crossings, see ante §§ 77, 78.
In actions for fires, see post § 136.
Proximate cause and contributory negligence generally, see Negligence, III, IV.

¶ 768. Putting a blower on a locomotive unnecessarily and negligently is the proximate cause of the injury to a driver whose horse is frightened by the noise and becomes unmanageable by it and runs away colliding with another vehicle, the horse being ordinarily well broken and manageable.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 769. Plaintiff walking along a street without sidewalks but with a well beaten path on a dark night missed his way and fell into a turntable pit located upon the de-

fendant's depot grounds six feet from the line of the street along which plaintiff had been walking. It was unfenced but the evidence showed that plaintiff was well acquainted with the locality and surroundings, having himself worked for the company many years. Held, that he could not recover.—Early v. Lake Shore & M. S. R. Co., 66 Mich. 349.

¶ 770. Plaintiff was riding in a sleigh, drawn by a horse thirteen years old, kind and gentle, and which had been safely driven over the bridge a great many times before. At the foot of the approach the driver, in order to lighten the burden of the horse, the traveled track being barren of snow, got out of the sleigh, and walked beside and drove the horse from the right side. While thus driving in the center of the track, and about three or four feet from the edge of the embankment, as shown by plaintiff's evidence, the horse made a sudden shy to the right, went over the embankment, drawing the sleigh after him, and plaintiff was thrown out and injured. Defendant's evidence tended to show that the sleigh, at the point where the tracks went off, was being drawn within a foot and a half or two feet of the embankment; that the roadbed was muddy, but along the side there was some snow; that there was a path along the embankment on each side; and one of defendant's witnesses testified that he saw plaintiff and the driver just as they were driving up the approach, and it looked as if the horse stumbled or slipped, lost his balance, and fell over the embankment. It appeared from all of the evidence that there was no train coming, no teams near the horse, or other thing to frighten him, and that there was no defect in the highway. The jury, under a proper charge, found that the horse was under the control of the driver. Held, that it cannot be said, as mattter of law, that the mere shying of the horse, and not the improper and dangerous condition of the highway (absence of barriers) was the proximate cause of the injury; that they were apparently concurring causes,—the one, the shying of the horse, where neither party can be said to have been in fault; and the other, the defect in the highway, for which, under the finding of the jury, defendant is liable.—Gage v. Pontiac, O. & N. R. Co., 105 Mich. 335.

¶ 771. It cannot be said, as a matter of law, that the removal of snow from a sidewalk by means of a snow-plow drawn by horses, pursuant to a custom of long standing, is not a proper, necessary, and reasonable use of the walk.—Jeffrey v. Detroit, L. & N. R. Co., 108 Mich. 221.

§ 116. Actions for injuries.

For injuries to licensees and trespassers, see ante § 55 et seq.

For injuries at highway crossings, see ante 85 et seq.

Judicial notice of tendency of cars or locomotives to frighten horses, see Evidence § 4.

Venue of actions against railroads, see Venue.

¶ 772. In an action for damages for personal injuries sustained as a result of plaintiff's horses becoming frightened at the starting of a train under a viaduct which plaintiff was crossing, evidence held insufficient to establish that any unusual or unnecessary noise was made in the starting of the train.—Doston v. Michigan Cent. R. Co., 187 Mich. 650.

¶ 773. Defendant is guilty of actionable negligence for killing a seven-year-old boy while fishing in a stream where the evidence showed that the stream was stocked with fish by the State and during the fishing season everybody was permitted to come into the millyard through which the stream ran and fish, the boy being at a point 25 feet from the end of the spur track at the end of which ties and rails had been put to prevent cars from running beyond the end of the rails, the car having been pushed by a train beyond this obstruction; the boy being no trespasser.—Black v. Michigan Cent. R. Co., 146 Mich. 568.

¶ 774. It is for the jury to say whether an engineman was negligent in turning on a blower of a locomotive which made noise and frightened plaintiff's horse, where the locomotive was near the highway and in an obscured position and they might have contemplated that a traveler might be near the crossing, and where the use of the blower was according to some evidence unnecessary.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 775. It is a jury question whether there was negligence in the act of the engineer in putting into operation a blower on a locomotive, making a noise which frightened plaintiff's horse, if the evidence shows as a fact that when it was done the engineer was aware of plaintiff's presence.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 776. It was a question for the jury whether a blower on a locomotive was in operation at the time plaintiff approached a crossing, where the fireman in charge of the engine testified that it was not turned on, but a witness of the accident testified that he saw the fireman turn it on shortly before, that he saw the horse begin to run away and that he had heard a blower on an engine and "this sounded like a blower."—Foster v. East Jordan Lumber Co., 141 Mich. 316.

¶ 777. In an action by the owner of land adjoining a railroad right-of-way to recover damages for alleged injury due to the backing of surface water, the natural flow of which was obstructed by the grade upon the railroad right-of-way, held that the fact

that no way for the escape of the surface water had been shown was not equivalent to a direct finding by the jury that the water had been held back during the entire period since the construction of such grade, especially where there was evidence that the owner's lot was dry for 31 years after the construction of such grade.—Hume v. Grand Trunk Western Ry. Co., 192 Mich. 225.

F. INJURIES TO OR BY ANIMALS AT LARGE.

§ 117. In general.

Frightening of horses near railroads, see ante § 114.
Injuries to crops or lands by straying animals, see post § 122.
Actions for injuries, see post § 124.

¶ 778. Where the horses are trespassing on the right-of-way of a railroad an engineer owes no duty to exercise care to discover their presence on the track.—Rattenbury v. Pere Marquette R. Co., 172 Mich. 106.

¶ 779. It is not in all cases negligence in a railroad company if its engineer runs its locomotive at a high rate of speed and does not slow up on seeing that an animal is on the track and in danger, since the first duty is to the passengers and this course by the engineer may be the proper one having this duty in mind.—Robinson v. Flint & P. M. R. Co., 79 Mich. 323.

¶ 780. It is not negligence towards animals some distance away on the track unknown to the railroad company or its servants to run its train over a crossing at the rate of 30 miles an hour, though there is a rule for the protection of passengers and property at the place in question (a station) limiting the speed to 15 miles an hour.—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

Liability of railroad company for injury to animals at public, private or farm crossings, see note, 6 N. C. C. A. 32-41.
Liability of railroad company for injury to animals on station grounds, within switch limits, or in towns or cities, see note, 6 N. C. C. A. 167-181.
Liability of railroad company for negligent injury to animals trespassing on right-of-way, generally, see note, 6 N. C. C. A. 378-388.
Liability of railroad company for injury caused by allowing carcass of dead animal to remain on right-of-way, see note, 14 N. C. C. A. 180-195.

§ 118. Duty and liability in respect to fences and cattle guards.

Erection and maintenance of fences, gates and cattle guards, see also ante § 15.
Burden of proof and presumptions as to fences and cattle guards, see post § 125.
Evidence as to cattle guards and fences, see post §§ 126, 127.
Jury questions as to cattle guards and fences, see post § 128.
Alleging neglect of statutory duty to fence railroad, see Negligence ¶ 202.
Provisions as to fences and cattle guards, see Comp. L. 1915, §§ 8304, 8306.

¶ 781. At common law railroad companies were not required to fence their rights-of-way, and were not liable for the accidental destruction of cattle trespassing upon their roads.—Williams v. Michigan Cent. R. Co., 2 Mich. 259; Gardner v. Smith, 7 Mich. 410; Continental Improvement Co. v. Phelps, 47 Mich. 299.

¶ 782. The act of March 17, 1847 (Comp. L. 1857, § 628) was not applicable to a railroad company's right-of-way.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

¶ 783. The statute does not prescribe as to the strength of the fence, but it must be of such reasonable strength as to confine and turn the animals usually restrained by fences in the country.—Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

¶ 784. The Railroad Law of 1873, Act No. 198 (How. St. § 3377), in requiring companies to fence their tracks, only requires reasonable partition fences four and a half feet high, and fairly adapted, so far as their strength and mode of construction is concerned, to keep animals from getting on the track. But Laws of 1881, Act No. 175 (How. St. § 3308), leaves them to be approved and regulated by the commissioner of railroads.—Davidson v. Michigan Cent. R. Co., 49 Mich. 428.

¶ 785. Liability for stock destroyed because of neglect to fence track attaches to railroad companies in the upper peninsula.—Talbot v. Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66.

¶ 786. Under the general railroad act the liability of corporations organized under it, and their agents, for damages which may result from the neglect of the corporation to erect and maintain fences on the sides of the line of road, attaches as soon as they have possession of the route for the purpose of constructing the road.—Gardner v. Smith, 7 Mich. 410; Continental Improvement Co. v. Ives, 30 Mich. 448.

¶ 787. A railroad company, though required to maintain side-fencing, is not liable for the destruction of cattle suddenly let loose upon the track through a breach in the fencing caused by a storm, and existing through no fault or neglect of the company.—Robinson v. Grand Trunk Ry. Co. of Canada, 32 Mich. 322.

¶ 788. A railroad's company's negligence in failing to fence its track whereby stock gets upon the track and is killed by a passing train is of itself sufficient to warrant

recovery for such loss.—Talbot v. Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66.

¶ 789. Liability for live stock destroyed because of failure to fence track attached to railroad companies in the Upper Peninsula. —Talbot v. Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66.

¶ 790. The amendment of 1885 to the railroad fence law (Pub. Acts 1885, No. 234, § 15; How. St., § 3377), providing that nothing contained in the statute shall be construed to prevent the erection of such fences as may be agreed upon in writing between the railroad company and the owner of land through which the road runs, does not enable the company to avoid liability to third persons for killing stock, by agreeing with the landowner for the erection of a fence not reasonably sufficient to prevent stock from straying upon the right of way.—Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146.

¶ 791. It being the duty of a railroad company to erect and maintain a fence, if it be insufficient or out of repair, in the absence of any proof showing an extraordinary cause for such condition, the company will be liable for the consequences resulting to the property of any person having an interest in the maintenance of the fence, and not shown to be in fault for such defective condition. —Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

¶ 792. The sufficiency of the fence which a railroad company is required to maintain along its tracks (Pub. L. 1875, p. 139) is not impaired by leaving gates in it; nor does it come in question where cattle have got upon the track by going through the gate while open.—Detroit, G. H. & M. R. Co. v. Hayt, 55 Mich. 347.

¶ 793. Where it is necessary, for the common convenience of the public and a railway company, that the latter should leave unfenced a part of its right of way where a loading spur joins the main track, it incurs no liability by reason thereof to the owner of a steer which strays upon the track through the opening, and is killed.—McDonald v. Minneapolis, St. P. & S. Ste. M. R. Co., 113 Mich. 484.

¶ 794. Cattle-guards are sufficient if they are in good repair and of a pattern that has been found by experience effective in keeping from the track such animals as they are generally designed to restrain.—Smead v. Lake Shore & M. S. Ry. Co., 58 Mich. 200.

¶ 795. How. St., § 3377, relating to cattle guards, does not require a railroad company to construct a guard at its crossings that should keep animals from getting over it under a great degree of excitement.—Smead v. Lake Shore & M. S. Ry. Co., 58 Mich. 200.

¶ 796. How. St., § 3377, contemplates that railway tracks shall be exposed within the limits of the highway only, and where, by constructing its guards at a distance from the highway, the company exposes its track and increases the danger, it renders itself liable for damage occasioned thereby.—Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607.

Liability of railroad company for injury to animals entering on track or right of way because of failure to construct or maintain proper fences or cattleguards, see note, 6 N. C. C. A. 496-514.

§ 119. ——In station grounds and railroad yards.

See also ante § 16.

¶ 797. A railroad company is not liable under the statute for the killing of horses upon its yard tracks, on the ground that they were not fenced.—Bird v. Michigan Cent. R. Co., 145 Mich. 706.

¶ 798. Railroad companies are not liable for not inserting cattle-guards at such street-crossings as are within their depot grounds and in use by them and the public transacting business with them.—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

¶ 799. The premises of a railroad company are yards within the meaning of the fencing statute, where, in an action for negligent killing of certain stock, it appears that at the point of such accident the company's tracks on one side of the right-of-way lead to brickyards, factories, etc., and on the other the tracks lead to ice houses at which refrigerator cars in transit are iced, that such tracks are used for the storing and inspection of cars, and that switching is done there; even though the public is not allowed to load and unload there.—Bird v. Michigan Cent. R. Co., 145 Mich. 706.

¶ 800. A railroad company is not negligent in failing to place fences or screens between its tracks and the driveway thereto at a station for the purpose of preventing the frightening of horses approaching the station.—Flagg v. Chicago, D. & C. G. T. J. R. Co., 96 Mich. 30.

¶ 801. A place at which trains stop, whenever there are passengers or freight to be received or delivered is exempt, as station grounds of the company, from the statute requiring it to fence its right of way, although no agent or depot building is maintained there.—Schneekloth v. Chicago & W. M. R. Co., 108 Mich. 1.

¶ 802. Where plaintiff's horse had been killed by defendant's train within 300 or 400 feet of the switch at a station, it was held that a railroad company, especially in a new and unsettled country, is not required

to make a formal separation or dedication of its station grounds, or to put up notices of their limits; that such grounds are not limited to the territory between the switches; and that at least as much of the main line and grounds outside of the switches as is in actual use for reaching the side-tracks within the switches, is a part of the station grounds, and need not be fenced. —Grondin v. Duluth, S. S. & A. R. Co., 100 Mich. 598.

¶ 803. Whether a part of a railroad company's right-of-way is or is not within the "yard limits" depends upon whether it is reasonably necessary for switching purposes, or liable to become so; and the determination of the question does not necessarily depend upon distance from depots, or the frequency with which switching is done at the time of the inquiry.—Rabidon v. Chicago & W. M. R. Co., 115 Mich. 390.

¶ 804. A part of a railroad right-of-way lying about a mile distant from freight and passenger depots in a thickly-settled locality is not too remote to come within the rule relieving railroad companies from the duty of fencing their "yard limits" or "depot grounds," if such part is in fact within the yard limits as fixed by the company, and is used for switching purposes, so that the erection of a fence along the right-of-way, with the incident cattle-guards and wing fences, would render the place dangerous to employees.—Rabidon v. Chicago & W. M. R. Co., 115 Mich. 390.

¶ 805. A switch and part of the main track distant a mile and a half from station grounds and used as a loading place by the railroad company and a lumber company need not be fenced.—Cornell v. Manistee & N. E. R. Co., 117 Mich. 238.

¶ 806. Where in an action against a railroad company for damages for killing cattle, the liability of the defendant depends upon whether it was under any obligation to provide and maintain cattle-guards and connecting fences; by fencing each side of its main track to a point near a station the railroad company exercises its discretion to determine the limits of its station grounds and fixes that point as such limits.—Stewart v. Grand Rapids & I. R. Co., 147 Mich. 48.

¶ 807. Comp. L. 1897, § 6294 compels all railroads in Michigan to fence their tracks, and to maintain cattle-guards and connecting fences at the point where its fenced track leaves its unfenced yard; the station grounds of the companies are not in express terms exempted from this statute.—Stewart v. Grand Rapids & I. R. Co., 147 Mich. 48.

¶ 808. Under the statute requiring fencing of railroads defendant was liable for the killing of plaintiff's cow, which got upon its track at a point within an unfenced part of its road, such part extending without any cattle-guards a long distance each side of a station and highway crossing, although the way could have been fenced up to, and guards put in at, such crossing without inconvenience to the public or the company. —Lafferty v. Chicago & W. M. R. Co., 71 Mich. 35.

¶ 809. A railroad company is not guilty of negligence as to its employees in maintaining a cattle-guard at a point where its ordinary right-of-way joins its station grounds.—Fuller v. Lake Shore & M. S. R. Co., 108 Mich. 690.

¶ 810. A street which approaches a railroad and depot grounds at a different angle and in a different direction from its course on the other side and with its ends not opposite is not such a continuous street as requires to have cattle-guards under the statute (How. St. § 3377; Laws 1887, p. 339).—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

¶ 811. The exception to the statutory requirements absolving the duty of maintaining cattle-guards applies to station grounds; but does not apply to a point from 30 to 80 rods from a station where the public is not admitted and the right-of-way is fenced and where in fact a guard was.—Hathaway v. Detroit, T. & M. R. Co., 124 Mich. 610.

Liability of railroad company for injury to animals on station grounds within switch limits or in towns or cities, see note, 6 N. C. C. A. 154-161.

§ 120. Inspection, repair and reconstruction of fences.

¶ 812. A railroad fence was found burning at about six or seven o'clock in the evening; the section foreman got notice thereof at about eight o'clock, and went next morning before six to repair the fence with the nearest materials belonging to the company, which were about half a mile distant. Held not unreasonable delay.—Stephenson v. Grand Trunk Ry. Co. of Canada, 34 Mich. 323.

¶ 813. Where the fences had been accidentally destroyed by fire after the track inspector had made his daily inspection, and the fact was not known until after the injury had been done, the company was not guilty of negligence.—Toledo, C. S. & D. R. Co. v. Eder, 45 Mich. 329.

¶ 814. A railroad company, in maintaining fences along the track, is only bound to reasonable diligence, and is not liable for injuries occurring to cattle which come upon the track through defects in fences not traceable to want of care.—Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152.

¶ 815. A railroad company must be as watchful to keep its fences in repair as any

prudent person would be in maintaining fences to protect his own property.—Crosby v. Detroit, G. H. & M. Ry. Co., 58 Mich. 458.

§ 121. ——Liability of agents and contractors.

¶ 816. A contractor for the construction of the road is an agent of the corporation within the meaning of Comp. L. 1857, § 1987, requiring railroads to fence their tracks. And he is primarily liable to the same extent that the corporation would have been for the same acts or omissions.—Gardner v. Smith, 7 Mich. 410.

¶ 817. Where, while a contractor was engaged in constructing a railroad through certain premises, and had taken away fences for the purpose, the sheep of the owner of the land escaped and were lost in consequence, it was held that the contractor was liable for the loss, notwithstanding the owner turned the sheep into the field after the route was taken possession of, and while the contractor was constantly throwing down the fences for his purposes.—Gardner v. Smith, 7 Mich. 410.

¶ 818. The term "agent," as used in Comp. L. 1857, § 1987, included everyone exercising the powers of the company upon or over the road, and so included another company becoming lessee of the road. Such lessee being thus liable to fence, its neglect to do so rendered not only itself, but the lessor, liable for any damage resulting: and the object of the amendment of 1867 (Laws 1867, p. 221) was to give the injured party a remedy against both the agent and the principal.—Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

§ 122. ——Injuries to crops or lands by straying animals.

¶ 819. A railway company's liability for an injury done to crops by cattle that have gone upon the premises in consequence of the company's neglect to fence its right-of-way is not changed by the fact that the road was at the time in the hands of a contractor who had nothing to do with the fencing.—Pound v. Port Huron & S. W. R. Co., 54 Mich. 13.

¶ 820. Where a company had acquired a right-of-way across a farm and had taken down the fences already on the premises, it was liable for injuries done to the crops by cattle which had come upon the right-of-way and had escaped therefrom upon the farm (How. St. § 3377).—Pound v. Port Huron & S. W. R. Co., 54 Mich. 13.

¶ 821. At the common-law, railroad companies were not required to fence their property.—Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146; Rabidon v. Chicago & W. M. R. Co., 115 Mich. 390.

§ 123. Contributory negligence of owner.

Jury questions as to contributory negligence, see post § 130.

Instructions as to contributory negligence, see § 131.

General law as to contributory negligence, see Negligence, IV.

¶ 822. In an action under the statute to recover the value of stock killed by reason of the neglect of a railroad company to fence its track, the negligence of the owner to take care of his property is no defense to the company, as it would be at common law, since the statute is a police regulation, as much for the security of passengers as the protection of property.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510; Grand Rapids & I. R. Co. v. Cameron, 45 Mich. 451.

¶ 823. Contributory negligence by the owner of cattle is no defense to his action for injuries to them resulting from defendant's neglect to maintain side-fencing as required by statute of railroads.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510; Grand Rapids & I. R. Co. v. Cameron, 45 Mich. 451.

¶ 824. The owner of cattle who turns them loose in a public highway near a railroad crossing is guilty of contributory negligence, and cannot recover if they enter the company's grounds at a place where fencing is not required and are killed.—Robinson v. Flint & P. M. R. Co., 79 Mich. 323; Niemann v. Michigan Cent. R. Co., 80 Mich. 197.

¶ 825. Where a colt broke out of the pasture in which it was on the morning of the day on which it was killed and was in the highway without its owner's knowledge, such owner cannot, in the absence of a want of reasonable care, be said to have allowed the colt to run at large, and to have been contributively negligent.—Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607.

¶ 826. One who permits his horse to run at large near the place where a railroad track is unfenced is guilty of contributory negligence, precluding a recovery for the killing of the horse by a passing train, unless it was the duty of the company to maintain a fence at that point.—Schneekloth v. Chicago & W. M. R. Co., 108 Mich. 1.

¶ 827. The statutory liability of a railroad company for a horse killed upon its track by reason of its failure to maintain a sufficient cattle-guard is not affected by the contributory negligence of the owner of the stock in allowing it to run at large knowing its tendency to stray onto the track.—La Flamme v. Detroit & M. R. Co., 109 Mich. 509.

¶ 828. A landowner, who loses stock because of the insufficiency of a fence which he has himself erected and maintained pursuant to an agreement with the company, has no right of action for his damages.—Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146.

¶ 829. The contributory negligence of the owner of stock in permitting it to run at large is no defense to an action based on failure to fence, where the animals get upon the right-of-way through defective fences maintained by the company, or by adjacent owners under agreement with the company. —Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146.

¶ 830. In an action under Comp. L. 1897, § 6294, against a railroad for injury to cattle caused by their escaping a defective cattle guard, recovery by the plaintiff is not defeated by contributory negligence.—Hathaway v. Detroit, T. & M. R. Co., 124 Mich. 610.

¶ 831. Where a defendant railroad has failed to maintain a proper cattle-guard, plaintiff may recover for the killing of a horse passing across such guard despite negligence of the plaintiff in allowing said horse to run at large upon the highway.—Chapin v. Ann Arbor R. Co., 167 Mich. 648.

¶ 832. Defendant factory put in private gates in a fence separating its premises from the tracks of a railroad. Said fence was constructed by the railroad and defendant upon securing consent to instal said gates, assumed all risk and liability for any loss, injury or damage to persons or property in connection with the use thereof. It also assumed full control of said gates. Plaintiff's cow wandered from its pasture, passed over defendant's premises through one of said gates and upon said railroad tracks and was killed by a train. Held, defendant assumed as to third persons, the statutory liability of the railroad company, and the contributory negligence of the plaintiff did not bar his right of action.—Sylvester v. Grand Rapids Bookcase Co., 169 Mich. 340.

¶ 833. It is no defense to an action to recover for the killing of a cow on a railway right-of-way, that the plaintiff permitted it to graze on the adjoining highway, where it got on the right-of-way, as the result of the defendant's failure to keep its fences in effective repair as required by statute, by permitting a cattle-guard to become filled up with sand, dirt and cinders.—Geerds v. Ann Arbor R. Co., 181 Mich. 12.

§ 124. Actions for injuries and pleadings therein.

Improper argument in actions against railroads, see Argument of Counsel.

Pleading damages from neglect to fence, see Damages § 252.

General law as to pleadings, issues and variance, see Pleading.

Amendment of declarations for injuries to animals for want of fence or guard to conform to proofs, see Pleading § 122.

Cure of omission to allege place of neglect by verdict, see Pleading ¶ 927.

Venue of actions against railroads, see Venue.

¶ 834. Under the general railroad law of 1871, which went into effect April 18, 1871, and prior to its amendment by Laws 1873, Act No. 198, the liability of a railroad company for neglect of its duty in fencing its road was subject to an action only by an adjacent occupant or proprietor; and the owner of property distant half a mile from the railroad is not such.—Continental Improvement Co. v. Phelps, 47 Mich. 299.

¶ 835. In an action against a railroad company for damage arising from neglect to fence its lands, the declaration need not be specially framed upon or refer to the statute imposing the duty of fencing railroads—that duty being imposed by a general statute, and the action not being one for a penalty but for damages resulting from a neglect of a statutory duty.—Grand Rapids & I. R. Co. v. Southwick, 30 Mich. 444.

¶ 836. Where action was brought to recover damages arising from the neglect of a railroad company to fence its road, and the injuries complained of extended over a period within which the statute requiring the fencing had been changed as to the extent of the liability imposed for the neglect, but not as to the duty of maintaining fences, a declaration that made no specific reference to the statutes was held good in the absence of demurrer; there would be no practical difficulty in determining the admissibility of proofs by the laws in force at the time to which they refer.—Continental Improvement Co. v. Ives, 30 Mich. 448.

¶ 837. A declaration for an injury caused by the insufficiency of a cattle-guard should state in what particulars it was insufficient; and if it does not do so it is demurrable.—Smead v. Lake Shore & M. S. Ry. Co., 58 Mich. 200.

¶ 838. General allegations of the continuous operation of a railroad and continuous neglect to fence it, and that damage resulted therefrom, are sufficient to authorize a recovery for such natural mischiefs as invariably follow the destruction of fences and exposure of lands, and which cannot easily be itemized.—Grand Rapids & I. R. Co. v. Southwich, 30 Mich. 444.

¶ 839. Where, in an action against a railroad company for damages arising from want of fencing, the declaration charged the defendant as a corporation "owning, occupying and doing business on and over" a certain road (naming it), "under the laws of the state of Michigan," it was held that the objection could not be raised, under the plea of the general issue, that it did not allege defendant to be a corporation or otherwise competent to be sued.—Grand Rapids & I. R. Co. v. Southwick, 30 Mich. 444.

¶ 840. In an action against a railroad company for the killing of a cow, which got upon the track through defendant's

neglect to repair its fence, the fact that the cow had wandered to a highway crossing at the time she was struck is immaterial.—Jebb v. Chicago & G. T. R. Co., 67 Mich. 160.

§ 125. Burden of proof and presumptions.

Weight and sufficiency of evidence, see post § 127.

General law as to burden of proof and presumptions, see Evidence, II.

¶ 841. The existence of an exceptional case, doing away with the necessity of having a cattle-guard near a highway crossing in a village, cannot be presumed, but must be proved by the defendant company.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510.

¶ 842. The burden of proof in an action for the loss of a colt killed upon a railway track in consequence of the insufficiency of the cattle-guards is upon plaintiff to show that such guard was not sufficient to restrain such animals as it was designed to restrain.—Smead v. Lake Shore & M. S. Ry. Co., 58 Mich. 200.

¶ 843. Any exceptional case preventing the application of the statute must be proved by the company when it is sued for an injury from failure to fence, and such case will not be presumed.—Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510.

¶ 844. In an action against a railroad company for injuries to stock which got upon its track through an open, unfenced space, away from a highway, it is for defendant to show that such space is within its station grounds.—Wilder v. Chicago & W. M. R. Co., 70 Mich. 382.

¶ 845. In an action for killing horses brought against a railroad company, under Comp. L. 1897, § 6294, requiring fences and cattle-guards and providing that fences and cattle-guards approved by the commissioner of railroads shall be legal, it is competent for the defendant to show that the horses entered on the right-of-way over cattle-guards and not through defective fences, the burden of proof is on plaintiff to show that the injury resulted from defects or lack of adequate fences.—Clement v. Pere Marquette R. Co., 138 Mich. 57.

¶ 846. Where in an action for injuries to a mare and colt it is alleged in one count that the injury arose from neglect to keep up proper cattle-guards and in another count that it resulted from negligence in running the trains. It cannot be presumed that it was negligent to run a railroad train in the usual manner, in the absence of proof that such usual manner is in itself improper.—Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506.

§ 126. Admissibility of evidence.

Weight and sufficiency of evidence, see post § 127.

General law as to evidence, see Evidence.

¶ 847. A railroad fence burned and animals were killed on the track. The fence was mended without unreasonable delay. In an action for the injury done, evidence was offered that it might have been mended sooner by using materials nearer at hand. But it did not appear that they were available, and did appear that they did not belong to the railroad company. Held proper to exclude the evidence.—Stephenson v. Grand Trunk Ry. Co. of Canada, 34 Mich. 323.

¶ 848. In an action for the loss of a colt killed upon a railway track in consequence of the insufficiency of the cattle-guards, it was improper to ask the plaintiff and his witnesses whether, in their opinion, the cattle-guard was sufficient to prevent animals from getting on the right-of-way under circumstances ordinarily arising at those places.—Smead v. Lake Shore & M. S. Ry. Co., 58 Mich. 200.

¶ 849. In an action against a railroad company to recover for animals killed on its track through its failure to keep its fences in repair, plaintiff cannot be allowed to show that animals of his other than those killed had on several occasions, months before the loss sued for, been seen on defendant's right-of-way.—Jebb v. Chicago & G. T. R. Co., 67 Mich. 160.

¶ 850. Upon the issue whether plaintiff's colts killed at a railroad crossing had escaped through the fence along defendant's right-of-way at a given point, as plaintiff claimed, or at a point in plaintiff's fence along the highway, the question whether a witness knew of the colts' "coming out and being shut up on the highway" is incompetent, it referring to no particular time and being directed to no particular fence.—Bowen v. Flint & P. M. R. Co., 110 Mich. 445.

¶ 851. Evidence that, on several occasions within about a month before the killing of plaintiff's colts at a railroad crossing, cattle were found upon the track, and driven through the fence along the right-of-way at the point where plaintiff claims the colts subsequently went through, is admissible upon the issue whether the colts escaped at such point, or at a point in plaintiff's fence along the highway, where defendant's testimony is to the effect that the former fence was in a good condition.—Bowen v. Flint & P. M. R. Co., 110 Mich. 445.

¶ 852. Where, in an action against a railroad company for killing stock upon its unfenced right-of-way, there is evidence tending to show that the bars through which

the stock got upon the right-of-way were improperly constructed, evidence that they had been frequently found down, and had been replaced by employees of the company, is admissible to charge the company with knowledge of their defective condition.—Neversorry v. Duluth, S. S. & A. R. Co., 115 Mich. 146.

¶ 853. Where there is a claim that a cattle-guard had been repaired and put in as good condition as it was before certain damage, and the plaintiff's claim is that it was out of repair by reason of which his animals were killed on the track, it is relevant to show whether after the repairs cattle passed over the guard; since it tends to show that want of repairs was not the cause.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 854. In a suit against defendant railway for killing a horse, plaintiff introduced evidence to show that the cattle-guard was insufficient. Defendant then introduced evidence to show that it was both sufficient and was of the kind approved by the railroad commission. Held, defendant having assumed the burden of proving that the guard in question was of the kind approved by the commission, plaintiff was properly permitted to show by detailed dimensions that said guard was different from the model established by the commission.—Chapin v. Ann Arbor R. Co., 167 Mich. 648.

¶ 855. That cattle sometimes get on a railway right-of-way over cattle-guards when in good repair is immaterial in an action for the value of a cow killed by escaping on the right-of-way over a cattle-guard which the defendant negligently permitted to become filled up.—Geerds v. Ann Arbor R. Co., 181 Mich. 12.

§ 127. Weight and sufficiency of evidence.

Questions of law and fact, see post § 128.

¶ 856. Where, in a suit to recover for sheep killed by a railroad company, it appears that they entered upon defendant's depot grounds where it was not obliged to fence, plaintiff must show some neglect of a statutory duty on defendant's part as a basis of liability.—Stern v. Michigan Cent. R. Co., 76 Mich. 591.

¶ 857. In an action against a railroad sued for sheep killed on the track, plaintiff cannot recover upon proof that defendant negligently failed to maintain its cattle-guards to a cattle-pass leading to its right-of-way, without proof that such sheep passed through the gate which was the approach to said pass, left open through defendant's negligence.—Lemon v. Chicago & G. T. R. Co., 59 Mich. 618.

Validity of statute making occurrence of injury or damage to animal prima facie evidence of negligence of railroad company, see note, 2 N. C. C. A. 243-249.

§ 128. Questions of law and fact.

General law as to jury questions, see Trial, VI.

¶ 858. In an action of damages against a railroad company for injuries to horses caused by neglect to keep up proper cattle-guards, testimony was admitted, without objection, having some tendency to prove a cattle-guard insufficient; held no error to submit the question of sufficiency to the jury.—Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506.

¶ 859. Sending out a train with so few brakemen that on some grades its speed cannot be checked cannot be held, as a matter of law, to have no tendency to support an allegation of reckless management; nor can the neglect be held to be of one degree rather than another; if there are special circumstances tending to excuse such management, they are for a jury to weigh.—McDonald v. Chicago & N. W. Ry., 51 Mich. 628.

¶ 860. A declaration against a railway company for the killing of animals that had got upon the track through the company's neglect to keep the side fencing in repair averred that defendant "so carelessly and negligently ran, conducted and directed the locomotive and train" that they struck and killed the animals "so being on the railroad as aforesaid by and through the neglect of the defendant to keep in repair the fences as aforesaid, and through the gross neglect and reckless conduct of the servants and employees of defendant on said locomotive in running down said animals," etc. Held, that as it was not claimed on the trial that the averment was so general that no evidence could be received in support of it, the jury was entitled to consider any evidence that was admitted without objection, and tended to prove the main allegation; and if sending out a train without enough brakemen to keep it under control had any such tendency, this fact could be relied on as well as reckless conduct in the conductor or engineer at the time of the injury.—McDonald v. Chicago & N. W. Ry., 51 Mich. 628.

¶ 861. A flock of sheep were killed by a railroad train in the neighborhood of a cattle-guard at a highway crossing. There was testimony that the fencing near by was and had long been insufficient, and that the cross-fence was two feet short of the cattle-guard and the cattle-guard was shallow. Held that, in an action against the railway company for damages, the case was properly left to the jury.—Agnew v. Michigan Cent. R. Co., 56 Mich. 56.

¶ 862. The extent of unfenced depot grounds is not fixed according to the con-

tinuous, actual use of every part of them; nor can their proper limits be collaterally determined by a jury in an action against the company for the loss of a cow that came upon the track near the station where there was no fence.—McGrath v. Detroit, M. & M. R. Co., 57 Mich. 555.

¶ 863. Where plaintiff, when he first claimed damages, attributed the injury to defendant's defective fence, and afterwards attributes it to a defective cattle-guard, the contradiction is matter going merely to his credibility as a witness.—Myron v. Michigan Cent. R. Co., 61 Mich. 387.

¶ 864. Where stock are killed on defendant's track, having entered thereon from unfenced station grounds, the criterion of defendant's liability is not whether all the grounds set apart for station purposes have been actually used, but whether defendant, in view of the present or prospective needs of such grounds for a station, has exercised a reasonable discretion in throwing them open for that purpose; and where it appears from the testimony that the grounds are not unreasonably extensive, the company's liability is a question of law, and is not for the jury to determine.—Rinear v. Grand Rapids & I. R. Co., 70 Mich. 620.

¶ 865. Track repairers found at the close of the day that several rods of railway fencing, enclosing pasture land, had been burned, but they put off mending it till morning. Meanwhile a horse got upon the track during the night and was killed by a passing train. Held, that in an action against the company for the injury it was for the jury to say, in view of all the circumstances, whether defendant was negligent.—Crosby v. Detroit, G. H. & M. Ry. Co., 58 Mich. 458.

¶ 866. In an action for the killing of a colt at a cattle-guard the questions whether the manner in which the fences and cattle-guards were constructed was a substantial compliance with the statute, and whether the killing was due to defendant's failure properly to construct its fences and cattle-guards, are for the jury.—Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607.

¶ 867. Where a colt was killed at a highway crossing either because it lagged behind other horses which crossed ahead of the train, or because the train prevented its crossing and it tried to run around the train at a place where the cattle-guards and fences were set back a short distance from the line of the road which the track crossed diagonally, it could not be said as a matter of law that defendant's neglect properly to construct its fences and cattle-guards on the line of the highway did not cause the killing of the animal for the loss of which action was brought.—Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607.

¶ 868. Plaintiff sued to recover the value of a colt, which had escaped from an adjoining field upon defendant's right-of-way, and was run over by one of its trains. The testimony tended to show that plaintiff had exercised reasonable care respecting the gate, which had in some unexplained manner been opened. It was conceded that defendant was not in any sense responsible for the presence of the colt upon the right-of-way, and that it was not seen thereon prior to the approach of the train, and not from that time afterwards, before it was killed, by anyone except the engineer and fireman, and they both testified that they did not see it until they were within twenty-five feet of it, and too late to stop the train. The testimony on plaintiff's part tended to show that a man or a horse upon the right-of-way or track, at any point between the gate and the place where the colt was struck, could be readily seen for a distance of over half a mile therefrom, and that the foot-prints made by the colt showed that it ran upon the track for a distance of forty-four rods before being overtaken by the train, which was running at the rate of forty-five miles an hour. Held, that the question whether or not defendant's servants were negligent in running down the colt after they became aware of its presence was properly left to the jury.—Granby v. Michigan Cent. R. Co., 104 Mich. 403.

¶ 869. The opinion of a former railroad employee that a specified point in the right-of-way in a city is not a part of the depot and station grounds, such as the company is relieved from fencing, is insufficient to raise a question for the jury, where the positive testimony adduced by the company shows that such point is within the yard limits as it has defined them, that switching is done there, and that the erection of the statutory fences would endanger employees.—Rabidon v. Chicago & W. M. R. Co., 115 Mich. 390.

¶ 870. On the question whether a certain point on a railroad line was a loading place and therefore not one where a fence had to be maintained, no harm was done by leaving the question to the jury and also the question whether the place was maintained in good faith, where under the evidence it clearly was such and both questions might have been taken from the jury.—Cornell v. Manistee & N. R. R. Co., 117 Mich. 238.

¶ 871. In an action for killing horses brought against a railroad company, under Comp. L. 1897, § 6294, requiring fences and cattle-guards and providing that fences and cattle-guards approved by the commissioner of railroads shall be legal, uncontradicted evidence that the cattle-guards were approved by the commissioner of railroads makes it erroneous to leave to the jury the question of their adequacy, the railroad com-

missioner's action is conclusive on this question.—Clement v. Pere Marquette R. Co., 138 Mich. 57.

¶ 872. In an action against an electric railway company for killing a cow, testimony for the plaintiff that the cow was on the track when the car came in sight, that it remained on the track and that the car did not slacken in speed is sufficient to go to the jury on the question of defendant's negligence, although controverted by testimony of the defendant.—Airikainen v. Houghton County St. R. Co., 138 Mich. 184.

¶ 873. In an action against a railroad for killing stock it is not error to submit to the jury the question whether the glance fence and cattle-guard were negligently constructed, though the pattern of guard was made of standard width and had been approved by the railroad commissioner, since if the fence and the guard left a strip between them so that cattle could pass, the statute was not complied with.—Johnson v. Detroit & M. Ry. Co., 139 Mich. 287.

¶ 874. Where in a suit against defendant railroad for killing plaintiff's horse, which had crossed over its cattle-guard, the defense is offered under Comp. L. 1897, § 6294, as amended by Act No. 308, Pub. Acts 1909, that the cattle-guard in question corresponded to the one prescribed by the state railroad commission, and the plaintiff introduces evidence to show that the guard in question differed from the one so prescribed with respect to the thickness of the bars, their closeness together and their sharpness, the question of fact raised is properly left to the jury.—Chapin v. Ann Arbor R. Co., 167 Mich. 648.

¶ 875. Defendant's factory lay a short distance south of a railway track running east and west in a city. South of said factory lay some fair grounds used for pasturing cattle. The railroad company had constructed a private fence between its tracks and said factory. Defendant obtained permission from the railroad to construct some small gates in said fence for the use of its employees in going across said tracks to land owned by defendant on the north side thereof. To the knowledge of defendant corporation's officers, the general public had been habitually using said gates in crossing said railroad. They also knew that the stock pastured in said fair grounds frequently escaped therefrom and wandered about in the vicinity. Upon securing permission to install said gates, defendant contracted with the railroad to assume all liability for injury to persons or property. Defendant's officers made no efforts to prevent the public use of said gates. Plaintiff's cow escaped from said fair grounds, wandered across defendant's premises, through said gates and upon said tracks and was killed by a train. Held, sufficient evidence was afforded to warrant the submission to the jury of the question of defendant's negligence.—Sylvester v. Grand Rapids Bookcase Co., 169 Mich. 340.

¶ 876. Where a horse is killed at a diagonal railroad crossing, where the evidence is conflicting, it is for the jury to decide as to the width of the wagon road established by adverse use, whether the cattle-guard is placed at the intersection of the right-of-way and the line of the highway, whether such guard is as near the highway line as practicable and whether the horse was within the boundary of the highway proper when struck.—Goretski v. Au Sable & Northwestern R. Co., 172 Mich. 623.

¶ 877. Where horses are killed by a train while trespassing on the railroad's right-of-way, and the engineer and the fireman testify that they knew nothing of the accident, the question of the engineer's negligence in failing to stop after seeing them cannot be left to the jury where the only evidence is that horses not identified as those killed were seen running about on the highway and that near the time of the accident the engineer sounded warning whistles.—Rattenbury v. Pere Marquette R. Co., 172 Mich. 106.

§ 129. ——As to wilful or gross negligence.

¶ 878. In an action against a railroad for the killing of horses by a train where the evidence shows that plaintiff was grossly negligent in permitting his horses to remain on the track where he was loading logs, the approaching train being visible for three miles; and that it was his duty to look out for and protect himself against danger from trains, it is error to leave the case to the jury on the theory of wilful and gross negligence on the part of defendant's engineer in failing to take proper precautions after seeing the danger, there being no definite evidence that the accident resulted from reckless and intentional acts on his part or that he failed to take such precautions as seemed to him proper under the circumstances.—Redson v. Michigan Cent. R. Co., 120 Mich. 671.

§ 130. ——As to contributory negligence of owner.

Care required of the owner, see ante § 123.

¶ 879. It was proper to send the question of contributory negligence to the jury where colts were killed at a loading place, not required to be fenced and in the forest, and it appeared that the colts strayed from unfenced lands of the plaintiff and got onto the track at the unfenced place but there was testimony that horses would not be likely to pass from a cleared place into or through woods.—Cornell v. Manistee & N. E. R. Co., 117 Mich. 238.

§ 131. Instructions.

General law of instructions, see Instructions.

¶ 880. The owner of cattle cannot recover damages from a railroad company for a cow killed by a passing train, where it appears that such owner turned his cows across the railroad tracks of defendant where by law defendant was not compelled to keep and maintain a fence, that supposing they had gone to the river to drink, he paid no further attention to them, although he heard a train pass, and that his cow was killed at a place about 70 rods distant from where he stood talking with a neighbor; and the jury should have been instructed accordingly.—Niemann v. Michigan Cent. R. Co., 80 Mich. 197.

¶ 881. In an action for the statutory liability (Comp. L. 1897, § 6294) for failure to maintain cattle-guards an instruction substantially that if an approved kind of guard was installed and kept in a state of repair efficient for its intended purpose the company would not be liable, but if the guard was allowed to become out of repair by filling up with cinders and the injury was occasioned by such want of repair, then it would be liable, is sufficiently favorable to the railroad company; where the evidence was that there was a guard and that it was an approved kind and in repair but that it was filled up so that cattle walked over it.—Hathaway v. Detroit, T. & M. R. Co., 124 Mich. 610.

¶ 882. In an action against a railroad for killing cattle, a charge which referred to the statute providing that a cattle-guard that has been approved by the state railroad commissioner shall be deemed sufficient, and stated that if the guard in question had been kept as it was originally placed there, and if there was no question about the space between the guard and the fence, plaintiff could not recover; was not open to the objection that it told the jury that defendant had not done its full duty in providing a cattle guard approved by the commissioner unless such guard was in fact sufficient to prevent cattle passing on the track.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 883. In an action against a railroad for killing cattle, it was not error to charge that plaintiff was entitled to recover if the cattle crossed the metal guard because it was out of repair, or if they passed such guard and between it and the fence and were killed by the defendant's cars.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 884. In a suit against defendant railroad for negligently killing a horse passing over its cattle-guard, it is not error to instruct that plaintiff should recover for defendant's negligence in failing to provide a cattle-guard sufficient to turn stock, where such instruction is given in connection with a further charge telling the jury defendant is not liable if it provided a cattle-guard of the kind prescribed by the state railroad commission.—Chapin v. Ann Arbor R. Co., 167 Mich. 648.

¶ 885. In a suit for negligently killing a horse, it is not error for the court to instruct the jury as to the value of the horse where the defendant concedes the qualifications of the witness called to prove such value offers no testimony to the contrary, and such testimony is positive, undisputed, and unchallenged.—Chapin v. Ann Arbor R. Co., 167 Mich. 648.

¶ 886. An instruction properly submits the question whether a fence and cattle-guard at a diagonal crossing where a horse was killed are properly placed where it states that if the railroad company fenced its right-of-way up to the highway line and constructed a cattle-guard there that it is not liable, but that it is liable if the fence and guard do not extend to the line of the highway, if the killing of the horse is traced to the neglect to properly fence.—Goretski v. Au Sable & Northwestern R. Co., 172 Mich. 623.

§ 132. Verdict and findings.

Weight and sufficiency of evidence, see ante § 127.

General law as to verdicts and findings, see Verdicts.

¶ 887. In an action against the Continental Improvement Company for damages arising from its neglect to fence the road controlled by it, it was held that a finding that "the Grand Rapids & Indiana Railroad" is located on the land, and that "grading was commenced on such railroad in the month of June, 1868; that the said Grand Rapids & Indiana Railroad Company has never built or caused to be built any fences," etc., could not be misunderstood in view of the universal custom of calling railroads by the name of the company laying out or building them; also, that, where the sense was clear and the bill of exceptions furnished conclusive proof by which the finding could be amended, the defect would not be held a fatal omission upon the objection that it failed to declare specifically that the Grand Rapids & Indiana Railroad Company was a corporation owning and occupying the road in question or coming within the railroad laws.—Continental Improvement Co. v. Ives, 30 Mich. 448.

G. FIRES.

General liability for negligent fires, see Fires.

§ 133. Duty, care and liability of railroads in general.

See also ante § 40.

In respect to sparks and cinders, see post § 134.

Liability to double damages for spread of fire, see Damages § 203.
Provisions as to prevention and extinguishment of fires, see Comp. L. 1915, § 776.
Liability of company for damage by fires, see Comp. L. 1915, § 8305.

¶ 888. The care which a railway company must exercise in the running of trains so as not to injure property situated near its track is not contingent upon such circumstances as the force and direction of the wind, the dryness of the weather, or the combustible character of property likely to be affected. The company not being in fault as to the quality or character of their equipments, the special risks incident to proximity to railroad trains must be borne by those who establish themselves in such localities.—Michigan Cent. R. Co. v. Anderson, 20 Mich. 244.

¶ 889. A railroad company must keep its right-of-way reasonably clear of dangerous combustible matter, and, if a fire occurs in consequence of a negligent failure to do so, it is liable for damage ensuing therefrom to the property of another.—Jones v. Michigan Cent. R. Co., 59 Mich. 437.

¶ 890. Defendant removed a platform from the side of the mill, and deposited the planks and timbers of which it was constructed into a ravine on defendant's right of way, lying between the mill and the side track, and covered said material with sawdust and shavings. Plaintiff notified defendant's section foreman of the situation, and the foreman promised to cover the material with cinders. A short time before the fire plaintiff visited the mill, and found that the foreman's promise had not been kept, and that the sawdust and shavings were scattered about on the top of the ground so that there was danger from fire; and, although it was a dry time, he went away without leaving the mill in charge of any one except his family, who lived two blocks away, and without notifying the defendant, or taking any action to protect the property, and did not return again until after the fire. Held, that defendant's servants were responsible for the condition of the sawdust and shavings and that plaintiff, when he left, had a right, in view of the promise of the foreman to presume that the right-of-way would be put in a safe condition.—Briant v. Detroit, L. & N. R. Co., 104 Mich. 307.

¶ 891. Where sectionmen of defendant railway, in direct violation of the orders of defendant, set fires in the course of their employment in clearing up defendant's right-of-way, defendant is liable.—Leffonier v. Detroit & M. Ry. Co., 163 Mich. 635.

Liability of steam railroad company for interfering with extinguishment of fires, see note, 3 N. C. C. A. 490-503.

Proximate cause of damage by fire originally set by railroad locomotive, see note, 11 N, C. C. A. 150-164.
Liability of railroad company for loss by fire caused by delaying fire department by obstruction of crossing, see note, 15 N. C. C. A. 1049-1055.

§ 134. Fires from escaping sparks and cinders.

Provisions as to spark arresters on engines, see Comp. L. 1915, § 776.

¶ 892. Engines propelled by steam are notoriously dangerous, and the care and caution required by the owner to prevent injury to neighboring property by fire must be commensurate with and in proportion to the risks assumed.—Kendrick v. Towle, 60 Mich. 363.

¶ 893. A railroad company cannot be held liable for the spreading of fire, because of its failure to adopt other appliances, unless they are shown to have been well and properly known, and unless their efficiency has been demonstrated by actual use.—Hagan v. Chicago, D. & C. G. T. J. R. Co., 86 Mich. 615.

¶ 894. How. St. § 3378, defining the extent of liability of railroad companies for fires caused by such railroad, does not define the character of the engines to be used by railroad companies, although engines, etc., must be in good order and condition to relieve the company from liability for fires.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 895. Railroad trains must be run with regularity and with reference to the movements of other trains, and the running of a way freight train at the rate of forty miles an hour is not in itself negligence.—Hagan v. Chicago, D. & C. G. T. J. R. Co., 86 Mich. 615.

Proximate cause of damage by fire originally set by railroad locomotive, see note, 11 N. C. C. A. 150-164.

§ 135. Injury to person or loss of life.

¶ 896. Where, through a railroad company's negligence, sparks and cinders escaping from its engine set fire to a house, so that a child asleep therein is burned to death, such death is not too remote from the neglect causing said fire to relieve the company from liability.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 20, 78 Mich. 681.

¶ 897. Where, through a railroad company's negligence, sparks and cinders, alive with fire, escaped from its engine and set fire to a house, the company is liable, in the absence of contributory negligence, for life destroyed by such fire.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 20; Rajnowski v. Detroit, B. C. & A. R. Co, 78 Mich. 681.

§ 136. Contributory negligence.

Of licensees and trespassers, see ante § 52.
Of persons injured at crossings, see ante § 78.
Of owner of injured cattle, see ante § 123.
General law as to contributory negligence, see Negligence, IV.

¶ 898. The owner of a steam saw-mill near which another person builds a railroad and runs an engine is not guilty of contributory negligence, though, having knowledge of the dangerous character of the engine in the way of emitting sparks, he allows the combustible offal of the mill to accumulate upon his premises as he did before the railroad was built.—Kendrick v. Towle, 60 Mich. 363.

¶ 899. Contributory negligence of a plaintiff is a defense in an action to recover damages for fire caused by a locomotive emitting sparks where the liability of the defendant rests upon the common law, but it is not a defense where the liability of the company is made absolute by statute.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 900. Contributory negligence is not a defense, in an action for damages by fire caused by a locomotive emitting sparks, under How. St. § 3378, which creates an absolute liability for loss or damages, but limits such liability, by a proviso that the company shall not be liable where reasonable precautions are taken to prevent fire, and where the locomotive is in good order and properly managed.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 901. Where shippers who with knowledge that an engine threw sparks, instructed defendant's employees to bring such engine upon plaintiff's property during a high wind, knowing that inflammable material was close to the tracks, the negligence in switching under such conditions was the shipper's, as between him and the company.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

Contributory negligence as defense in action against railroad company to recover for damage to or destruction of property by fire, see note, 10 N. C. C. A. 946-962.

§ 137. Contract, acquiescence, or estoppel absolving from liability.

¶ 902. Under a contract between mill owners and a railroad company for the construction of side tracks by the latter, under which they assumed the duty and agreed to keep the adjacent grounds reasonably free and clear from inflammable and combustible material so as to prevent the starting of fire, they assumed the risk, where fire originating from defendant's engine, caught inflammable and dry material left close alongside the tracks, to the depth of nearly a foot.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 903. "Vicinity" construed where used in a contract for the construction of side tracks, which exempted the railroad company from loss to the mill owner's property in the vicinity of the tracks, by fire originating from its engines, where the combustible character of the materials put close to the track by the mill owner, and the danger in high and dry winds in case of fire, were known to both parties.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 904. Under a contract with a shipper for the building of side tracks by a railroad company, exempting such company from loss caused by fire from its engines, the company was exempt from liability for fire caused by sparks from engines while they entered upon other tracks in connection with and for the express purpose of using such side tracks.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 905. The owners of a warehouse owned a railroad track running on their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of but nevertheless continued to make use of it for a long time. At last the warehouse was set on fire and burned by sparks emitted by it. Held, that the owner had no redress against the railroad company for the burning.—Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169.

¶ 906. Property owners who have submitted to a railroad company's using, to draw cars from the premises, a locomotive that throws sparks, cannot complain if at last the property is set afire; and it is immaterial that the railroad company, on repeated applications made that it should repair the engine, had promised to do so "sometime"; the use continuing thereafter with plaintiffs' knowledge and on their application.—Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169.

¶ 907. Persons who have authorized the use of a locomotive on their premises, and have known of its use and acquiesced in it, have no right of action for damage done to their property by fire set by sparks from such locomotive.—Spear v. Marquette, H. & O. R. Co., 49 Mich. 246.

Contributory negligence as defense in action against railroad company to recover for damage to or destruction of property by fire, see note, 10 N. C. C. A. 946-962.
Validity of contract exempting railroad company from liability for damages caused by fire set by locomotive, see note, 11 N. C. C. A. 263-272.

§ 138. Actions and pleading.

For injuries at highway crossings, see ante § 85.

For injuries beside or near to tracks, see ante § 116.
Variance as to time of passage of engine causing fire, see also Pleading ¶ 814.
Venue of actions against railroads, see Venue.

¶ 908. A count in a declaration for defendant's causing the death of a child through neglect to keep its engine in proper repair whereby sparks set fire to a dwelling-house so that the child sleeping therein was burned to death was held to be sufficiently certain and explicit in its statement of defendant's duty and of the neglect which resulted in the death of plaintiff's intestate.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 20.

¶ 909. Where the origin of a fire claimed to have been caused by defendant's defective engine depends upon inferences to be drawn from facts proved, defendant may introduce testimony tending to prove that the fire was of incendiary origin.—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163.

¶ 910. Where in a suit to recover for the destruction of an elevator and its equipage by sparks from a locomotive, the bill of particulars specifies the loss of certain friction clutch pulleys and of the heating plant, it is not error to permit witnesses to describe particularly said pulleys and plant, defendant having made no demand for a more specific bill.—Close v. Ann Arbor R. Co., 109 Mich. 392.

¶ 911. In an action of trespass on the case under 2 Comp. L. 1897, § 6295, against a railway company for negligently setting a fire on "its right of way" which spread and destroyed plaintiff's property, the time of the negligent action asserted is so far material and descriptive of the negligence relied upon by the plaintiff that it should be strictly proved, although alleged under a videlicet.—Hewitt v. Pere Marquette R. Co., 171 Mich. 211.

¶ 912. In an action against a railroad company for damages for loss of farm buildings by fire communicated by a passing locomotive, a declaration that on a certain date defendant was the owner of, and was engaged in operating, a railroad in the state by means of steam locomotives, which said railroad ran so near to the property owned by plaintiff that it was possible for sparks from said locomotives to be blown and carried over to and upon the property, was sufficient to warrant the admission of evidence as to the great distance that the straw stack, from which fire was communicated to the buildings, was from the track, and evidence tending to support the inference of improper equipment and operation from the circumstance of the great distance it was assumed the spark causing the loss was thrown.—Budd v. Ann Arbor R. Co., 200 Mich. 250.

§ 139. Burden of proof and presumptions.

Weight and sufficiency of evidence, see post § 141.
General law as to burden of proof and presumptions, see Evidence, II.

¶ 913. In an action against a railroad company for injury from the negligent spreading of fire, if it is made to appear by plaintiff's testimony that the fire originated from either of the causes mentioned in How. St. § 3378, the burden is cast upon defendant to show itself free from negligence.—Jones v. Michigan Cent. R. Co., 59 Mich. 437.

¶ 914. In an action against a railroad company for negligence in "permitting a quantity of combustible material to accumulate upon its right of way, in causing a fire to be started therein, and in permitting such fire to escape from the right of way to the adjoining land of the plaintiff," it is incumbent upon plaintiff to prove the origin of the fire as alleged, and that defendant's negligence was the proximate cause of the injury. A general instruction, therefore, that defendant is liable no matter where the fire started or originated, if "the damage occurred because of the negligence of the railroad company," is erroneous.—Osborne v. Chicago & W. M. R. Co., 111 Mich. 15.

¶ 915. The burden of proof, under How. St. § 3378 as to liability for railroad fires, is cast upon the defendant to show that its locomotive was in good order and properly managed when a plaintiff shows the fact of fire caused by a railroad company's locomotive.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 916. Comp. L. 1897, § 6295, How. 2nd Ed., § 6649, making railroads liable for all loss or damage to property by fire originating from such railroad does not change the common-law rule as to liability for setting fires, but simply shifts the burden of proof upon the defendant to show that such fires were not negligently set.—Beach v. Michigan Cent. R. Co., 190 Mich. 592.

¶ 917. Comp. L. 1897, § 6295, How. 2nd Ed., § 6649, making railroads liable for all loss and damage to property by fire originating from such railroad does not relieve plaintiff of burden of establishing origin of fire.—Beach v. Michigan Cent. R. Co., 190 Mich. 592.

¶ 918. The provision of Comp. L. 1897, § 6295, How. 2nd Ed., § 6649, that a railroad company shall not be held liable for damage or loss of property by fire if such company prove to the satisfaction of the court and jury that such fire originated from fire by engines whose machinery, smokestacks or fire boxes were in good order and were properly managed, shifts the presumption of

non-negligence to that of negligence and puts upon the defendant the burden of proving that the fire originating from its engine was not negligently set.—Stoddard v. Grand Trunk Western Ry. Co., 191 Mich. 321.

¶ 919. In an action by the lessees of a lumber yard against a railroad company to recover damages for loss of lumber by fire due to sparks from a passing engine, under How. St. § 3481, providing that any railroad company operating any railroad shall be liable for all loss or damage to property by fire originating from such railroad, either from passing engines, provided that the company shall not be liable if it prove to the satisfaction of the court or jury that such fire originated from fire by engines whose machinery, smokestack or fire-boxes were in good order and properly managed, the burden lies upon the company to show that it exercised due care with respect to prevention of the fire, which had originated in its operation of the road, even though the lumber destroyed is on the right of way of defendant, where it has been placed by agreement between the owner and railroad company.—Ann Arbor R. Co. v. Fox, 92 Fed. 494.

Application of doctrine of res ipsa loquitur in action to recover for damage done by fire from railroad locomotive, see note, 5 N. C. C. A. 46-48.

§ 140. Admissibility of evidence.

In actions for injuries to licensees and trespassers, see ante § 58.
In actions for injuries at crossings, see ante § 87.
In actions for injuries to or by cattle, see ante § 126.
Weight and sufficiency of evidence, see post § 141.
General law as to evidence, see Evidence.
Evidence of other fires caused by other engines at other times and places, see also Evidence § 96.

¶ 920. Where the question whether a fire was communicated to plaintiff's factory by defendant's engine was sought to be established from inferences drawn from the facts and circumstances introduced in evidence tending to prove it, defendant, for the purpose of placing all of such facts and circumstances before the jury, may show that a stationary boiler, with a smoke-stack having no spark-arresters, was located within a short distance of the factory, and was in use at the time of the fire; and, to show that live sparks were emitted from this smoke-stack, a witness may testify that some time after the fire a spark from this smoke-stack fell upon and burned the witness' clothing.—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163.

¶ 921. In an action for loss to timber by fire negligently set, plaintiff's testimony that he saw defendant's foreman setting fires, and that while the foreman was starting a third fire plaintiff told him he did not wish him to set fires, that it was dry, and that he had wood and logs there, is at least competent as showing negligence in not preventing the spread of the fires.—Gordon v. Grand Rapids & I. R. Co., 103 Mich. 379.

¶ 922. In a suit to recover for property destroyed by fire from a locomotive, defendant may introduce a memorandum book to show by entries made therein, shortly after the fire, in the course of business, that said locomotive was in good condition.—J. H. Worden Lumber & Shingle Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 168 Mich. 74.

¶ 923. In a suit to recover for the loss of an elevator by fire from a locomotive, defendant offered testimony to prove that its locomotive was in good repair and properly operated. Held, it was not error to allow plaintiffs in rebuttal, after defendant had closed its case, to introduce certain testimony with respect to another fire set by a locomotive of the defendant, and as to the distance an engine properly equipped and operated would throw sparks.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 924. In a suit against a railroad for damages from a fire set by a locomotive, a plat was admitted in evidence showing the situation of the building burned and the defendant's tracks. On said plat was a red line marked "60 ft." Said figure represented, the estimated distance from the top of the locomotive stack, twelve feet above the ground, to the point in the roof of the building, thirty-four feet above the ground, where the fire was discovered. The meaning of said red line was fully explained by the witness. The court struck out the line and admitted the map, but did not have said line erased. Held, the admission of said map did not constitute prejudicial error on the ground urged by defendant, that the jury might infer therefrom that the figures related to the distance between the two points upon the ground.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 925. Evidence of experienced engineers that a locomotive in good order and properly managed, as the defendant claimed its engine was, will not emit sparks sufficient to start a fire eighty-one feet from the track, as the evidence tended to show was done, is admissible in rebuttal in an action for setting out a fire.—Pennsylvania Fire Ins. Co. v. Ann Arbor R. Co., 184 Mich. 375, 11 N. C. C. A. 193.

¶ 926. In an action to recover damages for the destruction of plaintiff's building and lumber by fire from defendant's engine, where plaintiff offered to prove by expert witnesses that such an engine as the one claimed by defendant to have been the only one in the

vicinity of the fire at the time would not, if in good order and properly handled, have thrown out sparks of fire of sufficient size and vitality to set fire to a dry building and lumber at a distance from the tracks at which the fire in question started, and that if it did do so it would indicate it was out of order or not properly handled, held that such evidence was properly excluded.—Tonn v. Michigan Cent. R. Co., 195 Mich. 645.

¶ 927. In an action by the owner of property near a railroad against such railroad for damages for loss of his property by fire, evidence that the engine alleged to have caused the fire set fire to a meadow six or seven miles away on the same trip is competent as tending to show defective condition or construction and improper management.—Stoddard v. Grand Trunk Western Ry. Co., 191 Mich. 321.

¶ 928. In an action by the owner of a warehouse against a railroad company for loss of a warehouse by fire alleged to be due to the improper equipment and negligent operation of an engine which was being used on a sidetrack in close proximity to the warehouse to rerail a car which had been derailed, expert opinion evidence is admissible as to what effect the slipping of the drivers would have on the fire of the engine, and whether the engine was properly handled, having in mind the surroundings.—William R. Roach Co. v. Blair, 190 Mich. 11.

¶ 929. Evidence, in an action against a railroad company for damages for loss of property by fire caused by emitted sparks from a passing engine, that at a later time workmen engaged in constructing a new barn farther from the track than the old one saw live sparks fall on the barn from passing engines was admissible for the purpose of showing that it was physically possible for sparks to be carried that distance through the air.—Budd v. Ann Arbor R. Co., 200 Mich. 250.

¶ 930. The fact that locomotive engineers, who are witnesses for the plaintiff in an action against a railroad company for loss of property due to escaping sparks from a locomotive engine, have not operated engines for many years, does not render inadmissible their testimony that an engine properly equipped could not throw sparks capable of setting a fire at a certain distance.—Budd v. Ann Arbor R. Co., 200 Mich. 250.

§ 141. Weight and sufficiency of evidence.

Directing verdict, see post § 145.

¶ 931. Testimony for defendant, in an action against a railroad company for damages caused by fire set by its locomotive, to the effect that such locomotive was properly equipped and managed, if not contradicted, is conclusive, under Comp. L. 1897, § 6295, and is not to be measured against an alleged presumption of improper equipment or of improper management arising upon the fact that the locomotive set the fire.—Clark v. Grand Trunk W. Ry. Co., 149 Mich. 400.

¶ 932. Evidence that a fire originated near a railroad track shortly after the passage of an engine when the weather was dry and the wind blowing from the railroad towards the point where the fire was discovered, held sufficient to warrant a finding that the fire was caused by such engine.—Tonn v. Michigan Cent. R. Co., 195 Mich. 645.

¶ 933. In an action against a railroad under Comp. L. 1897, § 6295, How. 2nd Ed., § 6649, for damages for the loss of a barn by fire alleged to have originated from a spark from one of defendant's passing engines, evidence held insufficient to sustain a verdict for plaintiff.—Malloy v. Grand Trunk Ry. Co. of Canada, 192 Mich. 344. (Moore, Bird and Ostrander, JJ., dissenting.)

¶ 934. In an action to recover for loss of property by fire due to sparks from a passing locomotive engine of defendant railroad company, where the evidence that the engine was out of order was based solely upon the fact that the fire was set at the distance named and that of experts that a properly equipped and managed engine would not emit sparks capable of setting fire at such distance, evidence held sufficient to show that the fire was due to defendant's passing engine.—Budd v. Ann Arbor R. Co., 200 Mich. 250.

¶ 935. Contributory negligence preventing recovery for the loss of lumber destroyed by fire claimed to have originated from a locomotive engine, is not shown by proof that the lumber was piled eight feet from the track of the railroad company.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 936. Evidence sufficient to take to the jury the question whether a fire was set by sparks from a locomotive, under § 6295, Comp. L. 1897, § 6649, How St., 2nd Ed., casts on the defendant the burden of showing that the firebox and smokestack of the engine were in good order and properly managed.—Pennsylvania Fire Ins. Co. v. Ann Arbor R. Co., 184 Mich. 375, 11 N. C. C. A. 193.

Sufficiency of evidence that fire causing damage to or destruction of property was caused by railroad locomotive, see note, 10 N. C. C. A. 782-811.

Sufficiency of evidence of negligence of railroad company, authorizing recovery for destruction of property by fire communicated thereto from locomotive, see note, 10 N. C. C. A. 861-883.

Sufficiency of evidence as to fire caused by defective or insufficient spark arrester on railroad locomotive, see note, 11 N. C. C. A. 59-76.

Sufficiency of defendant's evidence to overcome presumption of negligence in ac-

tion against railroad company for damages caused by fire, see note, 11 N. C. C. A. 198-211.

§ 142. Questions of law and fact.

In actions for injuries to licensees and trespassers, see ante § 62.
In actions for injuries at highway crossings, see ante § 95.
In actions for injuries to or by animals, see ante § 128.
General law as to questions of law and fact, see Trial, VI.

¶ 937. A railroad's negligent failure to remove or destroy dangerous combustible matter in its right of way is a question for the jury.—Jones v. Michigan Cent. R. Co., 59 Mich. 437.

¶ 938. In an action against a railroad company to recover the value of buildings destroyed by fire alleged to have been caused by sparks from an engine, evidence that the apparatus of the engine was in good order and properly managed, and that the engineer and fireman were competent and skilful, was not expressly contradicted; but there was no testimony tending to show that the fire could have happened in any other way, and it was shown that this fire and another one in a field a short distance away did occur immediately after the passage of the locomotive; held, that there was no error in leaving the case to the jury.—Hagan v. Chicago, D. & C. G. T. J. R. Co., 86 Mich. 615.

¶ 939. In an action to recover for loss by fire originating from defendant railroad company's engines, where the defendant was exempted from liability for loss by fire so originating, pursuant to a contract between plaintiff and defendant for the construction of sidetracks, it was error for the court after reading to the jury such exemption clause, to say that it was for them to say whether the loss came within the contract; as the jury should have been instructed that the contract relieved the defendant from its negligent acts.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 940. In an action to recover for loss by fire originating from railroad engines, where under a contract between plaintiff and the company for the construction of sidetracks, the company was released from liability for loss by fire of any property "situated or hereafter placed in the vicinity of such side track, whether such loss result from negligence or other causes," it was error to leave to the jury the question whether the destroyed property was in the vicinity of such track, where the property was actually situated near the tracks, and the contract clearly recognized that the entire premises in question were adjacent to and in the vicinity of the tracks.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 941. Where a railway switching crew received orders to go to a certain junction, and upon arriving there assisted others in saving property from a fire which was burning on and around the track, and in doing this work acted upon suggestions made by an owner of part of the burning property, it cannot be said as a matter of law that the crew was turned over to him and subjected to his orders.—Valentine v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 155 Mich. 151.

¶ 942. In an action by the owner of a warehouse against a railroad company for damages for loss of a warehouse by fire alleged to be due to the insufficient equipment and improper management of an engine while being used to rerail a car on a side track in close proximity to the warehouse, where there was evidence that in attempting to rerail the car, the whole power of the engine was used, and that it threw out of its stack large volumes of smoke and fire, and that on several occasions when the drivers slipped the volume of smoke and fire increased, and that the wind was blowing from the engine toward the building, and there was improperly excluded expert evidence that the engine was improperly managed, held that it was a question for the jury whether the defendant was negligent.—William R. Roach Co. v. Blair, 190 Mich. 11.

§ 143. ——As to safety and sufficiency of appliances and equipment.

¶ 943. Where in an action against a railroad company for the negligent burning of plaintiff's buildings from fire of the locomotive, the defendant has established by reputable and uncontroverted evidence that its appliances were such as good railroading requires, that they were in the condition required by law, and properly managed, Comp. L. 1898, § 6295, providing that the company shall not be liable for fires in such cases does not require the question of negligence to be submitted to the jury, the question then being one of law for the court.—Dolph v. Lake Shore & M. S. Ry. Co., 149 Mich. 278.

¶ 944. The question of proper equipment and management of a locomotive engine is one of fact for the jury, upon conflicting evidence in an action for destruction of property by fire.—Quay v. Duluth, S. S. & A. Ry. Co., 153 Mich. 567.

¶ 945. In an action against a railway company for setting fire to a building by permitting sparks to escape from a locomotive, opinions of experienced engineers tending to show that the locomotive was not in good order nor properly managed, within section 6295, Comp. Laws 1897, raised a question of fact for the jury.—Potter v. Grand Trunk Western Ry. Co., 157 Mich. 216.

¶ 946. In an action for the destruction of an icehouse by fire from defendant's locomotive, the question as to whether the locomo-

tive was in good order was properly submitted to the jury.—Union Ice Co. v. Detroit & Mackinac Ry. Co., 178 Mich. 346.

¶ 947. Where, in an action by the owner of property near a railroad for damages for the destruction of the property by fire alleged to be due to the negligence of defendant in operation of an engine, upon the whole case, there is room for inference based upon evidence, that the equipment of the engine was defective, or that the management thereof was improper, the case is for the jury.—Stoddard v. Grand Trunk Western Ry. Co., 191 Mich. 321.

¶ 948. In an action against a railroad company under Comp. L. 1897, § 6294, How. 2nd Ed., § 6649, for the loss of a barn situated 250 feet from the railroad right of way alleged to be due to a fire originating from a cinder from a passing engine of defendant, where there was evidence that if the spark arrester and other appliances were in good repair and properly managed they would not emit sparks containing sufficient vitality to cause fire at a distance of more than from 50 to 80 feet, held that it was a question for the jury as to whether the engine and appliances were in proper condition.—Malloy v. Grand Trunk Ry. Co. of Canada, 192 Mich. 344. (Moore, Bird and Ostrander, JJ., dissenting.)

¶ 949. In an action by a fire insurance company against a railroad company to compel defendant to reimburse plaintiff for the amount paid on policies on the theory that the fire was caused by defendant's negligence in failing to keep its engine and appliances in proper repair, held that it was a question for the jury whether defendant was negligent.—Michigan Mut. Home Ins. Co. v. Pere Marquette Ry. Co., 193 Mich. 429.

¶ 950. Whether a locomotive was equipped with safety devices as required by § 6295, Comp. L. 1897, § 6649, How. St., 2nd Ed., is a question for the jury, where the evidence on the subject is conflicting in an action for a fire set by sparks from such engine.—Pennsylvania Fire Ins. Co. v. Ann Arbor R. Co., 184 Mich. 375, 11 N. C. C. A. 193.

§ 144. ——As to proximate cause.

In actions for injuries at highway crossings, see ante § 96.

¶ 951. In an action against a railroad for the destruction of timber by fire, the evidence showed that the fire was originally communicated from an independent source both to plaintiff's timber and to cars standing on an adjacent track; that the plaintiff and his assistants had separated the burning timber from that not burning, and were continuing to widen the gap; that the wind was not blowing towards the timber not burning, but away from it; that after such separation the defendant negligently switched the burning cars near the timber which plaintiff had attempted to save, and fire was communicated from them to it; held, that the question whether the defendant's act in switching the cars was the proximate cause of the destruction of the timber which plaintiff had thus attempted to save, or whether such timber would have burned anyway was one for the jury.—Valentine v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 155 Mich. 151.

¶ 952. In an action against a railroad company under § 6295, Comp. L. 1897, How. 2nd Ed., § 6649, for the loss of a barn near the railroad right of way by fire alleged to have originated from a spark from one of defendant's passing engines, where there was evidence that the fire started at or near the peak of the roof of that portion of the barn situated nearest the railroad track a few minutes after the passing of a train, that the country in the vicinity of the barn was frequented by parties for the purposes of fishing and hunting and that the doors of the barn which was destroyed had at times been found open, and it also appeared that none of the witnesses who saw the fire saw any person emerge from the barn at or after the time of its discovery, held that it was a question for the jury whether there was evidence which would reasonably lead an inquiring and unbiased mind to the conclusion that a cinder from a particular engine caused the fire.—Malloy v. Grand Trunk Ry. Co. of Canada, 192 Mich. 344. (Moore, Bird and Ostrander, JJ., dissenting.)

¶ 953. In an action by an insurance company against a railroad company to compel defendant to reimburse plaintiff for the amount paid on fire insurance policies on the theory that the fire was caused by the defendant's negligence in failing to keep its engines and appliances in repair, evidence held to present a question to the jury as to whether the fire originated on defendant's right of way from a passing freight train and communicated to the insured's property and destroyed his buildings.—Michigan Mut. Home Ins. Co. v. Pere Marquette Ry. Co., 193 Mich. 429.

¶ 954. Evidence held sufficient to take to the jury the question whether a fire was set out by sparks from the defendant's locomotive.—Pennsylvania Fire Ins. Co. v. Ann Arbor R. Co., 184 Mich. 375, 11 N. C. C. A. 193.

¶ 955. There was evidence sufficient to submit to the jury the issue whether a fire on the premises of plaintiff was caused by the defendant's locomotive, where it appeared that on the morning of the fire an alarm was turned in at about 1:48 o'clock, and that a fire was discovered by those who responded to the alarm in the corner of plaintiff's shed, which lay parallel with defendant's tracks, and about 35 feet from it, that about 15 or 20 minutes before the alarm

of fire was given, a passenger train went along such track, that the wind was blowing strongly in the opposite direction to that in which the train was going, the engine was puffing very hard and seemed to be going fast, that the shed was built of wood, old and very dry, and the shingles were warped, and where no evidence was introduced tending to prove that the fire was set in any other way than as claimed by plaintiff; since there was proximity of time and place.—Clark v. Grand Trunk W. Ry. Co., 149 Mich. 400.

§ 145. ——Directing verdict.

General law as to directing verdict, see Directing Verdict.

¶ 956. In an action by the owner of a mill, which was situated 82 feet from a railroad track, against the railroad company for damages for loss of the building alleged to be due to the falling of sparks in an open window from a passing locomotive, evidence as to the fire being caused by such locomotive held too conjectural to authorize the submission of the question of the origin of the fire to the jury.—Beach v. Michigan Cent. R. Co., 190 Mich. 592.

¶ 957. In an action of trespass on the case under Comp. L. 1897, § 6295, against a railway company for negligently setting a fire on "its right of way" which spread and destroyed plaintiff's property, plaintiff's theory was that the fire was set by defendant's locomotive, but there was no evidence to support this theory unless the fact that fire originating upon the right of way of the railway company, coupled with the fact that fires had sometimes been set by locomotive engines, is evidence that it was set by an engine of the company. Held, that the jury should have been told that the testimony was insufficient.—Hewitt v. Pere Marquette R. Co., 171 Mich. 211.

¶ 958. Plaintiff sued defendant railway for negligently setting fires which spread and burned plaintiff's buildings. Plaintiff's evidence tended to show that the fire occurred July 27th. His only witness that defendant's section men started the fire, stated that they started it August 1st or August 2d. This witness testified, however, that when she saw the section men starting the fire, it was before plaintiff's buildings were burnt. Held, the court properly refused to direct a verdict on the ground that plaintiff's evidence showed the section men did not start the fire causing the damage in question.—Leffonier v. Detroit & M. Ry. Co., 163 Mich. 635.

¶ 959. Where the evidence admitted and that improperly excluded in an action to recover damages for destruction of plaintiff's building and property by fire from defendant's engine was sufficient to entitle plaintiff to go to the jury and have them say whether such fire was set by sparks from such engine, held that it was erroneous to direct a verdict for defendant.—Tonn v. Michigan Cent. R. Co., 195 Mich. 645.

§ 146. Instructions and requests to charge.

See also ante ¶ 914.

In actions for injuries to trespassers and licensees, see ante § 66.

In actions for injuries at highway crossings, see ante § 110.

In actions for injuries to or by animals at large, see ante § 131.

Directing verdict, see ante § 145.

General law as to instructions, see Instructions.

Instruction on measure of damages from fire, see Damages ¶ 1479.

¶ 960. An instruction exonerating a railroad company from liability for a fire destroying lumber, and claimed to have been started by sparks emitted from a locomotive, stating that if the defendant used an engine of such pattern as was commonly used by prudent railroad operators "for this kind of business," would be erroneous if understood to mean that a less degree of care was required in the service involved than in the ordinary business of the company.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 961. An instruction exonerating a railroad company from liability if appliances used to prevent the escape of sparks and fire from the locomotive are such as have been in common use for a long time for that purpose, and have substantially guarded against the danger sought to be avoided, and stating that the defendant railroad company performed its duty if it used engines of such a pattern as were in common use by prudent railroad operators, is correct.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

¶ 962. A railroad company is liable for property destroyed by fire where the hose is necessarily laid across the track for the purpose of extinguishing such fire, and the company's train men, with warning of the presence of the hose, unnecessarily run upon it and cut it, and where except for the delay caused thereby the fire could have been extinguished; but the company's servants, however, cannot be charged with negligence in not looking for and discovering the hose, and an instruction which bases liability of such company upon constructive notice of the presence of the hose is erroneous.—Clark v. Grand Trunk W. Ry. Co., 149 Mich. 400.

¶ 963. In a suit to recover for property destroyed by fire from a locomotive, an instruction is erroneous which requires plaintiff to prove by a preponderance of evidence, clear and well defined, that the engine in question set the fire and which requires the jury to find such fact before entering upon a consideration of the evidence as to the condition and management of the locomotive.—J. H. Worden Lumber & Shingle Co. v. Min-

neapolis, St. P. & S. S. M. Ry. Co., 168 Mich. 74.

¶ 964. An assignment by defendant that the court erred in assuming in his charge to the jury that the moving of a burning car was against the protest of plaintiff is of no merit where defendant's own witness has testified that said car was moved against plaintiff's protest.—Valentine v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 155 Mich. 151.

¶ 965. In action against a railroad company for fire spread from the burning of grass on the right of way a request to charge that if the fire was properly set and guarded there could be no recovery was properly refused, where it omitted the element of setting at an improper time, or at most covered it under the words "carefully set" in a way susceptible of misconstruction.—Cole v. Lake Shore & M. S. R. Co., 105 Mich. 549.

¶ 966. In action against a railroad company for fire spread from burning grass on its right of way a request to charge, which failed to recognize a right to recover for setting fire at an improper time, was properly refused, and a request which made the setting of the fire under circumstances customary with prudent railroad men the test was properly modified by omitting the word "railroad."—Cole v. Lake Shore & M. S. R. Co., 105 Mich. 549.

¶ 967. A wooden planing mill and the machinery used therein, owned by plaintiff, and standing within about thirty-four feet of defendant's side track, were destroyed by fire communicated, as claimed by plaintiff, from one of defendant's engines by reason of the negligence of its employees. The mill was built by plaintiff's grantors, had a sheet iron roof, and had been idle for about eighteen months at the time of the fire. Plaintiff sued to recover the value of the mill and machinery. Held, that a request of the defendant for an instruction that, in so constructing or maintaining said mill, plaintiff was guilty of negligence per se, and could not recover, was properly refused.—Briant v. Detroit, L. & N. R. Co., 104 Mich. 307.

¶ 968. In an action for the destruction of an ice house by fire alleged to have been set by defendant's locomotive, a request to charge upon the question of plaintiff's contributory negligence in leaving inflammable material in close proximity to the ice house was properly refused.—Union Ice Co. v. Detroit & Mackinac Ry. Co., 178 Mich. 346.

IX. RAILROAD CORPORATIONS.

§ 147. In general.

Railroad franchises, see ante § 1.
Property of railroad corporations, see ante III.
Right of one railroad to acquire stock and franchises of another, see ante ¶ 221.
Consolidation and reorganization of companies, see ante VII.
Enlargement of powers of the corporation as operating a dissolution, see ante ¶ 244.
General law of corporations, including all matters not of peculiar application to railroad corporations, see Corporations.
Presumptions and proof of corporate existence, see Corporations § 15.
Issuance of preferred stock on reorganization, see Corporations § 270.
Subscriptions to stock on conditions for construction or operation at given place or time, see also Corporations § 54.
Apportionment of subscriptions with respect to separate divisions and sections of road, see also Corporations, VII.
Interpretation and effect of subscriptions to stock and conditional subscriptions, see also Corporations, VII.
Rate regulating statute as amendment of charter, see also Corporations § 25, ¶ 107.
Compensation under terms of charter for amending or repealing same, see Corporations § 29.
Restriction of powers to general railroad purposes, see also Corporations § 70, ¶ 256.
Relative authority of directors and chief engineer as to location of stations and making of contracts, see also Corporations ¶ 422.
Indebtedness of and liens upon railroad corporations, see ante VI.
Reckoning invalid aid bonds as part of necessary subscriptions to warrant organization, see also Corporations ¶ 21.
Contracts and dealings by officers with the corporation or its property, or with others adverse to its interests, see Corporations, XVII, G.
Jury question as to authority of chief engineer, see also Corporations ¶ 477.
Notice to agent of predecessor, effect on successor whom he also serves, see Agency § 74.
Scope of agency of operating employees and officers, see Agency, II.
Course and scope of servant's employment, see also Master and Servant §§ 34, 75.
Legal status of railroad employees continuing under receiver, see Receivers, II, C.
Service of process on railroad corporations, see Process § 31.
Provisions as to sale of shares in the company, see Comp. L. 1915, § 8359.
Provisions as to incorporation and management of railroad companies, see Comp. L. 1915, § 8232 et seq.

¶ 969. Although railroad companies receive tolls as compensation for carrying persons and property, they are to be deemed public rather than private corporations, the legislative purpose in creating them being to benefit the public.—Swan v. Williams, 2 Mich. 427.

¶ 970. Laws 1871, Vol. 1, p. 328, "to revise the laws providing for the incorporation of railroad companies," superseded the general railroad law of February 12, 1855 (Comp. L. 1871, §§ 2297-2365), and the acts amendatory thereto.—Continental Improvement Co. v. Phelps, 47 Mich. 299.

¶ 971. The act of February 13, 1855, was not repealed by the amendment of the general railroad law by (Sess. L. 1872, p. 83), or by the general revision of that law in 1873 (Pub. L. 1873, p. 496); those acts refer to companies organized under the general railroad law.—Attorney General v. Joy, 55 Mich. 94.

¶ 972. Where a railroad company enters into a contract with the owner of the controlling stock of another railroad company for the purchase of his stock, for the purpose of acquiring the road-bed, right of way and franchises of the other company, and executes its note in payment therefor, it cannot, after the full execution of the contract by the stockholder, and its utilization of the property purchased, deny, in a suit upon the note, its power to enter into the contract and execute the note.—Dewey v. Toledo, A. A. & N. M. R. Co., 91 Mich. 351.

¶ 973. By the act of February 13, 1855, Laws 1855, p. 305, No. 140, authorizing the Detroit & Pontiac Railroad to change its name to Detroit & Milwaukee Railway Company, and to purchase all the rights, property and franchises of the Oakland & Ottawa Railroad Company for the purpose of building and operating a continuous line of railroad between Pontiac and Lake Michigan no new corporation was formed, but the Detroit & Pontiac Railroad Company was continued under a new name.—Detroit, G. H. & M. R. Co. v. Powers, 138 Fed. 284.

¶ 974. The name "Grand Trunk Railway System," used as descriptive of a number of railroads doing business together under a verbal agreement, is merely a trade name, the so-called "system" not being a corporation.—Detroit, G. H. & M. Ry. Co. v. Owosso Sugar Co., 192 Mich. 533.

RAISING QUESTION BELOW.

Cross-References.

Raising Question Below—
See Saving Questions; Indictment, XIV.

RAPE.

TREATS of the crime of forcible sexual intercourse by ravishment of a woman or of intercourse with a girl below the statutory age, and of assaults and attempts toward such crimes. It excludes such of the general law of crimes and prosecutions as is common to all or several crimes and not peculiar to rape.

Analysis.

§ 1. The crime in general and its elements.
§ 2. Consent by fear or fraud.
§ 3. Statutory rape or carnal knowledge of girl below age.
§ 4. Aiding and abetting.
§ 5. Assaults and attempts to rape.
§ 6. Defenses.
§ 7. Indictments and information.
§ 8. ——Issues and variance.
§ 9. ——Lesser and included crimes.
§ 10. Burden of proof and presumptions.
§ 11. Admissibility of evidence.
§ 12. Weight and sufficiency of evidence.
§ 13. Trial, jury questions, and instructions.
§ 14. Sentence and punishment.

Criminal seduction, see Seduction, II.
Other sexual crimes, see Crimes, II.
Civil liability for assault with intent to ravish, see Assault, II.
Civil liability to husband for assault and rape of wife, see Husband and Wife ¶ 526.
Civil liability to husband for criminal conversation, see Husband and Wife, V, B.

§ 1. The crime in general and its elements.

Immateriality of force or consent in statutory rape, see post § 3.
Criminal assault leading to ultimate consent, see post ¶ 19.
Consent induced by fear or fraud, see post § 2.
Statutory rape or carnal knowledge of girl below age, see post § 3.

Aiding and abetting, see post § 4.
Assaults and attempts, see post § 5.
Defenses, see post § 6.
Indictment and prosecution, see post § 7 et seq.
Sufficiency of evidence to prove the crime, see post § 12.
General law of crimes, see Crimes, I.
Statute defining the crime, see Comp. L. 1915, § 15211.

¶ 1. To convict of rape the jury must believe beyond a reasonable doubt that the offense was accomplished by force, and against the will of the prosecutrix, and that there was the utmost reluctance and resistance on her part, or that her will was overcome by fear of the defendant.—Strang v. People, 24 Mich. 1.

¶ 2. Carnal knowledge of the person of a female over ten years of age, unaccompanied with any circumstance of force or fraud does not constitute the crime of rape, either at common law or by statute.—Crosswell v. People, 13 Mich. 427.

¶ 3. Where a man had carnal connection with a woman over ten years of age, who was a willing participant in the act, it was held not to be a rape, notwithstanding the testimony showed that she had not at the time an intelligent understanding.—Crosswell. v. People, 13 Mich. 427.

¶ 4. Force is an essential element of the crime of rape, and the force contemplated is something more than that which is always essential to sexual intercourse when consented to. It is not limited, however, to the positive exertion of physical force in compelling submission to sexual connection, but includes any force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, and sufficient to create a real apprehension of dangerous consequences, or great bodily harm, or in any manner to overpower the mind of the victim so that she dare not resist.—Don Moran v. People, 25 Mich. 356.

§ 2. Consent by fear or fraud.

Court and jury questions, see post § 13.
Instructions to jury, see post § 13.

¶ 5. Where a female placed by her father under a physician's care is induced by such physician to submit to sexual intercourse with him from the fear, falsely and fraudulently inspired by him for the purpose of overcoming her opposition, that if she did not yield he would use instruments for the purpose of enlarging her parts, and that such operation would probably kill her, he is guilty of rape.—Don Moran v. People, 25 Mich. 356.

§ 3. Statutory rape or carnal knowledge of girl below age.

Criminal assaults and attempts, see post § 5.
Improper use of "ravish" in indictment, see post ¶ 25.
Sufficiency of evidence of the crime, see post § 12.
Jury questions and instructions, see post § 13.
Statutory definition of the offense, see Comp. L. 1915, § 15211.
Carnal knowledge of epileptic female in public institution, see Comp. L. 1915, § 15506 et seq.

¶ 6. The carnal knowledge and abuse of a female child under the age of ten years is rape, both at common law and by statute.—People v. McDonald, 9 Mich. 150; Crosswell v. People, 13 Mich. 427.

¶ 7. Consent is immaterial in the crime of statutory rape on a girl below the age of consent.—People v. Schoonmaker, 117 Mich. 190.

¶ 8. The crime of carnally knowing and abusing a child under the age of fourteen years may be established without proof of force, against the child's will as a necessary element.—People v. Courier, 79 Mich. 366.

¶ 9. In order to convict of assault with intent to rape a girl below fourteen it is not necessary to find an intent to ravish regardless of resistance.—People v. Goulette, 82 Mich. 36.

¶ 10. The crime of rape upon a girl under 16 years being complete under Comp. L. 1897, § 11489, whether the intercourse is had with force or by consent, the question of the making of any outcry or resistance is immaterial.—People v. Smith, 122 Mich. 284.

¶ 11. Sexual intercourse is sufficient as proof to establish the crime of carnally knowing and abusing a child under the age of fourteen years, and if an assault is made with that design the assaulter is guilty of an assault with intent to commit such crime. —People v. Courier, 79 Mich. 366.

¶ 12. The word "child," in How. St. § 9094, punishing one who carnally knows any female child under the age of fourteen years, includes a female under that age though she has reached the state of puberty. —People v. Miller, 96 Mich. 119.

¶ 13. Where a girl fifteen years old has for six or seven years led a virtuous life, though possibly unchaste previously, she is within How. St. § 9314a, punishing one who has carnal knowledge of a girl not over sixteen "theretofore chaste."—People v. Mills, 94 Mich. 630.

¶ 14. Perfect penetration is not necessary in order to constitute the crime of rape, or of carnal knowledge and abuse of a child under the age of fourteen years.—People v. Courier, 79 Mich. 366.

¶ 15. In a prosecution for having carnal intercourse with a female under the age of 16 years, penetration must be shown, though any penetration, however slight, is sufficient. —People v. Scouten, 130 Mich. 620.

§ 4. Aiding and abetting.

General law as to aiding and abetting and principals and accessories, see Crimes §§ 10, 11.

All parties as principals, see also Crimes ¶ 52.

¶ 16. One who aids and assists another in committing a rape is himself guilty of the offense.—Strang v. People, 24 Mich. 1; People v. Flynn, 96 Mich. 276.

¶ 17. A husband desiring to obtain evidence to sustain suit for a divorce from his wife employed a man to have intercourse with her by consent and be detected therein. The man went to her room and raped her, the husband standing by in a concealed place and refusing to answer her calls for help. Three days after the husband filed a bill for divorce on the ground of adultery on this occasion. Held, that the husband was guilty of rape as a principal.—People v. Chapman, 62 Mich. 280.

§ 5. Assaults and attempts to rape.

Assault on girl below age, character of intent, see also ante ¶ 9.

Sufficiency of intent, see ante ¶ 11.

Assault included in charge of rape, see post § 9.

Conviction under indictment for rape, see post § 9.

Conviction of assault with intent to commit rape on proof of actual intercourse not amounting to rape, see also post ¶ 36.

Sufficiency of evidence of assaults, see post § 12.

Necessity of proving intent to commit technical rape in action for assault with intent to ravish, see also Assault § 22, ¶ 84.

¶ 18. If a male person, intending to have sexual intercourse with a child of an age under fourteen years, has taken steps looking toward such intercourse and laid hands upon the child for that purpose, although he may not have meant to use any force or to complete the act on finding it to cause her pain, and may have desisted on so finding, he would be guilty of an assault with intent to commit the crime.—People v. Courier, 79 Mich. 366.

¶ 19. The offense of assault to commit rape is committed, although it results in sexual intercourse by consent or on failure to make the resistance required by the law. —People v. Marrs, 125 Mich. 376.

¶ 20. Assault with intent to commit the crime of rape, is properly defined where the court charged: "It will be necessary for you to find that the defendant made an assault upon this young girl, and actually intended to use whatever force was necessary to accomplish his purpose, and if you find that he did that and actually intended that, it would be your duty, and you would be authorized in finding him guilty of an assault with intent to commit the crime of rape, if you find that he ought not to be convicted of the graver charge."—People v. Murphy, 145 Mich. 524.

¶ 21. Although the testimony does not show that the respondent intended to use force to accomplish his purpose, yet where it shows that he intended to have sexual intercourse with a girl under sixteen years of age, even though with her consent, he is guilty under the statute (Comp. L. 1897, § 11490) of an assault with intent to commit rape.—People v. Chamblin, 149 Mich. 653.

¶ 22. In case of a charge of assault with intent to commit rape upon a female child under the age of ten years, the consent of the child does not waive the assault.—People v. McDonald, 9 Mich. 150.

¶ 23. A battery is not necessarily, though usually, involved in an assault with intent to commit rape.—People v. Sanford, 149 Mich. 266.

§ 6. Defenses.

Intoxication as mitigation, see also Crimes § 16.

¶ 24. The acts of a female under the age of consent form no legal justification for an assault upon her with intent to violate her person.—People v. Goulette, 82 Mich. 36.

§ 7. Indictments and information.

Indictments and informations in general, see Indictment, I.

Amendable matters of accusation, see Indictment § 69 et seq.

Averments of rape in indictment for murder in attempt to ravish, see Homicide § 34.

Joinder of counts for rape and indecent liberties with child, see Indictment § 45.

¶ 25. The unwarranted use, in an information under How. St. § 9314a, charging carnal knowledge of a girl of fifteen, of the word "ravish," cannot, where the words "with her consent" follow, lead to the inference that the offense of rape was intended to be charged.—People v. Mills, 94 Mich. 630.

¶ 26. An information for carnally knowing a female child under the age of fourteen properly charges an assault, the female being incapable of consent, so that the act is by force and arms.—People v. Ten Elshof, 92 Mich. 167.

§ 8. ——Issues and variance.

See also post ¶ 37.

General law of variance from indictments, see Indictment, I, E.

¶ 27. Where a respondent, tried for having carnally known a female child under the age of fourteen years, denied her testimony that the offense was committed on a certain day in a barn on a certain farm, but testified that it was committed about a month later in a house on the same farm, his conviction was affirmed.—People v. Ten Elshof, 92 Mich. 167.

¶ 28. As an assault with intent to commit rape is necessarily included in every rape, a conviction of such assault is not erroneous though the evidence shows a completed act of sexual intercourse.—People v. Miller, 96 Mich. 119.

¶ 29. When testimony has been introduced by the state fixing the particular act of intercourse for which a conviction for rape is sought, evidence of later acts of intercourse is not admissible.—People v. Nichols, 159 Mich. 355.

¶ 30. Testimony that the respondent had intercourse with the complaining witness subsequent to the time stated in the information is not admissible on a trial for statutory rape.—People v. Ayers, 182 Mich. 241.

§ 9. ——Lesser and included crimes.

See also ante ¶ 28.

Instructions as to convicting for included offenses, see post § 13.

¶ 31. Under an information for rape there may be a conviction of assault with intent to ravish.—Campbell v. People, 34 Mich. 351; Hall v. People, 47 Mich. 636.

¶ 32. On an information charging carnal knowledge and abuse of a child under the age of fourteen years, respondent may be found guilty of an assault with intent to commit that offense.—People v. Courier, 79 Mich. 366.

¶ 33. Under an information charging carnal knowledge and abuse of a child under the age of fourteen years, respondent may be convicted of a simple assault.—People v. Courier, 79 Mich. 366.

¶ 34. An indictment charging assault with intent to carnally know and abuse a female child under the age of ten years charges an assault with intent to commit rape; and under it the defendant may be found guilty of a simple assault.—People v. McDonald, 9 Mich. 150.

¶ 35. Under Comp. L. 1897, § 11489, a respondent can be convicted of the lesser crime of assault with intent to commit rape, under an information charging rape.—People v. Dowell, 136 Mich. 306.

¶ 36. Conviction of assault with intent to commit rape may be had of defendant upon an information charging rape, where the jury find that he ought not to be convicted of the graver charge, even though actual intercourse with the prosecutrix is proven.—People v. Murphy, 145 Mich. 524.

¶ 37. The question whether a female child above fifteen years of age may consent to the taking of indecent liberties with her person is not involved in a prosecution for an assault with intent to commit rape on a female under the age of sixteen years.—People v. Harrington, 186 Mich. 482.

¶ 38. A person may be convicted of a simple assault under a charge of assault with intent to commit rape on a female under the age of sixteen years.—People v. Harrington, 186 Mich. 482.

¶ 39. Conviction of an assault and battery may be had of defendant upon an information charging rape, if it be found that the defendant touched the person of the prosecutrix rudely or in an insolent manner against her will, even though he ought not to be convicted of the graver charge.—People v. Murphy, 145 Mich. 524.

§ 10. Burden of proof and presumptions.

Sufficiency of evidence to sustain the burden, see post § 12.

General law as to presumptions and burden, see Indictment, VIII, A.

¶ 40. In a prosecution for rape, it was not error to refuse to charge that the people had the burden of proving that respondent, an old man, was competent to have sexual intercourse.—People v. Row, 135 Mich. 505.

¶ 41. There is no conclusive presumption as of law that a girl nearly fourteen years old would understand the nature and consequences of an assault committed upon her with intent to ravish; and on the question of resistance and the extent of the effort to resist, the jury may consider her age, strength, and physical and mental capacity, as these facts appear in evidence. Charge set forth and held not prejudicial to defendant.—People v. Lynch, 29 Mich. 274.

§ 11. Admissibility of evidence.

Other later acts as variant from indictment, see ante ¶¶ 29, 30.

Admissibility of other acts and relations as evidence, see Indictment, VIII, B.

Weight and sufficiency of evidence, see post § 12.

Scope and range of cross-examination of accused, the woman, and other witnesses, see Examination of Witnesses, II.

Leading questions to woman as witness, see Examination of Witnesses § 16.

General rules of relevancy in criminal cases, see Indictment § 146 et seq.

General rules of competency in criminal cases, see Indictment § 151 et seq.

General rule as to admissibility of other acts

between the parties to sexual crimes, see Indictment §§ 168-170.
Admissibility of evidence of rape on other girls, see also Indictment § 169.
Admissibility of evidence of acts of intercourse by woman or girl with other men, see also Indictment § 170.
Evidence of other abuse of daughter and family by accused, see also Indictment ¶ 758.
Evidence that child begotten and born has been taken from mother, see also Indictment ¶ 720.
Blood stains on clothing as evidence, see also Indictment ¶ 881.
Admissibility of declarations and complaints by victim, see Indictment §§ 233, 245.
Admissibility of belated complaints, reasons for delay, and details of complaint or narrative, see Indictment §§ 234, 235.
Competency of complaining witness to testify to her own age, see Indictment § 199.
Admissibility of evidence of conversations between parties to explain nonresistance, see also Indictment ¶ 1068.
Admissibility of evidence as to character of prosecutrix to discredit her testimony, see Witnesses, VI, B.
Complaints as part of res gestæ, see also Indictment § 245.
Expert opinion as to physical capacity and probability of act, see Indictment § 206.
Voluntariness of confessions, see Indictment § 257 et seq.
Teacher's testimony of child's age as hearsay, see Indictment ¶ 991.
Evidence admissible in trespass for assault with intent to ravish, see Assault § 25.
Materiality of testimony in rape case to sustain prosecution for perjury, see Crimes § 116.

¶ 42. Evidence of circumstances immediately preceding and following the act, and which tend to characterize it, is admissible and the prosecution should put it in.—Strang v. People, 24 Mich. 1.

¶ 43. The alleged victim of rape may be asked whether she believed respondent and his companion intended to kill her; whether the intercourse caused her pain; and why she did not struggle against respondent.—People v. Flynn, 96 Mich. 276.

¶ 44. Where a prosecution for rape turns almost wholly on the testimony of the victim, a wide latitude should be allowed on cross-examination as to facts bearing legitimately on the question whether the act was against her will; and where proof of resistance was not very strong it was error to exclude cross-examination as to whether the prosecutrix voluntarily made statements of the occurrence, and whether she prosecuted of her own motion or at the instigation of others.—Rogers v. People, 34 Mich. 345.

¶ 45. The defendant has a right to show that his previous relations with the complaining party were of a friendly character, even though the testimony has no tendency to show that they were improper or that her general character or reputation was bad.—Hall v. People, 47 Mich. 636.

¶ 46. The complaining witness may show that the accused is her father and a man of great strength, and had been abusive to his family and often beaten his wife, and at the time of the outrage he was in liquor and she in great fear.—Maillet v. People, 42 Mich. 262.

¶ 47. In a prosecution for rape where it appeared that the night before that of the successful attack defendant made an attempt upon prosecutrix which was unsuccessful because of her resistance, held that it was competent to prove her mental and physical condition on the night of the successful attack as affecting the question of the resistance she offered or could offer and for such purpose to prove the state of her general health, that she was never disturbed by physical ailments, and that she was exhausted by loss of sleep and by the resistance offered on the previous night.—People v. Ayres, 195 Mich. 274.

¶ 48. In a prosecution for rape evidence that the night before that of the successful attack accused made an attack upon prosecutrix which was unsuccessful due to her resistance held admissible to negative desire or willingness on her part to engage in immoral relations with accused.—People v. Ayres, 195 Mich. 274.

¶ 49. Evidence of criminal intercourse between the prosecutrix and a person other than the defendant is admissible for purposes of impeachment, but evidence of facts tending to render the fact of such intercourse more probable is not admissible.—Strang v. People, 24 Mich. 1.

¶ 50. The complaining witness in a prosecution for statutory rape may be allowed to testify as to previous acts of familiarity with defendant.—People v. Coston, 187 Mich. 588.

¶ 51. In trial for rape upon girl under fourteen, evidence that parties were found together in bed after girl reached that age was inadmissible because not tending to show previous unlawful intimacy.—People v. Etter, 81 Mich. 570.

¶ 52. In a prosecution for rape upon a girl less than fourteen years old, the victim may be permitted to testify that respondent had intercourse with her prior to the offense charged; this to show the relations of the parties, and respondent's opportunity of meeting her.—People v. Abbott, 97 Mich. 484.

¶ 53. In a prosecution for statutory rape evidence of subsequent acts of intercourse between prosecutrix and defendant are not admissible upon the theory that it tended to

show the relations of the parties and corroborating the testimony regarding the offense charged.—People v. Brown, 142 Mich. 622.

¶ 54. Evidence given to explain delay in making complaint that the prosecutrix, being a young girl and living in defendant's family, was afraid to go away for fear that he would bring her back and treat her worse than ever, and that he threatened to kill her if she exposed him, is not open to the objection that it tends only to show the fear of a future possible or threatened danger, and not one presently impending.—Turner v. People, 33 Mich. 363.

¶ 55. Where, on the trial of a father for an alleged rape upon his daughter, she is the sole witness for the prosecution, and is contradicted by the father, and does not deny having stated to third parties that the charge sworn to was untrue, they having testified to such statements by her, evidence of her having repeatedly made similar accusations against her brothers and other persons, and afterwards, admitted their falsity, is admissible, as tending to show a morbid condition of mind or body, and as explaining the charge made against the father.—People v. Evans, 72 Mich. 367.

¶ 56. In a prosecution for rape it is competent to show complaint made after several days, but as soon as the prosecutrix, employed as a domestic ten miles from home, saw her parents.—People v. Marrs, 125 Mich. 376.

¶ 57. In a prosecution for rape evidence of the mental and physical condition of the prosecutrix is competent as bearing upon the extent of resistance.—People v. Marrs, 125 Mich. 376.

¶ 58. In a prosecution for statutory rape on a girl below the age of consent specific acts of lewdness with boys some months before are not admissible, since chastity is not in issue because she could not consent.—People v. Glover, 71 Mich. 303.

¶ 59. In a prosecution for having carnal intercourse with a female under the age of 16 years, penetration may be shown by testimony of the complaining witness that defendant had sexual intercourse with her and by testimony of a physician who made an examination of the parts.—People v. Scouten, 130 Mich. 620.

¶ 60. The bad reputation of the complaining witness for chastity prior to the date of an alleged assault with intent to rape is relevant to the issue of consent.—People v. Ryno, 148 Mich. 137.

¶ 61. In a prosecution for carnally knowing a female under sixteen years of age, it is competent for the prosecution to show intimate and friendly relations of the parties after the commission of the alleged offense and while the girl was with child.—People v. Elco, 131 Mich. 519.

¶ 62. Evidence of the relationship of the prosecutrix to the defendant is competent.—Strang v. People, 24 Mich. 1.

¶ 63. In a prosecution for statutory rape a condition of the girl's genitals such as would result from frequent sexual intercourse with an adult male may be shown.—People v. Scouten, 130 Mich. 620.

¶ 64. In a prosecution for carnally knowing a female under the age of sixteen years, the jury may consider the appearance of the female and also statements testified to by several witnesses as having been made by respondent that she was under age, where the question of age is in issue.—People v. Elco, 131 Mich. 519.

¶ 65. It was not error to allow the prosecutrix in rape to testify that she supported herself by keeping boarders and working out, after she had testified that her husband had left her several months before the alleged crime; since such testimony tended to show the status of the witness.—People v. Murphy, 145 Mich. 524.

§ 12. Weight and sufficiency of evidence.

See also ante ¶ 1.
To prove rape on girl below age, see also ante ¶ 15.
Evidence of assault, see also ante ¶ 21.
Variance from charge, see ante § 8.
Conviction of assault on proof of rape, see also ante ¶ 28.
Force of presumptions and inferences, see also ante ¶ 41.
Statutory measure of proof of "carnal knowledge," see Comp. L. 1915, § 15211.

¶ 66. Tardiness in making complaint may be considered as lessening the weight to be given the story of the woman alleged to have been raped.—People v. Marrs, 125 Mich. 376.

¶ 67. On a prosecution for rape the case was properly sent to the jury on evidence that the girl, eighteen years old and physically and mentally weak, was assaulted and after becoming exhausted submitted to intercourse with accused, who took her for a buggy ride, on the second time he ever met her, that he had promised to take her to her home but drove elsewhere instead, that she was unaccustomed to company of men, the testimony of accused being that he took liberties with her the first time he met her and that she then refused but voluntarily had intercourse on the time in question.—People v. Marrs, 125 Mich. 376.

¶ 68. A conviction for rape upon a child under sixteen was sustained, although the testimony of the child was contradicted by

the defendant and the evidence was claimed to balance; where the defendant's conduct immediately upon the arrest of his brother upon a similar charge was indicative of a fear of prosecution, and tended to corroborate the charge, and where the circumstances of the case made it peculiarly one for the jury.—People v. Randall, 133 Mich. 516.

¶ 69. A conviction for statutory rape may be based upon the victim's uncorroborated testimony, though denied by respondent.—People v. Miller, 96 Mich. 119.

¶ 70. Where the act of intercourse is admitted, and the vital question is whether it was by force or against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act, and considering the place, time, occasion and surrounding circumstances disclosed by this case, it was important that the jury should scrutinize the facts bearing on this point very closely.—Brown v. People, 36 Mich. 203.

¶ 71. The evidence held to sustain a conviction for an assault on a female under sixteen years of age with intent to commit rape.—People v. Harrington, 136 Mich. 482.

¶ 72. On a second trial for rape where the prosecutrix testifies that her evidence on the former trial as to the guilt of the accused was false, and there is no other evidence as to his guilt, a verdict should have been directed in his favor.—People v. Ayers, 136 Mich. 366.

¶ 73. Evidence of slight penetration is sufficient when believed by the jury to sustain conviction of rape on a girl of fourteen.—People v. Rivera, 147 Mich. 643.

¶ 74. Evidence that accused accosted a girl, proposed to "go home" with her, offered her money, threw her down when she refused, tried to pull up her skirts, held his hands over her mouth to prevent her outcry, and ran away when help came in response to an outcry she made, suffices to sustain a conviction of assault with intent to rape.—People v. Toutant, 133 Mich. 520.

¶ 75. Upon a trial for carnally knowing a girl less than sixteen years old, testimony by the victim and her mother that she is under sixteen is sufficient to authorise the submission of the question to the jury, in the absence of any evidence to the contrary, although the mother's examination shows she is mentally weak and cannot remember dates.—People v. Bernor, 115 Mich. 692.

¶ 76. The testimony of the prosecutrix upon a trial for carnally knowing a female child under the age of consent, and of her mother, that she is under sixteen years of age, is sufficient to authorise the submission of that question to the jury, in the absence of any evidence to the contrary, although the mother's examination shows that she is mentally weak, and does not remember dates well.—People v. Bernor, 115 Mich. 692.

¶ 77. The fact that the complaining witness, upon a prosecution for carnally knowing a female under sixteen years of age, at first testified that there was no penetration does not amount to a failure of proof, where it is evident that she did not comprehend the question, and her subsequent testimony showed penetration and on preliminary hearing respondent had admitted having had intercourse with her.—People v. Bernor, 115 Mich. 692.

§ 13. Trial, jury questions and instructions.

Charge defining assault with intent to rape, see also ante ¶ 20.

Charge as to burden of proof, see also ante ¶ 40.

Sufficiency of evidence to go to jury, see ante § 12.

General criminal trial practice, see Indictment, IX.

Offer or proof on given date as election against counts for other dates, see Indictment § 48.

Instruction on proving defense that prosecution was a conspiracy and false, see also Indictment ¶ 1922.

Sufficiency of charge to cover lesser included crimes, see Indictment, I, E.

Character of the crime, incest or rape, as jury question, see Indictment ¶ 1849.

Charging on lesser crimes included in charge or in proofs, see also Indictment §§ 423, 424.

Construction of verdict with respect to several counts, see also Indictment ¶ 2288.

Harmless error, see Indictment, XV.

Effect of admission of improper persons within railing during trial, see Indictment ¶ 1530.

¶ 78. The question whether the accused put the prosecutrix in such fear as to preclude her from resisting may be submitted to the jury.—Turner v. People, 33 Mich. 363.

¶ 79. In a trial for rape it was error to charge that the defendant was guilty if he procured the woman's consent by false and fraudulent representations that as a part of his medical treatment of her it was necessary for him to have carnal connection with her, as this wholly ignores all idea of force as a necessary element of the crime.—Don Moran v. People, 25 Mich. 356.

¶ 80. Instructions in a prosecution for rape concerning the elements of the crime, the questions of force and resistance, and the effect of the woman's previous dissolute life, held, without discussion by this court, to contain nothing of which respondent could complain.—People v. Crego, 70 Mich. 319.

¶ 81. Where evidence on the part of the people in a rape case was that the prosecu-

trix never yielded, and on the part of the accused that she made no resistance, but assented from the beginning, there was no basis for a charge on the hypothesis of her having first made resistance but afterwards yielded.—Brown v. People, 36 Mich. 203.

¶ 82. A charge to the jury in a trial for rape, that if they should find respondent used force, and complainant resisted so far as she was able to under the circumstances, they should find him guilty even though they found she at last yielded, is erroneous and misleading; the term "circumstances," as here used, may have been understood as including weakness of the will, and the term "yielded" as meaning an assent to the consummation or completion of the act; and if there was a yielding in that sense, there was no case to support a verdict of guilty. —Brown v. People, 36 Mich. 203.

¶ 83. In a rape case an instruction that the time at which the victim made complaint of the outrage is a relevant circumstance "as tending to prove the truth of the charge, for the reason that it is natural for the woman ravished to make complaint as soon as possible," is not open to the objection that it makes the time of complaint a circumstance to corroborate the accusation but not to weigh against it.—Maillet v. People, 42 Mich. 262.

¶ 84. Under an information charging rape respondent may be convicted either of assault with intent to commit that crime or of assault and battery and the court should instruct the jury what constitutes such offenses. —People v. Abbott, 97 Mich. 484.

¶ 85. Where the testimony showed either that the complete offense was committed, or no offense at all, and where respondent's counsel adopted this view of the case, as evidenced by his requests to charge, error cannot be assigned upon the failure of the court to instruct the jury that respondent might be convicted of assault, or assault with intent to commit the crime of rape.— People v. Harris, 103 Mich. 473.

¶ 86. Where, upon a trial for rape, only two witnesses were sworn, the alleged victim, whose testimony, if true, established all the elements of the crime charged, and respondent, whose testimony was that he was not even guilty of taking improper liberties, and where the court instructed the jury fully as to the offense charged, it was held that it was not error to fail to instruct the jury, no such instruction having been asked, that respondent might be convicted of assault with intent to commit the crime of rape or of assault and battery.—People v. Ezzo, 104 Mich. 341.

¶ 87. The evidence of a girl of ten years and her little brother was that defendant enticed the girl away; asked her to lie down with him; threatened to shoot her if she did not; asked her little brother who was present to feel a gun in his pocket; threatened to kill him if he screamed, and pushed him to one side, whereupon the girl ran away. Held, in a prosecution for assault with intent to commit statutory rape, the question was properly left to the jury.— People v. Carlson, 160 Mich. 426.

¶ 88. In a prosecution for assault with intent to commit rape upon a child under sixteen, a charge which permitted the jury to be misled into considering that if respondent approached the girl with an assault in view, that would constitute an assault, was erroneous.—People v. Dowell, 136 Mich. 306.

¶ 89. In a prosecution for assault with intent to commit rape upon a girl under sixteen, intent is of the gist of the offense, and in such cases it is the duty of the court to carefully instruct the jury as to the distinction between improper liberties with intent to have sexual intercourse, and improper liberties without such intent.—People v. Dowell, 136 Mich. 306.

¶ 90. Where the only testimony given on the trial of a respondent for an assault with intent to commit the crime of rape is that of the assaulted party, which is positive as to the making of the assault, it is not error for the court to charge the jury that, if they believe said testimony, respondent is guilty of assault and battery, and that "the only question" for them to consider is whether or not he intended to commit the greater offense, the other portions of the charge being clear and an assault having been admitted.—People v. Ricketts, 108 Mich. 584.

¶ 91. It is error not to charge in a prosecution for assault with intent to rape as to the lesser offenses included in the charge and that accused might be convicted of either of them if the highest offense charged was not proved.—People v. Ryno, 148 Mich. 137.

¶ 92. In a prosecution for carnally knowing a female child under sixteen years of age where witnesses had testified that respondent had said she was "under age," it is for the jury to determine what he meant by "under age."—People v. Elco, 131 Mich. 519.

¶ 93. In a prosecution for an assault with intent to commit rape, a charge in which the judge explains the crime and that of rape, and directs a verdict of guilty if the jury find beyond a reasonable doubt that the respondent on the occasion in question took hold of the complainant and used force to overcome her,—that she resisted, and that his intent was to overcome her resistance and gratify his passions notwithstanding, and that it was against her will, is held proper.—Mahoney v. People, 43 Mich. 39.

¶ 94. "By force and against the will," in rape, is properly defined where the court

charged: "It is not important whether that act was committed, or if it was committed, by power; that is, by strength or in some other manner. It may have been committed because of fear. It will be necessary for you to find that it was committed by force, as far as the young man is concerned, and against the will of the girl—you must find that she was overcome and overpowered, and that resistance must have continued from the inception to the close, because if she yielded at any time it would not be rape."—People v. Murphy, 145 Mich. 524.

§ 14. Sentence and punishment.

General law of punishments, see Crimes, I, E.
General law of sentences for crime, see Indictment, XI.
Punishment for the crime of rape, see Comp. L. 1915, § 15211.
Punishment for assault to rape, see Comp. L. 1915, § 15212.

RATES to REAL PARTY IN INTEREST.

Cross-References.

Rates for Service—
See Public Service; and see Carriers; Electricity; Gas; Telegraphs and Telephones; Waters, VI.
Rates of Interest—
See Interest; Usury.
Ratification—
Of acts of agents, see Agency, II, C; Corporations § 140 et seq.
In the sense of waiver or affirmance of duress or fraud, see Duress § 5; Fraud.
General law of waiver, see Election and Waiver.
Of invalid subscription to corporate stock, see Corporations § 47.
Of contracts or acts done under contracts, see Contracts § 238.
Of acts done by trustees and fiduciaries other than agents, see Estates of Decedents, X; Trusts; Guardianship.
Rational Intervals—
See Insane Persons, I.
Responsibility for crime, see Crimes § 13.
Capacity to make will, see Wills, II.
Real Actions—
See Ejectment; Trespass; and see also Quieting Title; Specific Performance.
Rules for venue, see Venue, I.
Real Evidence—
See Evidence, IX; Indictment §§ 277-281.
Real Party in Interest—
Proper plaintiff, see Parties § 2.
Suits by assignees, see Assignments § 30.
Complainants in equity, see Equity § 62, and see also topics treating of specific suits in equity.

REAL PROPERTY.

TREATS of such portions of the general law of real property as are not covered by specific topics elsewhere in this digest. For the topics thus excluded to separate treatment see the cross-references throughout this topic.

Analysis.

§ 1. In general; definitions.
§ 2. Kinds and classes of estates.
§ 3. ——Present and future or contingent.
§ 4. Restraints on use; negative easements.
§ 5. Covenants and rights running with the land.
§ 6. Rents and profits, charges, and incumbrances.
§ 7. Injuries to land.
§ 8. Merger of estates.
§ 9. Transfer, devolution and conveyance.
§ 10. Seizin, title, and possession.

§ 1. In general; definitions.

Ownership of undiscovered minerals in place as real property, see also Mines § 1.
Franchises as interests in land, see Franchises § 1.
Titles and rights of entrymen, settlers, and patentees of public Lands, see Public Lands, III.
Capacity to take, hold, convey, or transmit title to land, see topics treating of corporations or of natural persons in a given status or disability, e. g., Corporations; Associations; Fraternal Associations; Religious Societies; Municipal Corporations; Counties; Townships; Aliens; Bastards; Infants; Insane Persons; Husband and Wife (married women); Indians.
Rights of fishing and hunting incident to ownership, see Fish and Game § 2.
Possession as presumptive ownership, see Evidence § 55.

Annexed chattel as fixture or movable, see Fixtures.
Appurtenant or gross easements, see Easements § 4.
General law of private easements, see Easements.
Growing trees as part of the realty to which unassigned dower attaches, see Dower ¶ 11.
Standing timber as land for purposes of taxation, see Taxes § 75.
Felled timber as passing with land, see Deeds § 63.
Crops as part of land conveyed, see Deeds § 64.
Appurtenances as passing by deed of the land, see Deeds §§ 47, 48.
Right to have damages for appropriation of property to public use as personal property not passing with the land, see Eminent Domain § 148.
Equitable conversion of land into personalty and the reverse, see Equity § 12.
Dedication of land to public uses, see Dedication.
Quality and quantum of estate taken on division of property in divorce, see Divorce § 144.
Size and arrangement of lots permissible in platted addition to city, see Dedication § 22.
Real or personal nature for purposes of descent, see Descent §§ 7, 8.
Doctrine of equitable conversion of real into personal or personal into real, see Equity, II.
Proof of identity of lands, see Evidence § 105; Ejectment; Trespass; Quieting Title.
Qualifications of experts as to values of land, see Evidence § 287.
Buildings erected upon land held under contract of purchase, see also Justices of the Peace ¶ 724.
Justices' jurisdiction of actions affecting or involving real property, see Justices of the Peace § 20.
Situs as jurisdictional factor, see Courts § 45; Venue, I.
Rules for descriptive allegations in pleading, see Pleading § 11.
Statutory distinctions of freeholds, chattels real, and chattel interests, see Comp. L. 1915, §§ 11523, 11524.

¶ 1. A contract right of possession of land for a term of years is not leviable as realty.—Grover v. Fox, 36 Mich. 453.

¶ 2. As a general rule the principles of the common law treat nothing movable as realty unless either permanently or organically connected with the land.—Higgins v. Kusterer, 41 Mich. 318.

¶ 3. Unsevered crops, growing or ripe, pass with the land unless reserved in writing.—Vanderkarr v. Thompson, 19 Mich. 82; Tripp v. Hasceig, 20 Mich. 254; Scriven v. Moote, 36 Mich. 64; Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192; Coman v. Thompson, 47 Mich. 22; Knapp v. Woolverton, 47 Mich. 292.

¶ 4. Standing timber is part of the realty.—Stout v. Keyes, 2 D. 184; Wetherbee v. Green, 22 Mich. 311; Greeley v. Stilson, 27 Mich. 153; Johnson v. Moore, 28 Mich. 3; Russell v. Myers, 32 Mich. 522; Haskell v. Ayres, 35 Mich. 89; Wetmore v. Neuberger, 44 Mich. 362; Sovereign v. Ortmann, 47 Mich. 181; Spalding v. Archibald, 52 Mich. 365; Williams v. Flood, 63 Mich. 487.

¶ 5. Timber standing and growing on land is an interest in the land itself and is assessable as realty.—Fletcher v. Township of Alcona, 72 Mich. 18.

¶ 6. Standing timber is an interest in real estate.—Williams v. Hyde, 98 Mich. 152.

¶ 7. Standing timber is an interest in lands that may be acquired by deed, and the fact that it must be removed within a definite period does not prevent the vesting of title to it in the grantee.—Mee v. Benedict, 98 Mich. 260.

¶ 8. A sale of ice already formed, whether upon or removed from the water, is a sale personalty.—Higgins v. Kusterer, 41 Mich. 318.

¶ 9. It seems that royalties payable for ore to be mined from the earth are real property rather than rents and profits; and that the money to be realized therefrom and held in trust may be treated in the same way as if it were the purchase price of the land.—Palms v. Palms, 68 Mich. 355, per Morse and Campbell, JJ.

¶ 10. "Real estate" includes the right of a street railway company to maintain and operate a line on a public street.—Detroit Citizens' St. Ry. Co. v. City of Detroit, 124 Mich. 449.

¶ 11. Rents and profits are an interest in real estate, before they are collected and converted into money. When collected, the money is personal property.—Case v. Ranney, 174 Mich. 673.

¶ 12. A tenement signifies everything that may be holden, provided it be of a permanent nature, and applicable to land, and accordingly a lease of the upper floors of a building is within the term.—Minnis v. Newbro-Gallogly Co., 174 Mich. 635.

¶ 13. The right to enter and reap a crop when it cannot be exercised within one year is an interest in land.—Carney v. Mosher, 97 Mich. 554.

¶ 14. Growing crops are a part of the realty.—Rough v. Womer, 76 Mich. 375.

¶ 15. The right to exclusive and unrestricted use of land carries with it title

to the land itself.—Cram v. Ward, 137 Mich. 423.

¶ 16. The ownership of realty carries with it as an incident thereto the prima facie presumption of ownership of both the natural products of the land and the emblements of annual grown crops.—Heilwig v. Nybeck, 179 Mich. 292.

§ 2. Kinds and classes of estates.

Merger of lesser in greater estate, see post § 8.

See Life Estates, Remainders, and Reversions; Tenants in Common; Easements; Dower; Curtesy; Homesteads; Landlord and Tenants; Trusts; Powers.

Duration of estates in land held by corporations, see Corporations § 82.

Statutory kinds and divisions, see Comp. L. 1915, §§ 11519, 11523, 11525.

Statutory divisions and kinds with respect to number of owners, see Comp. L. 1915, § 11561.

Abolition of estates tail, see Comp. L. 1915, § 11521.

¶ 17. The law has classified and defined all the various interests and estates in lands that it permits individuals to hold or create; and parties creating a particular species of estate cannot sever from it its essential legal incidents, as this would introduce a new estate unknown to the law, producing confusion and uncertainty.—Mandlebaum v. McDonell, 29 Mich. 78.

¶ 18. Under How. St., §§ 5519, 5520, abolishing fees tail and treating them as fees simple absolute if no remainder be limited thereon, and treating a remainder limited thereon as a contingent limitation upon a fee, a devise upon a trust for minority, which has terminated, with a limitation over on default of heirs of the body creates a fee in the taker defeasible on his death without bodily heirs.—Eldred v. Shaw, 112 Mich. 237.

¶ 19. A devise to S with a subsequent clause that the lands are bequeathed "not only to S but to the heirs of his body" creates an estate tail general which by Comp. L. 1897, § 8785 is converted into an estate in fee.—Rhodes v. Bouldry, 138 Mich. 144.

¶ 20. The rule in Shelley's Case is abolished in this state by statute, Comp. L. 1897, § 8810 (R. S. 1846, p. 252, § 28).—Wilson v. Terry, 130 Mich. 73; Fraser v. Chene, 2 Mich. 83.

§ 3. ——Present and future or contingent.

Alienability of future contingent estate, see post § 9.

Requisites of expectant estates, see also Deeds ¶ 98.

Nonsalable expectancy as improper factor in estimating alimony, see Divorce ¶ 595.

Statutory division into estates in possession and estates in expectancy, see Comp. L. 1915, §§ 11525-11531.

Permissible future estates, see Comp. L. 1915, § 11582 et seq.

Statutory rule making "heirs" in limitation over to heirs of life tenant a word of purchase and not of limitation, see Comp. L. 1915, § 11546. [Note. This statute is said to have abolished the rule in Shelley's Case, whereby such use of the word "heirs" in a deed was in law a word of limitation. It really superseded that rule by enacting the contrary one.]

¶ 21. The policy of our statutes favors vested estates rather than those which are contingent.—Rood v. Hovey, 50 Mich. 395. And see Union Mut. Aid Ass'n of Battle Creek v. Montgomery, 70 Mich. 587.

¶ 22. An estate in possession means merely an estate in present enjoyment, whether occupied in person, by tenants, or unoccupied.—Eberts v. Fisher, 44 Mich. 551.

¶ 23. An estate subject to a long lease is nevertheless a present estate in possession, though there be neither direct occupation nor receipt of profits.—Toms v. Williams, 41 Mich. 552.

¶ 24. An estate granted upon condition cannot vest and lapse from time to time according as the condition may be observed or disregarded by the grantee.—Conrad v. Long, 33 Mich. 78.

¶ 25. An estate in expectancy in heirs is not created by the administrator's right to possession to pay debts.—Campau v. Campau, 19 Mich. 116.

§ 4. Restraints on use; negative easements.

Covenants and rights running with the land, see post § 5.

Restraints on alienation, see Perpetuities.

Building restrictions, see Buildings, §§ 15-27.

Validity of conditions in restraint of use or alienation, see also Deeds § 82.

Restrictions in deed as to use, see Deeds § 86.

Waiver of restrictions on use, see also Deeds § 90.

Regulations of summer resort associations controlling their property, see Associations § 8.

Statutory rule as to nominal conditions which may be disregarded, see Comp. L. 1915, § 11564.

¶ 26. A condition in a conveyance by which the land is to revert to the grantor should it ever be used for the purpose of carrying on the sale of intoxicating liquors cannot be enforced if the grantor permits such use to be continued and valuable improvements to be thereafter erected thereon without objection.—Barrie v. Smith, 47 Mich. 130.

¶ 27. Building restrictions limiting real estate to use for residential purposes are in

the nature of reciprocal negative easements, and may be created upon a division and conveyance in severalty, to different grantees, of an entire tract.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

¶ 28. Building restrictions limiting land to use for residential purposes constitute a substantial property right, which the owners can maintain and enforce.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

§ 5. Covenants and rights running with the land.

Crops, trees, and other incidents of the land, see ante § 1.
Restrictions on use, see ante § 4.
Covenants for title running with land, see Covenants for Title, II.
Agreement for pass as right running with granted railroad right of way, see Railroads, III.

¶ 29. A covenant runs with the land when its purpose is to give future protection to the title which the deed containing the covenant undertakes to convey, but not when it simply gives protection against something which immediately affects the title and causes present damage.—Post v. Campau, 42 Mich. 90.

§ 6. Rents and profits, charges, and incumbrances.

Merger of lien or incumbrance in the fee, see post § 8.
Nature of rent in general, see Landlord and Tenant § 122.
Right of dowress to rents and profits, see Dower § 57 et seq.
Adjustment of rights in ejectment, see Ejectment, VI.
Adjustment of rights in partition or in other equitable suits, see Partition §§ 26-28; Quieting Title § 31; Specific Performance, IV.
Mining royalties as realty, see ante ¶ 9.
Rents and profits as real or personal estate, see ante § 1.
Rents and profits or value of use as element in damages, see Damages.
Testamentary charges on lands, see Wills, VI, G.
Liens and mortgages, see Liens; Mechanics' Liens; Mortgages; Taxes, IX; Local Improvements § 95 et seq.
Liens in general, see Liens.
Mortgages, see Mortgages.
Lien or charge on land by reason of condition or covenant, see Deeds ¶¶ 248, 295, 318.
Statutory rule for government of disposals in futuro of rents and profits, see Comp. L. 1915, § 11554.

§ 7. Injuries to land.

See Trespass; Nuisances; Waste; and see also Negligence with the cross-references under each of said topics.
Measure of damages for torts to real property, see Damages, III, B.
Crime of malicious injury to property, see Crimes § 105.
Criminal trespasses, see Crimes § 130.
Arson, burglary and other crimes against property or habitation, see Crimes, II.

§ 8. Merger of estates.

Merger of life estate in fee, see also Life Estates § 4.
Effect of merger of tax titles in original owner's title, see also Mandamus ¶ 82.
Merger of mortgage in fee, see Mortgages, VII, D.
Effect on party wall rights of union of both titles in one owner, see Party Walls ¶ 9.
Merger of dower in the fee, see Dower § 25.
Extinction of easement by merger in fee, see Easements § 31.
Conveyance to trustee as preventing merger of easement, see also Easements ¶ 181.
Merger of leasehold in fee, see also Fixtures ¶ 102.
Merger of titles as subjecting fixtures to landed rights, see also Fixtures ¶ 102.

¶ 30. The rule at law is that, when a greater and lesser legal estate held in the same right meet in the same person without any intermediate estate, the lesser merges in the greater; but in equity, where the legal and an equal coextensive equitable estate unite in the same person, they merge in the absence of acts showing an intention to prevent it.—Pritchard v. Kalamazoo College, 82 Mich. 587.

¶ 31. Since a court of equity is not bound by the legal rule of merger, it will permit or prevent a merger according to the just intention of the parties whether express or implied.—Hartz v. Hilsendegen, 182 Mich. 129.

¶ 32. There can be no merger where the transaction is tainted with fraud on the part of the mortgagor and grantor, and where the mortgagee and grantee has acted in good faith; so held where the mortgagor fraudulently included in a deed to a second mortgagee a provision that the grantee should assume and pay the first mortgage and also a third mortgage of which the grantee knew nothing, the deed not being delivered but being put on record by the grantor and being repudiated by the grantee as soon as he knew its contents, and there being no change of possession of the property and no surrender of the mortgage and note.—Cook v. Foster, 96 Mich. 610.

¶ 33. Complainant's rights under a land-contract, collateral to a loan and the taking of title by defendant as security, and under an alleged oral arrangement with the vendor therein, were merged in a lease of the premises to complainant and in a release by the latter of the vendor's contract obligations; and complainant's claim for a conveyance of the premises upon payment of the loan to

secure which title had been taken in vendor's name was denied.—Loth v. Friederick, 95 Mich. 598.

¶ 34. The holder of a tax deed, who during the period of redemption, took quitclaim deeds from the original owners of the land, took title to the property subject to any and all equities against such owners; since such deeds of necessity merged the tax title into the original title so obtained.—Boucher v. Trembley, 140 Mich. 352.

¶ 35. Where the owner of lands treats a mortgage thereon that has been assigned to him as a valid instrument, and transfers it as such, he is estopped from insisting, as against his assignee, or any one claiming under him, that in his hands it had merged and disappeared in the fee. And after he has recorded the assignment a purchaser from him is also estopped from insisting on such merger.—Powell v. Smith, 80 Mich. 451.

¶ 36. Where the holder of one of two concurrent liens purchases the property his lien is not merged in the title, it being evidently to his advantage that the two should not be merged.—M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co., 132 Mich. 285.

¶ 36a. Under a devise by A. to his wife for life, and then to his son for life, with remainder to the son's children, the life estates, if conveyed to the children, become merged in the remainder so that there is no outstanding interest.—Hovey v. Nellis, 98 Mich. 374.

§ 9. Transfer, devolution and conveyance.

Seisin, title, and possession, see post § 10.
Crops, trees, and other incidents passing with the land, see ante § 1.
Modes of transfer or succession, see Deeds; Descent; Wills; Gifts; Executions; Foreclosure; Judicial Sales; Eminent Domain; Dedication; Adverse Possession; Easements (prescription).
To whom dower is releasable, see Dower §§ 16-18.
Capacity of aliens to hold or devolve, see Aliens §§ 1, 2.
Powers of corporations as to real property, see Corporations, XIII.
Power of foreign corporation to acquire, hold and convey, see Foreign Corporations § 21.
Power of municipality to acquire, hold, or dispose of lands, see Municipal Corporations, X.
Arbitration affecting fee to land, see Arbitration § 2.
Foreign or domestic laws governing the ownership and transfer of real property, see Conflict of Laws, III.
Necessity of writing to create or transfer estates or interests in real property, see Frauds, Statute of, I, G.
Record of instruments of title to real property, see Notice and Record of Title, II.
Constructive notice from the record of title, see Notice and Record of Title, II, C.
Right of benefit society to convey its property, see Fraternal Associations § 10.

¶ 37. A future contingent estate is alienable in the same manner as an estate in possession, and may be conveyed by a deed of bargain and sale without covenants.—Goodell v. Hibbard, 32 Mich. 47.

¶ 38. No greater estate can be alienated either by the act of a party or by operation of law, than such party has in the real estate.—Finch v. Haynes, 144 Mich. 352.

¶ 38a. A husband and wife may, in a conveyance of land in which the wife has only a dower interest, reserve to both and to the survivor the use of land so long as either lives, dispunishable of waste.—Derham v. Hovey, 195 Mich. 243.

§ 10. Seisin, title, and possession.

Unrestricted right of use as equivalent to ownership, see ante ¶ 15.
Incidents of ownership, see also ante § 1.
Crops, trees, and other incidents of the land, see ante § 1.
Effect of condition attached to estate, see ante ¶ 24.
Estates in possession defined, see ante § 3.
Transfer, devolution, and succession of ownership, see ante § 9.
Sufficiency of title to satisfy contract for sale of land, see Vendors and Purchasers, III.
Adverse possession, see Adverse Possession.
What constitutes color of title, see Adverse Possession § 32.
Ownership, title and easements in public streets and ways, see Highways §§ 156, 160.
Titles to Indian lands, see Indians.
Quality and strength of title taken by inheritance, see Descent § 19.
Right of forfeiture as estate in grantor, see also Deeds ¶ 115.
Modes of enforcing forfeiture of estate for breach of condition, see also Penalties and Forfeitures § 2.
Right of re-entry under terms of mining grant or lease, see Mines § 7.
Excepted land or estate as held by original title, see Deeds ¶ 283.
Who are "freeholders" qualified to sign drain application, see Drains ¶¶ 55, 56.
Rights of dominant and servient owners relatively, see Easements §§ 22-24.
Title and rights by execution purchase, see Executions, VII, C.
Titles taken by judicial sale, see Judicial Sales § 6, and cross-references there collated.
Title or estate of husband in which dower may be had, see Dower, II.
Ejectment to determine title to real property, see Ejectment.
Scope of rule against trial of title to land in personal actions, see Pleading § 154.

Presumption as to seizin and ownership, see also Evidence §§ 54, 55.
Presumption as to possession and of title from fact of possession, see also Evidence §§ 54, 56.
Possession as incident of title in partition, see also Partition ¶ 24.
Allegations of ownership as implying possession, see also Equity ¶ 595.
Records respecting title to real property, see Notice and Record of Title, II.
Rights in lands held for joint adventures or partnership, see Joint Adventures § 5; Partnership § 23.

¶ 39. Seizin in fee may include possession, and is of two kinds, seizin in deed and seizin in law. The former is actual possession of a freehold, the latter is a legal right to such possession.—Lull v. Davis, 1 Mich. 77.

¶ 40. In some cases seizin will be presumed, as when one in possession claims title against a trespasser; but mere occupancy or possession, without color or claim of title, cannot be evidence of seizin, particularly as against a prior occupant; and without showing title, or a possession under a claim of title, one's possession or right by virtue thereof must be restricted to the land actually occupied.—Millerd v. Reeves, 1 Mich. 107.

¶ 41. Proof of possession under a claim of title founded upon a deed not emanating from the source of title or traced back to a person so claiming does not raise a legal presumption of seizin in fee; and if such possession were evidence of seizin, it would at most be a bare presumption, liable to be overcome by other proof, such as title in a third person.—Lull v. Davis, 1 Mich. 77.

¶ 42. Where a title is assailed after standing undisputed for half a century, and being originally founded upon a judicial determination, every reasonable intendment will be made in support of the existing possession.—Willets v. Mandlebaum, 28 Mich. 521.

REALITY of ASSENT to RECEIPTS.

Cross-References.

Reality of Assent—
To contract, see Contracts, III; Duress; Fraud; Mistake.
Reargument—
On appeal or error, see Appeal § 239.
Rearrest—
Of paroled convict, see Pardons and Paroles § 4.
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See also Arrest.
Reasonable Care—
In general, see Negligence §§ 1, 5.
See topics treating of that in respect of which a duty is owed, e. g., Carriers; Highways, XII; Master and Servant, III; Railroads, VIII; Street Railways, IV.
Reasonable Construction—
See Contracts, VI, A; Deeds, III, A; Statutes, V; Wills, VI, A.
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Reasonable Doubt—
Degree of proof required to convict of crime, see Indictment, VIII, C.
Reasonable Rates—
See Public Service; and specific references collected there.
Reasonable Time—
For performance of contract, see Contracts § 179 et seq.; Building Contracts § 20 et seq.; Sales, V; Vendors and Purchasers, V.
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Reasonable Value—
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Receiptors—
Delivery of levied goods to receiptor, see Executions § 52.
Liability of receiptor to sheriff, see Sheriffs, IV.
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Declaration by sheriff against receiptor in trover, see Conversion ¶ 112.
Receipts—
As admissions against interest, see Evidence, VII, C.
Effect and conclusiveness as evidence, see Evidence, X.
As basis for estoppel, see Estoppel § 38.
Of part of claim in composition of the whole, see Accord and Satisfaction.
Releases in form of receipt coupled with discharge, see Releases.
Warehouse receipts, see Warehousing.
Shipping receipts, see Carriers § 16 et seq.

Ex. J. M.
12/29/21